

Commonwealth of Pennsylvania

OFFICIAL OPINIONS

OF THE

**ATTORNEY GENERAL**

OF

**PENNSYLVANIA**

FOR THE YEARS

**1923 and 1924**

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George W. Woodruff  
*Attorney General*

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**OPINIONS TO THE DEPARTMENT OF  
AGRICULTURE**

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## OPINIONS TO THE DEPARTMENT OF AGRICULTURE

*Costs in Summary Proceedings—Dismissal of Charge—Prosecutor—Statutory Requirements—Acts of 1919 and 1921.*

An officer of the Department of Agriculture is not liable for the costs in a prosecution under the Act of April 18, 1919, P. L. 71, as amended by the Act of April 6, 1921, P. L. 112, where the case was dismissed. Under the common law a prosecutor in his official capacity was not liable for costs and can be made liable only where a statute specifically so provides.

March 20, 1923.

Mr. W. A. McCubbin, Deputy Director of Plant Industry, Department of Agriculture, Harrisburg, Pa.

Dear Sir: I return herewith the file in reference to suits brought by an officer of your Department to enforce the provisions of the Act of April 18, 1919, P. L. 71, as amended by the Act of April 6, 1921, P. L. 112. The suits were all brought under the amendment of the Act of 1921, and are, therefore, summary convictions, and the question now arises as to the disposition of the costs accruing in said cases.

The only question with which your Department is concerned is the liability of your officer, or of your Department, to pay such costs. Six suits were brought; in one the defendant was found guilty and sentenced to pay a fine and costs; in another the defendant entered a plea of guilty. In these two cases, of course, the defendants are liable for the costs, and in default of payment may be committed to the county jail.

The other four suits were dismissed. The informant in all these cases was Mr. Herbert L. Roberts, an officer of the Department of Agriculture, who made the informations in pursuance of the duties of his office. At common law the prosecutor was not liable for costs, and to impose them on him, some statutory authority so to do must be given. *Com. vs. Moore*, 21 C. C. 221. In penal actions on summary conviction the informant is not liable for costs if proceedings fail, unless a statute so provides. *Com. vs. Hergesheimer*, 1 Ashmead, 413.

The Department of Agriculture is not a party to the record in any of these cases, and could not, therefore, have been responsible for any of the costs arising therefrom. *Com. vs. Deneen*, 50 C. C. 560. The statute under which these actions were begun gives no authority to impose costs upon the informant or upon the Department of Agriculture, nor has any statute been found that does.

I am therefore of the opinion and advise you that neither the Department of Agriculture nor Herbert L. Roberts, the informant in the above mentioned cases, is liable for the payment of any costs accruing in the same.

Yours very truly,

J. W. BROWN,

*Deputy Attorney General.*

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*Dog Law—Animals—Licenses—Fines—Justice of the Peace—Remittance of fines to State Treasury—Remedies against justice who fails to return fines—Act of May 11, 1921.*

1. Under the Act of May 11, 1921, P. L. 522, fines for violation of the Dog Law should be paid by the justice of the peace who collects them into the State Treasury.

2. If a justice of the peace fails to return them, civil action may be brought against him through the Department of Agriculture, or criminal proceedings may be instituted against him for embezzlement or malfeasance in office.

3. The word "forthwith," used in the Act of 1921 in connection with the payment of such fines to the State, means that the payment should be made within such convenient time as is reasonable and requisite. It should be made, in fact, within a few days.

April 3, 1923.

Honorable F. P. Willits; Secretary of Agriculture, Harrisburg, Pa.

Sir: From your letter of March 16, 1923 it appears that you have some cases on hand in which justices of the peace have imposed fines for violations of the Act of May 11, 1921, P. L. 522, known as the Dog Law, and failed to remit such fines when collected to the County Treasurer. Section 36 of the Act provides:

"All fines collected under the provisions of this act shall be forthwith paid to the county treasurer and by him paid into the State Treasury."

The fines belong to the State, and it is, therefore, the duty of the justice imposing and collecting them to pay them over to the county treasurer. If the fines collected are not so paid over the State may proceed through the Department of Agriculture to collect from the justices such fines as have been retained by him. This can be done by instituting a civil action against the justice, and if necessary, his bondsman, to recover money due the State.



A justice of the peace who retains fines collected by him and which belong to the State may also

“be proceeded against for embezzlement or malfeasance in office.”

“Forthwith” when used in reference to time, is generally construed to mean without delay. The construction usually given by the courts to the word “forthwith” when occurring in statutes is that the act referred to should be performed within such convenient time as is reasonable and requisite. *Meyers vs. Dunn*, 104 S. W. 352. Reasonable time in the case under consideration should not be more than a few days, as within that time a justice of the peace can readily send to the county treasurer any fines collected by him.

Yours very truly,

J. W. BROWN,  
*Deputy Attorney General.*

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*Dog Licenses—Dogs Transferred from one County to Another—Additional Fee—County Treasurer—Compensation—Act of 1921, P. L. 522.*

When a dog is transferred from one county to another, an additional license fee of twenty-five cents is required by the Act of May 11, 1921, P. L. 522, but the County Treasurer is not entitled to a fee of ten cents for issuing such license.

May 21, 1923

Honorable F. P. Willits, Secretary of Agriculture, Harrisburg, Pa.

Sir: This Department has your letter of May 5th enclosing letter from Dr. Muncé asking to be advised what is the proper fee for issuing a license for a dog transferred from one county to another.

The Act of May 11, 1921, P. L. 522, known as the Dog Law, in Section 3 provides for the licensing of dogs and fixes the fee to be paid for both male and female dogs. The Section also contains the following provision:

“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.”

This fixes the compensation of the County Treasurer for his services in issuing, recording and reporting the licenses and shows just what he is entitled to. Section 10 of the Act provides:

“Whenever any dog licensed in one County is permanently removed to another county, the county treasurer

of the county where the license was issued shall, upon the application of the owner or keeper of such dog, certify such license to the treasurer of the county to which the dog is removed. Such treasurer shall thereupon, and upon payment of a fee of twenty-five cents, issue a license and tag for such dog in the county to which it is removed."

This fixes the fee to be paid for the services set forth in the Section and no one has the right or authority to increase it and compel the payment of more than the law specifies. The Act fixes the amount to be paid by the county treasurer for issuing the license, and thus shows the intent of the Legislature.

In the case of the removal of a dog from one county to another the fee to be paid is also fixed, but no compensation for the treasurer is mentioned. If it had been the intention of the Legislature to have the treasurer receive an additional ten cents, the Act would have so stated, as it did in Section 3. Fees are only to be charged as fixed by statute, and the fee charged in Section 10 of the Act under consideration is all that may be charged. The intention was to have the owner pay twenty-five cents, and by no construction can the additional fee provided for in Section 3 for the services therein mentioned, be made to apply to Section 10 for the services therein enumerated.

You are, therefore, advised that the authority to charge more than twenty-five cents for the issuing of a license for a dog transferred from one county to another is not given by law, and that the county treasurer is not entitled to a fee of ten cents for issuing such license.

Yours very truly,

J. W. BROWN,

*Deputy Attorney General.*

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*State Fair Commission—Appropriation of 1921.*

The unexpended balance of the State appropriation does not lapse or revert to the State Treasurer, but the same remains and is available for the purpose for which it was specifically appropriated. Act of 1921, P. L. 1191.

May 21, 1923.

Honorable F. P. Willitts, Secretary of Agriculture, Harrisburg, Pa.

Sir: In answer to your inquiry in reference to the unexpended balance from the appropriation of \$15,000 made to the State Fair Commission in 1921, and as to whether such balance lapses, I beg to advise you the Act of May 27, 1921, P. L. 1191, creating the State

Fair Commission shall consist of certain State Officials and of a number of citizens of the State to be appointed by the Governor, such appointments to be for terms running from two to four years. The moneys appropriated for the work of the Commission shall be paid upon warrants of the Auditor General on the State Treasurer. The duty of the Commission is:

“To formulate plans for the establishment, organization, conduct and management of the annual State Fair \* \* \* to examine sites for purchase by the Commission for the purpose of the State Fair, prepare plans for exhibits, together with their equipment \* \* \* to undertake the preliminary work looking to the establishment of an annual State Fair”

This language is evidence of a legislative intent that the appropriation would be followed by such other appropriations as should be necessary for the completion of the work contemplated by the Act creating the Commission, for it will be noted that the Act creating the Commission and making the appropriation, provided that the Commission shall undertake the *preliminary* work.

There is nothing in the language of the Act making the appropriation which places any limit on the time within which it must be expended, nevertheless, a specific appropriation may not remain indefinitely unexpended, but must be expended within a reasonable time for the accomplishment of the purpose for which it is made. In this case there is nothing that shows unreasonable delay on the part of the Commission; the full and complete report required by the Act was made to the General Assembly before the third Monday of January, 1923, together with the recommendations of the Commission. To carry out the work of the Commission why should not the money appropriated therefor be so expended. What good reason can be urged for its lapsing into the treasury of the State, and thereby delay the work imposed upon the Commission by the Act? No great work which requires more than two years to be completed can be successfully prosecuted or carried to a finish if the money appropriated for the purposes lapses before the work is completed. As heretofore noted, there is nothing in the Act creating the Commission which limits in any way the time within which the appropriation in question is to be expended.

I am, therefore, of the opinion, that under the language of the act making the appropriation, and in view of the facts above recited, the unexpended balance of the State appropriation does not lapse or revert to the State Treasurer, but the same remains and is available for the purpose for which it was specifically appropriated.

Yours very truly,

J. W. BROWN,

*Deputy Attorney General.*

*Statutory Regulations—Boroughs—Right to Impose Special Tax—Act of May 11, 1921, P. L. 522.*

A borough has a right to impose and collect a dog tax in addition to the tax which is imposed by the Act of May 11, 1921, P. L. 522. The fact that dog owners may have to pay two taxes and that dogs may have to bear two tags, a State tag and a borough tag, does not militate in any way against the power of the borough to impose such tax.

June 12, 1923

Dr. T. E. Munce, State Veterinarian, Harrisburg, Pa.

Sir: This Department is in receipt of your letter enclosing letter from H. A. Bierer Chief of Police of North Belle Vernon, Pennsylvania, asking if a borough has a right to impose a dog tax in addition to the tax imposed by the Act of May 11, 1921, P. L. 522.

Dog owners must comply with the provisions of the Act of 1921. This is an Act entitled "An Act relating to dogs and the protection of livestock and poultry from damages by dogs, providing for the licensing of dogs by the Secretary of Agriculture, etc."

Because the State has undertaken to impose certain regulations applicable to the entire Commonwealth, a borough is not deprived of the right to impose other regulations adapted to its own conditions, provided these are not inconsistent or at variance with those of a general character prescribed for the entire Commonwealth.

A municipality may make new and further regulations in the exercise of its police power and enforce them by proper penalties, even though the State has previously acted by a general law in reference to the same matter. *Radnor Township vs. Bell*, 27 Superior Court 1.

The fact that dog owners may have to pay two taxes and that dogs may have to bear two tags, a State tag and a borough tag, does not militate in any way against the power of the borough to impose such tax.

A similar situation arose when the Automobile Act of April 19, 1905, P. L. 217 was passed, requiring automobile owners to procure a license from the State. Prior to that time certain cities by ordinance had required automobile owners to obtain a city license. It was held by the Supreme Court in the case of *Brazier vs. Philadelphia*, 215 Pa. 297, that the State Act and the ordinance could co-exist, even though the result of such holding might be that automobiles would have to carry two licenses.

You are, therefore, advised that a borough has a right to impose and collect a dog tax in addition to the tax which is now imposed by the Act of 1921.

Very truly yours,

J. W. BROWN,  
*Deputy Attorney General.*

*Commercial feeding stuffs—Penal statutes—Metal fasteners for tags—Tiers for bags—Food law—Acts of May 3, 1909, and May 11, 1921.*

1. A penal statute must be construed strictly and should not be extended beyond the evident intention of the legislature as expressed on its face.

2. The provision of the Act of May 3, 1909, P. L. 395, as amended by the Act of May 11, 1921, P. L. 490, prohibiting the "use of metal fasteners in fastening or attaching tags or cards to packages of feeding-stuff," does not apply to tiers used to close or fasten a bag or package.

July 5, 1923.

Honorable F. P. Willits, Secretary of Agriculture, Harrisburg, Pa.

Dear Sir: Your inquiry as to whether or not tiers manufactured by the Bates Valve Bag Company come under the provisions of Section 3 of the Act of May 3, 1909, P. L. 395, as amended by the Act of May 11, 1921, P. L. 490, has been received by this Department.

Section 3 of the Act provides, *inter alia*, as follows:

"The use of any or all metal fasteners for fastening or attaching tags or cards to packages of feeding stuffs is hereby prohibited."

Section 6 of the Act makes it a misdemeanor to violate any of the provisions of the Act and provides penalties for any violations thereof.

The only thing forbidden by the Section of the Act above quoted is "the use of metal fasteners in fastening or attaching tags or cards to packages of feeding stuffs." This does not include tiers used to close or fasten a bag or package, and the question is can the language of the Act by any construction be made to include such tiers.

When penalties were provided for the violation of any of the provisions of the Act it was made a penal statute and is therefore to be strictly construed.

"A penal statute must be construed strictly and should not be extended beyond the evident intention of the Legislature as expressed on its face." *Bucher vs. Commonwealth*, 103 Pa. 528.

When a statute is plain, and according to any meaning, broad or narrow, which may be ascribed to the language, does not apply to a certain case it is not permissible to add or omit words in order to make it so apply, even though it may be clear that the case is as fully within the mischief to be remedied as the cases provided for. This would be not to construe but to amend the law, which is within the exclusive province of the Legislature. *Com. vs. Cougar*, 21 Superior Ct., 217.

If a case is fully within the mischief to be remedied and is even within the same class and within the same reason as other cases enumerated, still, if such case is not within the words of the Act,

construction will not be permitted to bring it within the statute. *Bishop on Statutory Crimes, Section 220.*

In dealing with a penal statute it can not by implication be extended beyond its precise meaning, and applying the well settled principles to the case in hand we find the Act in the part above set forth relates only to metal fasteners used in fastening or attaching tags or cards to packages, and by no construction can it be made to refer to anything else. When an Act has been construed there will often remain cases within the mischief to be remedied and possibly within the general intent of the Legislature as disclosed by the act, and yet not provided for therein. In such case the Legislature alone can cure the defect.

I am therefore of the opinion that the Act of May 3, 1909, as amended, not having specifically forbidden the use of metal tiers to close or fasten a bag or package, such articles do not come under the provisions of the act and you cannot stop the use of them.

Yours truly,

J. W. BROWN,  
*Deputy Attorney General.*

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*Department of Agriculture—Funds from which certain salaries and expenses of the department are payable—Acts of March 19, 1923, P. L. 16, June 7, 1923, P. L. 498, May 11, 1921, P. L. 522, and July 13, 1923, No. 44A.*

The Dog Fund is chargeable with expenses incurred in enforcing the Dog Law; for the payment of indemnities for animals not exceeding \$300,000. for the biennium, and for the payment of salaries and expenses incident to the enforcement of the provisions of the several acts of Assembly, which by Act of 1923, P. L. 16, are administered by the Bureau of Animal Industry.

The general appropriation to the department made by the Act of 1923, No. 44A, is chargeable with the salaries and expenses of the employes of said department who are engaged in that part of the work of the present bureau of Animal Industry which does not consist in enforcing the laws above mentioned.

August 21, 1923.

Honorable Frank P. Willits, Secretary of Agriculture, Harrisburg, Penna.

Sir: I have your request of August 20, for an opinion with regard to the effect to be given to Act No. 12 of the 1923 Session of the Legislature in view of certain provisions of the Administrative Code and of the General Appropriation Act of 1923.

Your letter raises the following questions:

1. Can the salaries and expenses of the director, deputy director, officers, agents, and employes of the Bureau of Animal Industry be paid out of the Dog Law Fund, in view of the fact that the Bureau of Animal Industry was abolished as a statutory bureau on June 15, 1923, and immediately thereafter re-established by action of the Executive Board?

2. Is there any inconsistency between Act No. 12 of the 1923 Session, and the General Appropriation Act of 1923, and if so what is its effect?

3. To what purposes may the money in the Dog Law Fund be applied during the current biennium?

In considering these questions the following relevant facts must be kept in mind:

The 1923 Legislature passed and on March 19, 1923 the Governor approved Act No. 12 of the 1923 Session. This Act amends, inter alia, Section 16 of the Dog Law of May 11, 1921, P. L. 522, which as amended reads as follows:

*"The State Treasurer shall establish a separate fund, to be known as the 'Dog Fund,' into which all moneys collected under the provisions of this act shall be paid, and from which all expenditures necessary in the carrying into effect the provisions of this act shall be paid. All moneys in the dog fund from time to time are hereby specifically appropriated to the Department of Agriculture for the purpose of carrying into effect the provisions of this act, and for the payment of Indemnities for animals afflicted with dangerous, contagious or infectious diseases as provided by law, and for the payment of the salaries and expenses of the Director, Deputy Director, officers, agents and employes, of the Bureau of Animal Industry of the Department of Agriculture, and for the enforcement of the provisions of the several Acts of Assembly charged to the Bureau of Animal Industry \* \* \*"*

On June 7, 1923 the Governor signed the Administrative Code, which, under Section 2805 thereof, became effective on June 15, 1923.

Section 2 of the Administrative Code abolished the Bureau of Animal Industry.

On June 30, 1923 the Governor signed the General Appropriation Bill passed by the 1923 session. This bill appropriates five hundred and sixty-four thousand dollars (\$564,000) for the general work of the Department of Agriculture, including the payment of salaries, wages, or other compensation of all deputies and employes and "for the enforcement of any and all Acts of Assembly which it is the duty of the Department to enforce (not including, however,

appropriations for the payment of indemnities for animals afflicted with dangerous, contagious or infectious diseases which shall be paid from the Dog Law Fund, but not in excess of three hundred thousand dollars)."

At noon on June 15, 1923 the Executive Board created by Section 201 of the Administrative Code met and authorized the reestablishment of the Bureau of Animal Industry in the Department of Agriculture. This action was taken under the authority granted to the Board by Section 709-b of the Administrative Code.

## I.

Meaning of Section 16 of the Act of May 11,  
1921, P. L. 522 as amended by Act No.  
12 of the 1923 Session approved  
March 19, 1923.

This Section provides that all moneys in the Dog Fund from time to time are specifically appropriated to the Department of Agriculture for the following purposes:

- 1—Carrying into effect the provisions of the Dog Law;
- 2—The payment of indemnities for animals afflicted with dangerous, contagious or infectious diseases as provided by law;
- 3—The payment of the salaries and expenses of the Director, Deputy Director, officers, agents and employes of the Bureau of Animal Industry of the Department of Agriculture; and
- 4—The enforcement of the provisions of the several Acts of Assembly charged to the Bureau of Animal Industry.

It is to be noted in the first place that this appropriation is made not to any Bureau of the Department of Agriculture, but to the Department of Agriculture itself. The Administrative Code did not abolish the Department of Agriculture which remains under the Code exactly as it existed prior to the passage of the Code, except that all statutory Bureaus in the Department were abolished and any powers or duties previously conferred or imposed upon such Bureaus as parts of the Department are, under the Code, conferred and imposed upon the Department as a whole.

There can be no question as to the meaning of the Legislature's direction that money in the Dog Law Fund shall be used for the enforcement of the Dog Law.

Equally clear is the provision that the money in the Dog Law Fund shall be applied to the payment of indemnities for animals afflicted with dangerous, contagious or infectious diseases as provided by law.



Doubt has arisen as to the meaning of the provision that money in the Dog Law Fund shall be used "for the payment of the salaries and expenses of the Director, Deputy Director, officers, agents and employes of the Bureau of Animal Industry of the Department of Agriculture." Did the Legislature when it enacted Act No. 12 of the 1925 Session mean to limit the use of money in the Dog Law Fund to the payment of salaries and expenses of employes of the then existing statutory Bureau of Animal Industry, or did it mean to permit this money to be applied to the payment of the salaries and expenses of the employes of any Bureau of Animal Industry which might from time to time exist for the exercise of the functions performed by the statutory bureau as it existed on the date when Act No. 12 became a law? While there is much to be said to the contrary, I am of the opinion that the language used in Act No. 12 must be interpreted to apply only to the statutory Bureau of Animal Industry. Accordingly when the statutory Bureau of Animal Industry ceased to exist on June 15, 1923 the provision of Act No. 12 permitting the payment out of the Dog Law Fund of salaries and expenses of employes of this Bureau ceased to have effect.

In taking this view I am giving effect to the rules of statutory construction as generally recognized notwithstanding the fact that I am satisfied that the Legislature meant the money in the Dog Law Fund to apply to the salaries and expenses of the employes of any Bureau of Animal Industry which might exist. Unfortunately we can be guided only by the Legislature's intention as expressed by the language used.

The fourth purpose for which money in the Dog Law Fund may be used is "the enforcement of the provisions of the several acts of assembly charged to the Bureau of Animal Industry." While at first blush the abolishment of the Bureau of Animal Industry as a statutory bureau would seem to render the use of money in the Dog Law Fund for this purpose ineffective, further consideration makes it clear that no such difficulty arises.

The words "charged to the Bureau of Animal Industry" are merely identifying and descriptive. They identify the particular laws for the enforcement of which Dog Law Fund money may be used. The Legislature did not provide that the money should be used for the enforcement *by the Bureau of Animal Industry* of the provisions of the several acts of Assembly charged to the Bureau of Animal Industry. On the contrary, it appropriated the money to the Department of Agriculture for the enforcement by it of the provisions of certain Acts of Assembly identified by virtue of the fact that the enforcement of the Acts was on March 19, 1923 charged to the Bureau of Animal Industry. The abolishment of the Bureau of Animal Industry on June 15, 1923 cannot possibly be held to

have modified, repealed or in any wise affected the right of the Department of Agriculture to spend the money in the Dog Law Fund for the enforcement of those laws which on March 19, 1923 were charged for enforcement to the Bureau of Animal Industry.

## II.

The General Appropriation Act of 1923 is  
not inconsistent with the expenditure of  
Dog Law Fund money by the Depart-  
ment of Agriculture.

The General Appropriation Act of 1923 provides that the appropriation of five hundred and sixty-four thousand dollars (\$564,000)—to the Department of Agriculture may be used, among other things, for “the enforcement of any and all Acts of Assembly which it is the duty of the department to enforce (not including, however, appropriations for the payment of indemnity for animals afflicted with dangerous, contagious, or infectious diseases, which shall be paid from the Dog Law Fund, but not in excess of three hundred thousand dollars).”

Act No. 12 permits the use of the Dog Law Fund for “the purpose of carrying into effect the provisions of this act” and for “the enforcement of the provisions of the several Acts of Assembly charged to the Bureau of Animal Industry.”

There is no constitutional inhibition preventing the Legislature from passing two acts at the same session appropriating money for the same purpose to the same Department. Act No. 12 permits Dog Fund money to be used by the Department of Agriculture for enforcing the Dog Law, (which the Department is charged with enforcing) and of certain other acts, identified as the “Acts of Assembly charged to the Bureau of Animal Industry,” (with enforcing which the Department of Agriculture is also charged). The fact that at a later date the Legislature made a further appropriation for enforcing “any and all Acts of Assembly which it is the duty of the department to enforce,” does not expressly or impliedly repeal the Legislature’s earlier action as embodied in Act No. 12. The Dog Law Fund may, therefore, be used for (1) enforcing the Dog Law and (2) enforcing the several acts of Assembly which on March 19, 1923 were charged for enforcement to the Bureau of Animal Industry.

## III.

Employees of the Bureau of Animal Industry  
may be paid out of the funds appropriated  
to the Department of Agriculture  
in the General Appropriation Act  
of 1923.

The appropriation to the Department of Agriculture as contained in the General Appropriation Act of 1923 covers the payment of the salaries, wages or other compensation of such employees "as may be required for the proper conduct of the work of the Department." This language plainly applies to *all* employees of the Department, and includes employees of the Department engaged in the work of the present Bureau of Animal Industry.

The language of the Appropriation Act covering the payment of other expenses is equally broad.

There can, therefore, be no question with regard to the right to pay the salaries and expenses of employees of the Department engaged in the work of the Bureau of Animal Industry out of the general appropriation to the Department.

## IV.

## CONCLUSION

The views hereinbefore expressed indicates that you should by requisition in proper form, request the Auditor General to draw warrants:

1. Against the Dog Law Fund (a) for enforcing the Dog Law; (b) for indemnities for animals, not exceeding three hundred thousand dollars (\$300,000) for the biennium; and (c) for the payment of salaries and expenses incident to the enforcement of the provisions of the several acts of Assembly which were on March 19, 1923 charged for enforcement to the Bureau of Animal Industry.

2. Against the General Appropriation to the Department for the salaries and expenses of employees of the Department who are engaged in that part of the work of the present Bureau of Animal Industry which does not consist of enforcing the laws above mentioned.

You are accordingly advised to act in conformity with this opinion.

Very truly yours,

GEORGE W. WOODRUFF,  
*Attorney General.*

*State Appropriation—Gambling—Lewd or Immoral Practices—Exhibits—Rules and Regulations.*

Any agricultural association which allows either by direct permit or sufferance, gambling, lewd or immoral practices in connection with its exhibits or in or about the fair grounds or other places where the exhibit is carried on is not entitled to receive any part of the state fund provided for the country fairs. This provision should be incorporated in its rules.

May 29, 1924.

Honorable Frank P. Willits, Secretary of Agriculture, Harrisburg, Pa.

Sir: Referring to the Conference which we had with representatives of Fair Associations,—of the State Grange,—of the General Public,—and of the carnival interests and also to your request for an opinion from the Department of Justice on certain questions referred to at the Conference:

*A. In General.*

It is illegal, as well as immoral, for the Fair Associations, or any of their officials who make arrangements for entertainment at fairs, to arrange for, or permit the continuation of, any gambling devices, lewd or immoral shows,—or immoral practices under any guise whatever,—at agricultural Fairs in this State. This is so true under our laws, and so inevitably admitted by everybody concerned, that I only state it as a first broad general principle. Officials permitting such practices are themselves guilty of breaking the law.

*B. What is Gambling as Prohibited by the Law?*

Without, at this time, going deeply into a discussion of gambling it is plain from the definitions and cases, that games which depend substantially on the skill and practice of the participant, as opposed to games in which winning or losing depends substantially on the luck of the participant, or the accidental result of taking part therein, are not gambling games such as come under the ban of the law. However, to allow betting, even in a game of skill, is to bring in the element of gambling forbidden by law. Moreover the stake or reward of lucky chance may be not only money, but anything of value like merchandise.

*C. Lewd and Immoral Practices.*

It is well known that in the past the majority of shows whether called carnivals or not, and whether connected with Agricultural Fairs and other similar meetings or not, to which a large number of the general people are attracted otherwise than in order to occupy seats and listen or hear a definitely presented entertainment, have

been used to ply immoral business as between the sexes. Fortunately, the best circuses and carnival companies, as well as the Carnival Associations, have recognized that this evil if carried further would destroy the business itself; and, for sometime past, in the case of individual circuses, carnivals etc., and particularly during the last year in the case of Carnival Associations, there has been a movement which, in these praiseworthy instances, has practically wiped out these immoral, harmful forms of business in connection with the shows.

It is a sad fact that venereal diseases have followed in the wake of all shows whether at Agricultural Fairs or not, where lewd and immoral practices were carried on, whether with permission or not.

It is recognized that the disease producing effects of this feature of outdoor shows is far more vicious and harmful to the public than the gambling aspect. The guilty suffer and should be protected against themselves. Many innocent persons also suffer severely in health, and even danger to their lives, and to them the Fair Associations, and you as Secretary of Agriculture, owe a solemn duty.

*D. What Can the Secretary of Agriculture  
Do as Against Vice and Gambling  
At Agriculture Fairs?*

The General Appropriation Act of 1923, on page 47 provides as follows:

"For payment of incorporated agricultural associations, as provided by law, for exhibits of live stock, live stock products, horticultural products, handiwork, cereals, bees, and bee products, subject to the filing of such reports by said associations as may be required by the Secretary of Agriculture, two years, the sum of one hundred thousand dollars (\$100,000)."

In order that any Agricultural Association may obtain any part of this \$100,000, two things are necessary:

1. That the Association shall file such reports as may be required by the Secretary of Agriculture.
2. That the Secretary of Agriculture shall determine whether any part of the \$100,000 fund shall be paid to the Agricultural Association, and shall also sign a requisition upon the Auditor General for such payment.

The law meant something when it gave the Secretary power to require reports. You have the power and the duty, as far as allowances from the \$100,000 appropriation are concerned, to see to it, through reports required by you, and such inspection as you may be able to make concerning "exhibits" held by any Agricultural Association.

(a) That the Association does not knowingly permit any shows, games, exhibits, or practices of a gambling, lewd or immoral nature.

(b) That the Association does not allow any gambling, lewd or immoral practices to continue, whether permitted or not, as soon as it is discovered; and that the Association take steps to know whether such gambling, lewd or immoral practices are being carried on at the fair whether openly or secretly.

It is my opinion that you may, and should, formulate as part of your rules for the distribution of the \$100,000 fund to Agricultural Associations, the provisions that none of said fund will be given to an Association if it is known to you that it allows either by direct permit or by sufferance, gambling, lewd or immoral practices in connection with its exhibits, or in or about the fair grounds or other places where the exhibit is carried on.

It is plain that no Agricultural Association has a right to any part of the \$100,000 unless it conforms to such reasonable rules in furtherance of law and good morals as you may lay down; and, in my opinion, it is your duty to refrain firmly from allowing any State aid from the \$100,000 fund in any case where gambling, lewd and immoral practices are permitted or suffered.

Yours very truly,

DEPARTMENT OF JUSTICE

By GEORGE W. WOODRUFF

*Attorney General.*

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*Domestic Animals—Bureau of Animal Industry—Expenses incurred by enforcing what are known as the "Dog Laws"—how payable. (Acts of May 11, 1921, P. L. 522 and March 19, 1923, P. L. 16).*

Expenses incident to the enforcement of what are known as the "Dog Laws," such as telephone and telegraph bills and bills for supplies and materials required by the Bureau of Animal Industry, are payable out of the Dog Fund, provided by the acts mentioned.

June 27, 1924.

Honorable F. P. Willitts, Secretary of Agriculture, Harrisburg, Pa.

Sir: We have your request to be advised whether certain expenses which have heretofore been paid out of the "Dog Fund" under the Act of May 11, 1921, P. L. 522 as amended by the Act of March 19, 1923, P. L. 16 can continue to be paid out of that Fund. The expenses in question were, we understand, incurred in the enforcement of the provisions of the several Acts of Assembly charged to the

Bureau of Animal Industry. They include telephone and telegraph bills, and bills for paper, stencils, sponges, tags, ice and other supplies and materials required by your Department in the enforcement of the so-called "Animal Industry" laws.

Under date of August 21, 1923 this Department advised you that moneys in the Dog Fund may be used, inter alia, "for the payment of salaries and expenses incident to the enforcement of the provisions of the several Acts of Assembly which were on March 19, 1923 charged for enforcement to the Department of Animal Industry".

We understand that since August 21, 1923, expenses of the kind mentioned in your letter have been paid, with the approval of the State's fiscal officers, from the Dog Fund, but that very recently you have been advised by the Auditor General's Department that its practice of approving these expense items will be discontinued.

You are advised that there has been no change in the law or in its interpretation by the Courts or by this Department requiring any modification of our opinion of August 21, 1923, or of the practice of the Auditor General's Department; and that the expenses in question are, as they have previously been, payable out of the Dog Fund.

Yours very truly,

DEPARTMENT OF JUSTICE

By WM. A. SCHNADER,  
*Special Deputy Attorney General.*

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*Department of Agriculture—Domestic animals—Eradication of disease—Tuberculosis to cattle—Quarantine—Acts of May 9, 1889, July 22, 1913, and June 7, 1923.*

1. Under the Acts of May 9, 1889, P. L. 51, July 22, 1913, P. L. 928, and June 7, 1923, P. L. 498, the authorized agents of the Department of Agriculture may enter upon any premises to examine and test animals to discover whether they have diseases proscribed by the law.

2. If any persons interferes with such agents, such persons may be arrested, if that course seems wise, and subjected to fine and imprisonment.

3. If permission is not accorded to the agents, a search warrant may be sworn out before a magistrate and used to effect the necessary entry upon the premises, examinations and tests.

4. Under the Act of July 22, 1913, P. L. 928, relating to the establishment of a quarantine, it is not necessary to obtain a search warrant before entering upon a farm to post the quarantine notices as provided by the act, and this is the case whether the owner of the farm objects to entry on his premises or not

5. If any owner of untested cattle in a region where practically all the owners of cattle have submitted to the examination and tests prescribed by law should refuse, after a specific demand, to allow the agents of the department to enter upon his premises and examine and test his cattle, the department has the right to declare a general quarantine of the premises without examinations and tests, to post notices at prominent places on the premises, which it will be criminal for any person to remove or destroy, and to publish a copy of such notice in one newspaper circulating in the region in which the quarantined premises are situated.

November 14, 1924.

Honorable F. P. Willits, Secretary of Agriculture, Harrisburg, Pa.

Sir: You have stated to me the conditions which are interfering with the successful execution of the law concerning the eradication of diseases of domestic animals in Mercer County in order to make that county a "modified area." I understand that there are some 5,000 herds of cattle in Mercer County and that the permission of about 4,975 of the owners of these herds has been obtained, so that tests have been made and arrangements for the wiping out of tuberculosis in that large number of herds completed.

On the other hand, the owners of about 25 herds refuse to permit the law to be carried out on their farms, so that Mercer County has still within it some 25 centers of danger for the spread of tuberculosis in cattle; also that this condition endangers the general welfare, in that tuberculosis may be spread again from these danger spots to the herds which have been cleaned up, and the great expense to the State in the killing and paying for tuberculosis cattle in said herds will thus be made futile.

You ask that the Department of Justice give you an opinion on two questions:

A. What may you do in order to compel the acquiescence of owners of herds who refuse their permission in the testing of their cattle for tuberculosis?

B. If you do not find the method allowed by law for compelling acquiescence in tests effective, what may you do in order to quarantine the premises and herds of owners who refuse to allow tests to be made?

A.

The powers and duties of the State Livestock Sanitary Board, granted by law, have been transferred to and vested in the Department of Agriculture. Section 1502 of the Administrative Code provides as follows:

"Section 1502. Animal Industry.—The Department of Agriculture shall have the power, and its duty shall be:



“(a) To promote the live stock industry, and to prevent, suppress, control, and eradicate any transmissible diseases of animals and poultry;

“(b) To establish and maintain general or special quarantines, as may now or hereafter be provided by law;

“(c) To prevent the spread of infectious and communicable diseases of animals and poultry, and, for this purpose, the officers, agents, or employes thereof, may at any time enter any premises where domestic animals or products thereof are kept, confined, or stored; to take such measures as may seem advisable concerning methods of preventing, controlling and eradicating disease of animals; to cause the disinfection of any premises, and, when deemed necessary to prevent the spread of disease, to cause the destruction of animals, poultry, and personal property; and to regulate and prohibit the movement or transportation of animals or poultry into this Commonwealth, or from one place to another within this Commonwealth;

\* \* \* \*

“(g) To make such examinations and tests as may be deemed necessary to determine the healthfulness of the domestic animals and poultry of the Commonwealth”;

Section 2 of the Act of May 9, 1889, P. L. 51, makes it a misdemeanor punishable with fine or imprisonment for any person to interfere with any officer who may be authorized by the Department of Agriculture to carry out the provisions of the laws intended to protect, against the existence or spread of disease of domestic animals.

Section 7 of the Act of July 22, 1912, P. L. 928, provides that if the employes of the Department of Agriculture are refused or delayed in entering upon any premises in order to investigate and test for disease of domestic animals, a search warrant may be obtained by making an affidavit before a Magistrate to the effect that the agent of the Department “has reason to believe that diseased animals or poultry are, or have been, confined or kept in or on such premises,” and a search warrant shall give the agent of the Department of Agriculture authority to enter upon the premises and make examination by tests, and otherwise, concerning the presence there of disease of domestic animals.

#### CONCLUSION AS TO QUESTION A.

Therefore, the answer to your first question is that your authorized agents may enter upon any premises to examine and test animals to discover whether they have the diseases proscribed by the law; also that any persons who interfere with them may be arrested,

if that course seems wise, and subjected to fine or imprisonment: also that if permission can not be obtained otherwise, a search warrant may be sworn out before a Magistrate and used to effect the necessary entry upon the premises, examinations and tests.

B.

As to your second question concerning the right to quarantine:

The law quoted above specifically gives you that right, and Section 15 of the Act of July 22, 1913, P. L. 928, goes further and provides as follows:

"A general quarantine may be established and maintained whenever any of the diseases enumerated in section nine of this act, or any other disease of domestic animals or poultry now or hereafter adjudged or proclaimed by the State Livestock Sanitary Board (Department of Agriculture) to be of a transmissible character, shall exist in any locality in the State larger in extent than that which may be included in a special quarantine. A general quarantine shall be established and maintained by the State Livestock Sanitary Board (Department of Agriculture) only. Such quarantine shall include such *premises*, locality or territorial district and such animals, and shall continue for such time, as may be deemed necessary or advisable by the said Board (Department). In establishing and maintaining such quarantine the said Board (Department) may act through and by any member, officer, agent or employe of said Board (Department) to whom such power is delegated: and the establishment and maintenance of such quarantine by any member, officer, agent, or employee of said Board (Department) shall be prima facie the establishment and maintenance of quarantine by said Board (Department). Whenever any premises or any locality or territorial district shall be placed in or under quarantine by said Board (Department), it shall be the duty of the member, officer, agent, or employee of said Board (Department) by whom the order of said Board (Department) as to quarantine is executed, to post notices within the premises, locality or territorial district quarantined, declaring the extent and limits of premises, locality, or territorial district so quarantined, and the animals subject to such quarantine. At least ten such notices shall be posted in the most public places within said quarantined area. A copy of such notice shall be published in one newspaper published within such quarantined area, or, if there be no such newspaper, then in one newspaper circulating generally within such area."

It is my opinion that the necessity of obtaining a warrant before entering upon a farm to post the quarantine notices, as provided

in the above quoted law, is not necessary, whether the owner of the farm objects to entry upon his premises or not.

The warrant necessary for searching, examining and testing live stock is properly called a "search warrant." The Legislature is acting within its rights and not contrary to the Federal and State Constitutional prohibition against unreasonable searches and seizures, when it gives the power, as a necessary concomitant of the duty granted in the above law, to enter upon the premises to post the quarantine notices.

Such entry is not for the purpose of search or seizure, and therefore, does not come under the Constitutional prohibition. It is for the purpose of protecting the property of the public, and particularly the health of the public as affected by diseases of domestic animals, against the reasonably suspected continuance of transmissible diseased conditions in the cattle on the premises quarantined.

If the owner of the premises does not want to have the quarantine notices posted it is up to him to consent to the taking of the proper steps to examine and test his cattle. In a recent Michigan case the Circuit Court says of a much more drastic action than the posting of a quarantine:

"Such entry and inspection are lawful if they are not unreasonable, and they are not unreasonable if honestly and fairly conducted in the interest of the public health and welfare."

#### CONCLUSION AS TO QUESTION B.

Therefore, I am of the opinion that if any owner of untested cattle in a region where practically all the owners of cattle have submitted to the examination and tests prescribed by the law, should refuse after a specific demand to allow the authorized agent or agents of your Department to enter upon their premises and examine and test their cattle, you have the right to declare a general quarantine of the farm or premises upon which cattle are kept without such examination and tests,—to post notices at prominent places upon and around said premises, which it will be criminal for any person to remove, or destroy,—and to publish a copy of the notice in one newspaper circulating *in the region* in which the quarantined premises are situated.

#### C.

The above opinion is based upon the conditions in Mercer County as reported by you; but it is evident that the same rule is applicable throughout the State. It will only defeat the law for eradication of diseases of domestic animals, dangerous to the public health and

welfare, unless through examinations, tests and destruction of such diseased animals when necessary, or through quarantine of farms where existence of disease is suspected but owners resist tests, disease is wiped out in the first instance or confined strictly in the second case.

Yours very truly,

DEPARTMENT OF JUSTICE,

By GEORGE W. WOODRUFF,  
*Attorney General.*

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*Justice of the Peace—Summary proceedings—Costs—Discharge of defendant—  
Act of Sept. 23, 1791.*

1. A summary proceeding before a justice of the peace for a violation of the law is essentially a criminal proceeding for a public offence.

2. Such a proceeding is embraced in the provisions of Section 13 of the Act of Sept. 23, 1791, 3 Sm. Laws, 37, relating to costs.

3. A justice of the peace has no authority to impose the costs on a defendant in a summary proceeding where the defendant has been discharged, because the proceeding against him was unfounded.

December 23, 1924.

Honorable John M. McKee, Deputy Secretary of Agriculture,  
Harrisburg, Pa.

Sir: You have asked to be advised whether or not it is legal for a Justice of the Peace to impose costs on a defendant charged with having violated the law and who, at the hearing before the Justice of the Peace, is discharged on account of the charge being unfounded.

The Act of September 23, 1791, 3 Smith's Laws 37, provides:

“That where any person shall be brought before a court, justice of the peace or other magistrate \* \* \* on the charge \* \* \* of having committed a crime, and such crime upon examination, shall appear to be unfounded, no costs shall be paid by such innocent person, but the same shall be chargeable to and paid out of the county stock by such city or county.”

Prior to the passage of the Act of 1791 anyone accused of crime in Pennsylvania and arrested and tried before the proper tribunal was met by the rule of the common law which exacted from him the costs

of prosecution, even though he was acquitted. This wrong to those accused of crime when the accusation, after examination, appeared to be unfounded, the statute of 1791 redressed.

Defendants charged with crime before a Justice of the Peace, even though discharged, were:

“Equally liable to costs of prosecution as if he were convicted.”

and Section 13 of the Act of 1791 was passed to cure this evil, and, as was held in *Commonwealth vs. Evans*, 59 Superior 607, the rule applies to defendants, both in crimes which are indictable and those which are tried in a summary manner without a jury.

A summary proceeding for a violation of the law is essentially a criminal prosecution for a public offense. It is brought in the name of the Commonwealth and is founded upon an information or charge against the person accused and is proceeded in according to the course of the common law, except as modified and directed by statutory provisions relating thereto. Such a proceeding is embraced in the provisions of Section 13 of the Act of 1791, and defendants are relieved from the payment of costs where the charge is unfounded and they are discharged.

In speaking of the Act of 1791, *supra*, the Superior Court in *Commonwealth vs. Kane*, 56 Superior 258, held:

“This act is still in force and under it the magistrate has no power to impose the costs upon the complainant when the charge is unfounded: *County of Lehigh vs. Schock*, 113 Pa. 373. The magistrate could do one of two things, discharge the defendant and the costs would then fall on the county or enter judgment convicting the defendant and unless the judgment be reversed the costs in the latter case would fall on him: *Com. v. Evans*, 59 Pa. Superior Ct. 607 (613).

“We think the learned judge was wrong in holding that the justice had the power to punish the defendant by placing costs upon him when the record does not show that he was guilty of the crime charged.”

The Act of 1791 speaks of

“any person brought before a \* \* \* justice of the peace or other magistrate on the charge of having committed a crime.”

A crime is defined in *Bouvier's Law Dictionary* as:

“An act committed or omitted in violation of the public law forbidding or commanding it, a wrong which the government notices as injurious to the public and punishes in what is called a criminal proceeding in its own name.”

This definition embraces all offenses against the law, whether proceeded against by indictment or in a summary way.

The leading case in this State construing the Act of 1791 and the imposition of costs on defendants where the charge appears to be unfounded is *County of Lehigh vs. Schock*, 113 Pa. 373. In that case the Supreme Court, speaking through Mr. Justice Trunkey, said:

“Section 13 of the Act of 1791 applies to every case where a person is before a magistrate on a charge of having committed a crime, and the charge appears unfounded. No difference is made between crimes that are felonious and those that are not felonious, or by reason of some being infamous and others not, or because some are of a deeper dye than others. The innocent person shall not pay costs.”

I, therefore, advise you that a Justice of the Peace or other magistrate has no right to impose costs on a defendant where, after examination, the charge appears to be unfounded and the defendant is discharged.

Yours very truly,

DEPARTMENT OF JUSTICE,

By J. W. BROWN,  
*Deputy Attorney General.*

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**OPINIONS TO THE AUDITOR GENERAL'S  
DEPARTMENT**

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## OPINIONS TO THE AUDITOR GENERAL'S DEPARTMENT

*National Banks—Taxation under Act of 1923, P. L. 876—Acts of July 15, 1897, P. L. 292 and of June 28, 1923, P. L. 876.*

National banks are not within the contemplation of the Emergency Profits Tax of June 28, 1923, P. L. 876. That act does not supersede the Act of July 15, 1897, P. L. 292, as the general term "corporations" cannot be construed to include national banks.

February 5, 1924.

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

Sir: I am in receipt of your letter of the 29th ultimo requesting my opinion as to whether or not national banks are subject to taxation under the Emergency Profits Tax Act of June 28, 1923, P. L. 876.

The shares of stock of national banks are now taxable in Pennsylvania under the provisions of the Act of July 15, 1897, P. L. 292, unless the said act has been superseded by the Emergency Profits Tax Act of June 28, 1923, P. L. 876. The amendment of March 4, 1923 to Section 5219 of the Revised Statutes of the United States (42 Statutes at Large, 1499), provides that national banks may be taxed by the several states in one of three ways: (a) on their shares of stock; (b) on their net income and (c) on the dividends derived from the shares of stock. Three methods may thus be adopted, but the one adopted is exclusive of the other two. If, therefore, it were held that the Emergency Profits Tax Act of June 28, 1923 applies to national banks, it must follow that the Act of 1897 is superseded by the said Emergency Profits Tax Act. It is not to be assumed that the intention of the legislators was to supersede the said Act of 1897 by a tax which is to be operative but for two years, after the expiration of which period there will be no law whatever in existence providing for the taxation of national banks.

Furthermore, I very much doubt whether the term "corporation \* \* \* \* organized by or under the laws of the United States \* \* \* \*" in the Emergency Profits Tax Act covers national banks.

In *Columbia National Bank v. Powell*, 265 Pa. 85 (1919), it was contended on the part of the Commonwealth that national banks were within the meaning of the Escheat Act of June 7, 1915, P. L. 878, in that they were "organized or doing business under the laws of the Commonwealth," but the supreme court held:

"It will be observed that although appellant is 'doing business' within the Commonwealth it does not necessarily follow that it is transacting business 'under the



laws' of the Commonwealth. True, in carrying on its business within the state a national bank conforms to state laws in so far as they are not in conflict with federal statutes, yet such bank obtains no franchise or authority from the state, but owes its existence and its right to do business solely to acts of Congress. The state may not impose additional conditions or restrictions upon the right of such institutions to do business, nor may it in any way regulate or interfere with their conduct or management, concerning matters subject to the control of Congress. As a result of their status we have held that state statutes referring in general terms to banks will not be construed to include national banks, in absence of express provisions to that effect: *Commonwealth ex rel v. Ketner*, 92 Pa. 372; *Allen v. Carter*, 119 Pa. 192."

If a reference to banks in general terms will not be construed to include national banks, then a fortiori a state statute referring in general terms to "corporations" will not be construed to include national banks.

I am, therefore, clearly of the opinion that national banks are not within the contemplation of the Emergency Profits Tax Act.

Very truly yours,

DEPARTMENT OF JUSTICE

By GEORGE W. WOODRUFF,  
*Attorney General.*

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*Limited partnerships—Emergency profits tax—Acts of April 12, 1917, and June 28, 1923.*

Limited partnerships, created under and by the provisions of the Act of April 12, 1917, P. L. 55, entitled "An act relating to limited partnerships," are not subject to the emergency profits tax imposed by the Act of June 28, 1923, P. L. 876.

June 25, 1924.

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

Sir: The question raised by your letter of April 23, 1924, is whether or not limited partnerships formed under and by the provisions of the Act of April 12, 1917, P. L. 55, entitled—

"An Act Relating to Limited Partnerships,"

are subject to the tax imposed by the Act of June 28, 1923, P. L. 876, entitled—

"An Act imposing an emergency profits tax for State purposes on the net income of certain corporations, joint-stock associations, limited partnerships, and companies, doing business in this Commonwealth; providing for the collection of such tax; and prescribing penalties."

Section 2 of the Act of June 28, 1923, *supra*, provides for the imposition of the tax and reads as follows:

"Section 2. Imposition of Emergency Profits Tax.—Every corporation shall be subject to, and pay into the Treasury of the Commonwealth, an emergency corporation profits tax, at the rate of one-half of one per-centum ( $\frac{1}{2}\%$ ) per annum, for two years, upon each dollar of the net income of such corporation, during the calendar years one thousand nine hundred 'twenty-three and one thousand nine hundred and twenty-four, or in the event that such corporation is permitted by the Auditor General to make its report under the provisions of this act as of its fiscal year instead of the calendar year, then the tax imposed shall be paid on the net income of such corporation during its two fiscal years commencing at any time during the year one thousand nine hundred and twenty-three and ending at the end of the corresponding day in the year one thousand nine hundred and twenty-five.

"The tax hereby imposed shall be in addition to all taxes now imposed on any corporations under the provisions of existing laws."

It will be observed that under this section "Every corporation shall be subject to, and pay into the Treasury of the Commonwealth, an emergency corporation profits tax, \* \* \*." What is included within the term "Every corporation" is defined in Section 1 of the Act, the pertinent portion of which section reads as follows:

"Section 1. Be it enacted, &c., That the term 'corporation,' as used in this act, shall include every corporation having capital stock, every joint-stock association, limited partnership, and every company whatsoever, now or hereafter organized or incorporated by or under any laws of this Commonwealth, and every corporation, joint-stock association, limited partnership, and company whatsoever, now or hereafter incorporated or organized by or under the laws of any other State or Territory of the United States, or by the United States, or by any foreign government, and doing business in this Commonwealth, or having capital or prop-

erty employed or used in this Commonwealth by or in the name of any limited partnership or joint-stock association, company or corporation whatsoever, association or associations, copartnership or copartnerships, person or persons, or in any other manner. The term shall not include building and loan associations, nor any corporation, joint-stock association, limited partnership, or company, now required to pay a tax upon its gross premiums under the provisions of section twenty-four of the act, approved the first day of June, one thousand eight hundred and eighty-nine (Pamphlet Laws, four hundred and twenty), entitled 'A further supplement to an act, entitled "An act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine.'

It will be observed that included within the class of corporations, as such term is used in this Act of Assembly, are "every \* \* \* limited partnership, and every company whatsoever, now or hereafter organized or incorporated by or under any laws of this Commonwealth \* \* \*." This language is broad in its scope and considered solely as it is written in Section 1 would include a limited partnership formed under the provisions of the Act of April 12, 1917, *supra*. However, the Act of June 26, 1923, *supra*, as in the case of all Acts of Assembly, must be considered as a whole. Each section must be interpreted and construed in its relation to other portions of the Act. Turning to a consideration of the other sections of the Act, it is found that Section 4 provides for the making of reports to the Auditor General. These reports must be under oath or affirmation of the president, vice-president or other principal officer, and of the treasurer or assistant treasurer of the "corporation." Upon these reports, as appears by Section 5, the Auditor General settles the account for taxes imposed by the Act, from which settlement the "corporation" has the right of appeal "in the manner now provided by law for appeals from settlements of accounts by the Auditor General and State Treasurer."

In Section 7 of the Act it is provided that—

"\* \* \* In the event of the neglect or refusal of the officers of any corporation to make the report to the Auditor General as hereinbefore provided, it shall be the duty of the Auditor General to estimate the net income of such corporation for the calendar year next preceding and settle an account for taxes, penalties and interest thereon, from which settlement there shall be no right of appeal."

Section 8 of the Act reads as follows:

"Section 8. Penalty When No Report Filed.—If the said officers of any such corporation shall neglect or refuse to furnish the Auditor General with the report as hereinbefore provided, or shall knowingly make any false report, it shall be the duty of the Auditor General to add ten per centum to the tax of said corporation for each year for which such report was not so furnished, or for which a false report was knowingly made, which percentage shall be settled and collected, with the State tax imposed under the provisions of this act, in the usual manner of settling accounts and collecting such taxes."

A comparison of the Act of June 28, 1923, supra, with the Capital Stock Tax Act of June 20, 1889, P. L. 420, 427, and its amendments of June 8, 1891, P. L. 229, 223, June 8, 1893, P. L. 353, June 7, 1907, P. L. 430, June 7, 1911, P. L. 673, July 22, 1913, P. L. 903, June 2, 1915, P. L. 730, and July 15, 1919, P. L. 948, shows clearly the similarity in language, purpose and procedure in the matter of the filing of reports, settlements of taxes thereon, appeals therefrom, the duties of the officers of the corporations and the imposition of penalties.

Compliance with the provisions of the Act of June 28, 1923, supra, and the Capital Stock Tax Act, supra, of necessity requires that the "limited partnership," which is subject to its provisions has and is authorized and empowered by the law of its creation to have the officers which the statute imposing the duties requires it to have in order to comply with its provisions.

Upon an examination of the Act of April 12, 1917, P. L. 55, we find no provision for a president, vice-president, or other principal officer, or for a treasurer or assistant treasurer. We thus find that it would be impossible for this class of partnerships to comply with the provisions of the Act of June 28, 1923, supra. It is not sufficient to say that there is nothing in the Act of 1917 providing for the creation of this class of limited partnerships which prevents them having such officers. The answer to any such contention is twofold. Even though one were to regard the kind of limited partnership created by the said Act of 1917 as a legal entity akin to a corporation, one is confronted with the plain proposition of law that a corporation, which is an artificial being existing only in contemplation of law, can have only such powers and such attributes as the law of its creation gives to it. In the case of *Cooke vs. Marshall*, 191 Pa. 315, 321, the Supreme Court quotes with approval from the opinion of the Supreme Court of the United States in the case of *Scovill vs. Thayer*, 105 U. S. 143, as follows:

"As a general rule corporations can have and exercise only such powers as are expressly conferred on

them by the act of incorporation, and such implied powers as are necessary to enable them to perform their prescribed duties \* \* \*."

Again it must be borne in mind that this is a question of taxation and an interpretation and construction of a taxing statute, the precise question being whether or not a certain class of artificial beings, recognized by the law and known as limited partnerships created by the Act of April 12, 1917, *supra*, is to be subject to a tax. It is fundamental in all taxing law that one must find the authority to impose a tax in the clear language of the law. A tax is not imposed by implication. It could be sufficient to rest my conclusion that limited partnerships formed under the provisions of the Act of April 12, 1917, P. L. 55, are not included within the class of "corporations" made subject to the tax imposed by the Act of June 28, 1923, P. L. 876, upon the foregoing reasons. However, we are not without a ruling upon a similar question in an opinion by Attorney General McCormick, rendered to the Auditor General, April 30, 1896, and reported in the Report and Official Opinions of the Attorney General, 1887-96, and an opinion of the Dauphin County Court in the case of *Commonwealth vs. Biddle and Henry*, reported in 2 *Pa. District & County Reps.* 705.

In the aforementioned opinion of Attorney General McCormick the question before him was whether or not limited partnerships created under the Act of March 21, 1836, P. L. 143, were included in the provisions of the Act of June 7, 1879, P. L. 112, the Act of June 1, 1889, P. L. 420, entitled:

"A further supplement to an act entitled 'An act to provide revenue by taxation', approved the seventh day of June, Anne Domini one thousand eight hundred and seventy-nine",

and the Act of June 8, 1891, P. L. 229. The Attorney General reached the conclusion that such limited partnerships were not within the provisions of the said Acts of Assembly. After quoting at length from Section 4 of the Act of June 8, 1891, P. L. 229, he said:

"It would seem that the reports to the Auditor General, required by this act, were from corporations and limited partnerships having an organization with such officers as president, chairman, secretary and treasurer."

In line with the foregoing reasoning the Dauphin County Court in the case of *Commonwealth vs. Biddle and Henry*, *supra*, held that the limited partnerships here in question were not subject to taxation on capital stock under the Act of June 1, 1889, P. L. 420, and its amendments. It is not necessary to review the reasoning of

the Court. The Dauphin County Court, after setting forth certain fundamental principles of statutory interpretation and construction, both as to statutes in general and taxing statutes in particular, turned to a consideration of the different kinds of limited partnerships created under the law of Pennsylvania, pointed out the different characteristics and powers of each, differentiating one from the other, pointing out wherein they were not only dissimilar to one another, but wherein some of them were similar and akin to corporations, and reached the conclusion that the limited partnerships which were created under and by the provisions of the Act of April 12, 1917, P. L. 55, were not subject to the tax imposed upon capital stock under and by the provisions of the Act of June 1, 1889, P. L. 420, and its amendments, and, after referring to the opinion of Attorney General McCormick, said, *inter alia*, on page 708:

“\* \* \* The Limited Partnership Act of 1917 provides for the organization of a limited partnership, consisting of two or more persons, having one or more general partners and one or more limited partners. It is formed by executing a certificate and having the same recorded. The limited partner is not liable to creditors as the general partners are. A limited partnership organized under the Act of 1836 may become a limited partnership under this act. The Act of 1836, its supplements of April 16, 1838, P. L. 691, April 21, 1858, P. L. 383, March 30, 1865, P. L. 46, Feb. 21, 1868, P. L. 42, are all repealed by the Uniform Limited Partnership Act of 1917. Under the Act of 1836 and its supplements, and the Act of 1917, there is no provision for a president, vice-president, secretary or treasurer in the organization. There is no provision making the partnership a legal entity or allowing it to be sued in the partnership name without joining the partners, although there was in the supplement of March 30, 1865, P. L. 46, a provision that the ‘business of the partnership shall be conducted under a firm in which all the names of all the general partners shall be inserted, except that when there are more than two general partners, the firm name may consist of either two of such partners, with the addition of the words “and company.” But, in that event, the firm was required to place outside of its place of business some sign containing in legible English characters all the names in full of all the members of said partnership, stating who are general and who are special partners.’”

Again on pages 710 and 711 of the opinion we read:

“\* \* \* It can hardly be contended that the partnership under the Act of 1836 and the Uniform Limited Partnership Act of 1917 is a ‘company’ within the meaning of the taxing acts. The Act of July 15, 1919, P. L.

948, which is the last amendment of Section 20 of the Act of 1889, and which contains the same language carried along from the other acts, provides that '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 make reports, so that the character of company included is a company which has officers of the kind designated. So, also, it may be said that the 'limited partnership' referred to is the kind that has such officers. A limited partnership under the Act of 1917 has no such officers. A partnership association under the Act of 1874, and the kind of partnership organized under the Act of 1889, may have them, because the law provides for them. The Limited Partnership Act describes the thing to be formed under that act as a 'limited partnership' and not as a 'company'. It has no legal entity, such as a corporation or joint stock association. The Commonwealth has not invested it with privileges or franchises. It has simply regulated its organization. A limited partnership under the Act of 1917 may dissolve itself, and Section 20 of the act provides that the retirement, death or insanity of a general partner dissolves it, unless the right is reserved in the certificate to the general partners to continue the business. Section 32 of the Act of 1889 provides that 'no corporation, company, joint stock association or limited partnership made taxable by this act shall hereafter be dissolved by the decree of any Court of Common Pleas \* \* until all taxes due the Commonwealth have been fully paid into the State Treasury', etc. This is certainly inconsistent with a limited partnership formed under the Uniform Act of 1917, which does not require the dissolution by the Court of Common Pleas. A limited partnership under the Act of 1917 not being a legal entity, a settlement against it would have to take the anomalous form of a settlement against all the partners individually and not against the partnership alone, as in the case of partnership associations which can sue and be sued in the association name.

"Furthermore, when we examine the Bonus Act of May 8, 1901, P. L. 149, we find that it specifically provides for a bonus 'on partnership associations' formed under the Act of June 2, 1874, P. L. 271, and 'every partnership' formed under the Act of May 9, 1899, P. L. 261. It does not subject limited partnerships formed under the Act of 1836, and now under the Limited Partnership Act of 1917, to the payment of any bonus.

"It would seem a rather anomalous position for the legislature to provide that a partnership, no matter how large or how many general partners it may have, if it had one special or limited partner with an interest ever so small, should be subject to taxation, and that the general partners would be required to pay the tax on

the capital stock. We think that there is no such legislative intention to be gathered merely from the use of the words 'limited partnership' in the taxing acts. but that those words are the result of a confusion of terms due to the language of both the courts and the reporters of opinions. We are of opinion that the legislature intended to tax those partnership associations and partnerships which have the characteristics of a corporation and which have the officers and the organization to make the reports required in order to subject them to taxation. \* \* \* \*"

In view of the foregoing I am of the opinion that limited partnerships created under and by the provisions of the Act of April 12, 1917, P. L. 55, entitled:

"An Act Relating to Limited Partnerships",

are not subject to the provisions of the Act of June 28, 1923, P. L. 876, entitled:

"An Act imposing an emergency profits tax for State purposes on the net income of certain corporations, joint-stock associations, limited partnerships, and companies, doing business in this Commonwealth; providing for the collection of such tax; and prescribing penalties,"

and are, therefore, not subject to the tax imposed under and by its provisions.

Yours very truly,

JOHN ROBERT JONES,  
*Deputy Attorney General.*

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*Corporations—Taxation—Emergency profits tax—Trust and title companies—Acts of June 13, 1907, June 28, 1923, and July 11, 1923.*

Companies which are made subject to the tax imposed by the Act of June 13, 1907, P. L. 640, as amended by the Act of July 11, 1923, P. L. 1071, are included within the term "corporation," as such term is used in the Act of June 28, 1923, P. L. 876, and are subject to the emergency profits tax imposed by the latter act.

July 22, 1924.

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

Sir: You have requested the opinion of this Department upon the question of whether or not companies which are made subject to the tax imposed under and by the provisions of the Act of June 13, 1907, P. L. 640, as amended by the Act of July 11, 1923, P. L. 1071,



are included within the term "corporation," as such term is used in the Act of June 28, 1923, P. L. 876, and are subject to the tax imposed under and by the provisions of the latter Act.

The Act of June 13, 1907, *supra*, provided that—

"\* \* \* every company incorporated under the provisions of section twenty-nine of an Act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved April twenty-ninth, one thousand eight hundred and seventy-four, and its supplements; for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens, and incumbrances; and every company entitled to benefits of, and every company having any of the powers of, companies entitled to the benefits of an act, entitled 'An act conferring upon certain fidelity, insurance, safety deposit, trust, and savings companies the powers and privileges of companies incorporated under the provisions of section twenty-nine of an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth Anno Domini one thousand eight hundred and seventy-four, and of the supplements thereto,' approved June twenty-seventh, one thousand eight hundred and ninety-five, commonly known as title insurance, or trust, companies,"

should, on or before June 20th in every year, make a report to the Auditor General in the manner set forth in the said Act, in which report was to be set forth "the full number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof," which actual value was to be ascertained in the manner provided in the Act. This having been done, it thereupon became the duty of the Auditor General "to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares."

The Act further provided that "It shall be the duty of every such company, within a period of forty days after the date of such settlement by the Auditor General, at its option to pay the amount of said tax to the State Treasurer from its general fund, or collect the same from its shareholders and pay over to the State Treasurer."

The Act also contained the following provision:

"\* \* \* And provided further, That in case any such company shall collect annually from the shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of each share

of stock to be ascertained and fixed by adding together so much of the capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, and dividing this amount by the number of shares of such title insurance or trust company, and pay said tax into the State Treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth."

The Act contained additional provisions imposing various duties upon officers of the company in the matter of filing reports, furnishing information to the Auditor General, the imposition of penalty upon the failure or refusal of the officers of the company to perform certain duties, the payment of the tax, etc. These provisions had for their purpose a proper enforcement of the Act.

As to the purposes and intent of this Act of Assembly the Supreme Court has said:

"\* \* \* This act was intended to put trust companies upon practically the same basis as banking institutions for the purpose of taxation. Bank stocks are taxed under the Act of July 15, 1897, P. L. 292, and the method of ascertaining and fixing the value of shares by this act was adopted by the legislature in the Act of 1907 as applied to title insurance and trust companies. \* \* \* In the present case the appellee company filed its report in the office of the Auditor General in February, 1909, appraising the value of its shares at \$20,097,466.50, and elected to pay and did pay to the State Treasurer five mills on the value of the shares so appraised by its own officers prior to March 1, 1909. By so doing appellee was entitled to a deduction for so much of its capital, surplus and profits as was invested in shares of stock of other corporations liable to pay a capital stock tax or tax on shares, and to claim an exemption from all other taxation upon its capital stock, surplus, profits, and deposits not invested in real estate. The legislature evidently intended to tax shares of stock in banks and trust companies for state purposes, and to set at rest the somewhat mooted question whether the deposits of such institutions invested in personal securities should be subject to local taxation like moneys at interest in the hands of individuals. Banks and trust companies under the Acts of 1897 and 1907 by paying a state tax upon the value of their shares to be ascertained as provided in these acts are relieved from local taxation, and this fact must be given due consideration in determining what the legislature intended by provid-

ing that the value of each share shall be fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. \* \* \*

*Commonwealth vs. Union Trust Co. of Pittsburgh,  
237 Pa., 353, 354, 355, 356.*

This Act of Assembly was amended by the Act of July 11, 1923, F. L. 1071, by effecting the following changes, to-wit:

1. Changing the date on or before which the company is required to make its report to the Auditor General from the *twentieth day of June* in each and every year to the *last day of February*

2. Providing that the actual value of the shares of stock is to be ascertained as of December 31st preceding.

3. Providing that the actual value of each share of stock is to be ascertained and fixed as follows: "by adding together *so much of* the amount of capital stock paid in, the surplus, and undivided profits *as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,* and dividing this amount by the number of shares." The italicized words indicate the amendments, the effect of which is to provide the same method for ascertaining and fixing the value of the shares as was provided in the said Act of 1907 in the event that the payment of the tax was made on or before the first day of March in each year.

4. Changing the requirement that the Auditor General, after having fixed the value of the shares of stock and settled the account, shall transmit a copy of such settlement to the president, cashier, or treasurer of the company, by striking out the word "cashier" and substituting in lieu thereof the word *secretary*.

5. Changing the period of time after the date of the settlement within which it became the duty of the company to pay the amount of the tax to the State Treasurer from its general fund or to collect the same from its shareholders and pay it over to the State Treasurer from forty days to sixty days.

6. Reducing the penalty of fifty per centum of the amount of the tax, which penalty is imposed for the failure or refusal of the company to make the required report or to pay the tax at the time specified or for the making of any false statement in the report or failing or refusing by its officers to appear before the Auditor General as required in the Act or for failing or refusing to produce its books for examination when required to do so by the Auditor General, to ten per centum.

7. Changing the proviso in the said Act of 1907 whereby the company became responsible to the Commonwealth for the amount of the tax assessed against the shareholders of the company by reason of neglect or refusal of the president, cashier or treasurer of the company to post a copy of the settlement in a conspicuous place in the company's place of business immediately upon receipt of the same so as to give notice to the shareholders, by reason of which neglect or refusal the said president, cashier or treasurer was adjudged to be in default by striking out the word "cashier" and substituting in lieu thereof the word *secretary*.

8. Striking out of the last proviso of the said Act of 1907 certain portions thereof and adding new language thereto, the effect of which is, if the payment of the tax be made within a period of sixty days after the date of settlement, to allow the same exemption as was allowed in the said Act of 1907 when the payment of the tax was made on or before the first day of March in each year.

It will be observed that the subject of taxation, both in the Act of June 13, 1907, and the amending Act of July 11, 1923, *supra*, is the same; that is to say, the shares of stock. It is true that in the amending Act of 1923 the method of determining the actual value of the shares is changed in the manner indicated, but the subject of taxation is exactly similar.

The Act of June 28, 1923, P. L. 876, provided in Section 2 as follows:

"Imposition of Emergency Profits Tax.—Every corporation shall be subject to, and pay into the Treasury of the Commonwealth, an emergency corporation profits tax, at the rate of one-half of one per centum ( $\frac{1}{2}\%$ ) per annum, for two years, upon each dollar of the net income of such corporation, during the calendar years one thousand nine hundred twenty-three, and one thousand nine hundred and twenty-four, or in the event that such corporation is permitted by the Auditor General to make its report under the provisions of this act as of its fiscal year instead of the calendar year, then the tax imposed shall be paid on the net income of such corporation during its two fiscal years commencing at any time during the year one thousand nine hundred and twenty-three and ending at the end of the corresponding day in the year one thousand nine hundred and twenty-five.

"The tax hereby imposed shall be in addition to all taxes now imposed on any corporations under the provisions of existing laws."

It will be observed that the tax which is called "an emergency corporation profits tax" is a tax "at the rate of one-half of one per centum ( $\frac{1}{2}\%$ ) per annum, for two years, upon each dollar of the net

income of such corporation." I think it is plain that the subject of the tax imposed by this Act is the net income of the corporation as the term "net income" is defined in the said Act of Assembly.

In the first section of this Act it is provided "That the term 'corporation' as used in this act, shall include every corporation having capital stock, \* \* \* now or hereafter organized or incorporated by or under any laws of this Commonwealth \* \* \*". It will be observed that this language standing by itself would include within it such corporation as is made subject to the tax imposed by the Act of June 13, 1907, supra, as amended by the Act of July 11, 1923 supra. Section 1 sets forth expressly certain associations, corporations, etc., which are not to be regarded as included within the term "corporation" as used in the Act, and that none of such excluded corporations is a corporation made subject to the said Act of June 13, 1907, supra, as amended by the Act of July 11, 1923, supra. This portion of Section 1 reads as follows:

"\* \* \* The term shall not include building and loan associations, nor any corporation, joint-stock association, limited partnership, or company, now required to pay a tax upon its gross premiums under the provisions of section twenty-four of the act, approved the first day of June, one thousand eight hundred and eighty-nine (Pamphlet Laws, four hundred and twenty), entitled 'A further supplement to an act, entitled "An act to provide revenue by taxation," approved the seventh day of June Anno Domini one thousand eight hundred and seventy-nine.'"

This language manifests a clear intent to include under the provisions of the said Section 1 as being subject to the said tax such corporations as are subject to the said Act of June 13, 1907, and its amendment of July 11, 1923, supra. As if to remove all doubt it is expressly provided in Section 2 of the Act as follows:

"The tax hereby imposed shall be in addition to all taxes now imposed on any corporations under the provisions of existing laws."

I think this is conclusive of the question.

In answer to a contention which may be made to the effect that double taxation results by reason of the fact that in determining the value of the shares of stock of the company, under the provisions of the said Act of 1907 as amended by the said Act of July 11, 1923, "so much \* \* \* of the undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares," is included, and in the determination of "net income" made subject to the tax imposed by the said Act of

June 28, 1923, "profits" are included, it is sufficient to say, assuming that double taxation does so result, that double taxation is not forbidden legislation where there is a clear intent to impose it. (See *Commonwealth vs. Senet Solvay Co.*, 262 Pa., 234; *Commonwealth vs. Shenango F. Co.*, 268 Pa. 283, and cases cited therein; *Commonwealth vs. Fall Brook Coal Co.*, 156 Pa. 488, 495.) But double taxation does not so result. There can be no double taxation where the subjects of taxation are dissimilar. (See cases cited above.) As hereinbefore stated the subject of taxation in the Act of 1907 and its amendment of 1923 is "shares of stock" and the subject of taxation in the Act of June 28, 1923, is "net income", as defined in such act.

I do not think that there is any force in a contention that the said Act of July 11, 1923, amending the Act of June 13, 1907, having been approved by the Governor at a date subsequent to the approval of the Act of June 28, 1923, there is an implied intent on the part of the legislature to remove such corporations from the clear language of the said Act of June 28, 1923. As I have stated, the Act of July 11, 1923, amending the said Act of June 13, 1907, did not change the subject of taxation whatsoever. Its purpose was not to affect existing law as to the subject of taxation. It is not to be presumed that the Legislature by its passage of the Act of July 11, 1923, intended by implication to remove the particular corporations made subject to the tax imposed thereunder from the provisions of the Act of June 28, 1923. It is within reason to assume that if such had been the intent of the General Assembly it would have declared such intent in express language as it did in the case of certain other corporations in Section 1 of the said Act of June 28, 1923. (See *Commonwealth vs. Mortgage Trust Co.*, 227 Pa. 163, 182.)

I am, therefore, of the opinion that companies which are made subject to the tax imposed under and by the provisions of the Act of June 13, 1907, P. L. 640, as amended by the Act of July 11, 1923, P. L. 1071, are included within the term "corporation" as such term is used in the Act of June 28, 1923, P. L. 876, and are subject to the tax imposed under and by the provisions of the latter Act.

Yours very truly,

DEPARTMENT OF JUSTICE,

JOHN ROBERT JONES,  
Deputy Attorney General.

*Taxation—Corporations—Boroughs operating electric plants—Commercial operation—Acts of June 1, 1889, and May 14, 1915.*

1. A municipal corporation may act in a double capacity, in its capacity as a "public corporation created by the government for political purposes," and also in the capacity of a private corporation.

2. When a municipality, by virtue of legislative enactment, is given a grant of power for the purpose of private advantage or profit, even though the public may derive a benefit therefrom, such municipality is, as to such grant of power and as to such purposes, a private corporation, and subject to the liabilities of a private corporation.

3. Where a borough, by virtue of the authority given to it by the Act of May 14, 1915, P. L. 312, owns and operates an electric light plant for commercial purposes, manufacturing electricity and supplying it to the public, and charging therefor, it is subject to the tax imposed by the Act of June 1, 1889, P. L. 420.

4. Where a borough engages in such business, it is not performing the function of government "delegated by the State to its agencies as public instrumentalities," but it is acting in its "corporate character or business capacity."

October 23, 1924.

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

Sir: The issue raised by your letter of August 27, 1924, and your supplementary letter of September 11, 1924, is whether or not boroughs, which by virtue of legislative authority granted to them by the General Assembly, own and operate electric light plants for commercial purposes, are subject to the provisions of Section 23 of the Act of June 1, 1889, P. L. 420, and to the tax imposed thereby.

The pertinent portions of Section 23 of the Act of June 1, 1889, P. L. 420, read as follows:

"\* \* \*, and every electric light company, \* \* \* incorporated or unincorporated, doing business in this Commonwealth, shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of said corporation, company or association, limited partnership, firm or co-partnership, received \* \* \* from business of electric light companies, \* \* \*; the said tax shall be paid semi-annually upon the last days of January and July in each year; and for the purpose of ascertaining the amount of the same it shall be the duty of the treasurer or other proper officer of the said company, firm, copartnership, limited partnership, joint-stock association or corporation, to transmit to the auditor general a statement, under oath or affirmation, of the amount of gross receipts of the said companies, co-partnerships, corporations, joint-stock associations or limited partnerships derived from all sources, and of gross receipts from business done wholly within the State, during the preceding six months ending on the first days of January and July in each year; and if any such company, firm, co-partnership, joint-stock as-

sociation, association or limited partnership or corporation, shall neglect or refuse for a period of thirty days after such tax becomes due, to make said returns or to pay the same, the amount thereof with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth as other taxes are recoverable by law: Provided, \* \* \*."

The nature and character of the tax imposed by this Section of the said Act of Assembly was considered in the case of the *Commonwealth vs. Brush E. L. Co.*, 204 Pa. 249; In this case the Supreme Court said that the tax "is not to be paid upon the gross receipts from electric lighting, but upon the gross receipts from the business of the company." " \* \* it (the company) is taxed on what it does. The statute imposes the tax not upon a portion of its receipts—those derived from a particular commodity it supplies to the public—but upon all of its receipts from its general business conducted under its franchise."

That the term "corporation," as used in said Section 23 of the Act of 1889, supra, includes private corporations, I take it, calls for neither argument nor citation of authority. The question instantly arises: Does the term include municipal corporations? In answering this question the nature and character of municipal corporations must be considered, their functions as an agent of the sovereign State, and their powers and activities other than those of government.

A municipal corporation may act in a double capacity; in its capacity as a "public corporation created by the government for political purposes" and also in the capacity of a private corporation.

This principle of law has been affirmed and reaffirmed in numerous decisions of the Supreme and Superior Courts. (See *Western Saving Fund Society vs. City of Philadelphia*, 31 Pa. 175; *Philadelphia vs. Fox*, 64 Pa. 169; *Weller vs. Philadelphia*, 77, Pa. 338; *Brumm's Appeal*, 22 W. N. C. 137; *White et al. vs. City of Meadville*, 177 Pa. 643; *Baily vs. Philadelphia*, 184 Pa. 594; *Jolly vs. Monaca Borough*, 216 Pa. 345; *Gas and Wate Co. vs. Carlisle Borough*, 218 Pa. 554; *Penn Iron Co. vs. Lancaster*, 25 Pa. Super Ct. 478; *Bower vs. U. S. Gas Improvement Co.*, 37 Pa. Super Ct. 113; *Cousins vs. Butler County*, 73 Pa. Super. Ct. 86; *Moore vs. Luzerne Co.*, 262 Pa. 216; *Skibilia vs. City of Philadelphia*, 82 Pa. Super Ct. 328, affirmed by the Supreme Court, 279 Pa. 549.

In the case of *Philadelphia vs. Fox*, 64 Pa. 169, Justice Sharswood said on pages 180 and 181:

"The City of Philadelphia is beyond all question a municipal corporation, that is, a public corporation created by the government for political purposes, and



having subordinate and local powers of legislation: 2 Kent's Com. 275; an incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government: *Glover Mun. Corp.* 1. It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government—essentially a revocable agency—having no vested right to any of its powers or franchises—the charter or act of erection being in no sense a contract with the state—and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion. *Sic volo, sic jubeo*, that is all the sovereign authority need say. This much is undeniable, and has not been denied. That while it thus exists in subjection to the will of the sovereign, it enjoys the rights and is subject to the liabilities of any other corporation, public or private, is equally undoubted. This was the very object of making it a body politic, giving it a legal entity and name, a seal by which to act in solemn form, a capacity to contract and be contracted with, to sue and be sued, a *persona standi in judicio*, to hold and dispose of property, and thereby to acquire rights and incur responsibilities. These franchises were conferred upon it for the purpose of enabling it the better to effect the main design of its institution, the exercise of certain of the powers of government, subordinate to the legislature, over a certain part of the territory of the state. But all this affects its relations to other persons, natural or artificial; it does not touch its relation to the state, its creator. It is nothing to the purpose, then, to show that a city may act in certain particulars as a private corporation, may make contracts as such, and that it cannot impair the obligation of a contract entered into by it in that capacity, because it may deem it for the benefit of its citizens to do so, nor is it in the power of the legislature, under the provision of the Constitution, to authorize the violation of such a contract; *Western Saving Fund Society v. City of Philadelphia*, 7 Casey 175, 185. \* \* \*

In the case of *Western Saving Fund Society vs. City of Philadelphia* 31 Pa. 175, the Supreme Court said on pages 189 and 190:

“Nor can there be any doubt that the trust existing in the trustees is a private one, and that the City of Philadelphia is to be regarded as a private corporation, so far as relates to its contract with the loan-holders. It was not as a municipality that it dealt with them. As a local sovereign, it had no authority to enter into the business of manufacturing and selling gas, for its sovereignty did not extend to such subjects,

any more than it did to almost any other manufacture. It is true, a municipal corporation is not bound by any engagement which prevents a discharge of the duties imposed upon it by its organic law, for the plain reason that such engagements are contrary to law. But when such a corporation engages in things not public in their nature, it acts as a private individual, no longer legislates, but contracts, and is as much bound by its engagements as is a natural person. The distinction between public duties and private business is wide and obvious. It is, perhaps, nowhere better stated than by Chief Justice Nelson, in *Bailey v. The Mayor, &c.*, of the City of New York, 3 Hill 531. In speaking of powers granted to a municipal corporation, he remarks, that 'regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But, if the grant was for purposes of private advantage, or emolument, though the public may derive a common benefit therefrom, the corporation, quoad hoc, is to be regarded as a private company. It stands on the same footing, as would any individual, or body of persons, upon whom like special franchises had been conferred.' The contract, therefore, whatever it was, which was made with the loanholders, complainants in this case, is as unchangeable as if it had been made with a natural person."

In the case of *Moore vs. Luzerne Co.*, 262 Pa. 216, Mr. Justice Simpson, in speaking for the Court, said:

"Since *Western Savings Fund Society of Philadelphia v. Philadelphia*, 31 Pa. 185, we have steadily held to the principle that in determining the distinction between the governmental and business functions of a public body, 'regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage or emolument, though the public may derive a common benefit therefrom, the corporation, quod hoc, is to be regarded as a private company. It stands on the same footing as would any individual, or body of persons, upon whom like special franchises had been conferred.' \* \* \*"

It is therefore to be regarded as settled law that when a municipality by virtue of legislative enactment is given a grant of power for purposes of private advantage or profit, even though the public

may derive a benefit therefrom, such municipality is as to such grant of power and as to such purposes a private corporation and subject to the liabilities of a private corporation. The grant of such power to a borough or city is "a special private franchise, made as well for the private emolument and advantage of the city as for the public good." (See *Jolly vs. Monaca Borough*, 216 Pa. 345, and cases cited therein.)

The difficulties in particular cases arise in the application of this principle of law. The preliminary question in each case is, "Is the municipality acting in its public or governmental capacity or in its private and corporate capacity?" The test to determine the answer to this question was declared in the opinion of the Superior Court in the case of *Scibilia v. City of Philadelphia*, 82 Pa. Super. Ct. 328.

The Court, in considering the "difference between things which a municipality may do by virtue of its powers of sovereignty, and those things which it may do in the capacity of a corporation," stated the true test to determine in what capacity the municipality was acting in a particular case. On page 333 of the opinion we read:

"\* \* \* We think the true test is whether the duty is public and governmental or private and corporate. As characteristic examples of public or governmental functions we have the case of the policeman and fireman. Equally characteristic of private or corporate functions are the cases of municipal water supply or lighting plants furnishing convenience to the inhabitants for compensation. \* \* \*"

The judgment of the Superior Court was affirmed by the Supreme Court (279 Pa. 549). The Chief Justice rendered the opinion, saying on page 553:

"In deciding that, at the time of the accident, the City of Philadelphia was performing a purely public function, to which the rule of respondent superior did not apply, the court whose judgment is now under review correctly stated that the true test went to the nature of the duty the municipality was then engaged in carrying out, the controlling question being, was it 'corporate and managerial, or public and governmental'? and this without regard to whether the duty was 'absolute,' 'imperative,' or 'ministerial,' as distinguished from 'legislative,' 'judicial,' or 'discretionary,' which is a test sometimes applied."

In the light of these decisions of our Appellate Courts how stands the case of a Borough which, by virtue of authorization given to it by an Act of the General Assembly, owns and operates an electric

light plant for commercial purposes, manufacturing electricity and supplying it to the public and charging therefor?

In the opinion of the Superior Court in the case of *Scibilia vs. City of Philadelphia*, supra, it was expressly stated that "municipal \* \* \* lighting plants furnishing conveniences to the inhabitants for compensation" are "characteristic of private or corporate functions." This language can lead but to one conclusion, namely, that in the performance of this private or corporate function the municipality is in contemplation of law a private corporation and, in the language of the Supreme Court in *Western Saving Society vs. City of Philadelphia*, supra, and *Moore vs. Luzerne Co.*, supra, "stands on the same footing as would any individual, or body of persons, upon whom like special franchises had been conferred."

In the case of *Gas & Water Co., vs. Carlisle Borough*, 218 Pa. 554 Justice Elkin said, on page 558:

"\* \* \* When a municipal corporation engages in things not public in their nature it acts as a private individual, and is as much bound by its engagements as a natural person: *Western Saving Fund Society v. City of Philadelphia*, 31 Pa. 185. If it acts as an individual in acquiring the stock, it may as an individual dispose of it. The right to acquire, there being no statutory restriction as to alienation, includes the incidental power of sale."

In the case of *Bower v. United Gas Improvement Co.*, 37 Pa. Super. Ct. 113, 129, the Court said:

"It has been definitely settled that in thus undertaking to furnish to its citizens supplies of water and gas, the city was not discharging any municipal obligation or exercising any power which it possessed only because it was a municipality, but was acting in the capacity and exercising the powers of a private corporation: *Western Saving Fund Society v. City of Philadelphia*, 31 Pa. 175; S. C., 31 Pa. 185; *Wheeler v. Philadelphia*, 77 Pa. 338; *Bailey et al v. Philadelphia*, 184 Pa. 594. In the case first cited Chief Justice Lewis said: 'But the contracts which a municipal corporation may make for the purpose of supplying the inhabitants with gas light in their streets and houses relate to the "things of commerce," as distinguished in the civil law from the "things public," which are regulated by the sovereign. Such contracts are not made by the municipal corporation, by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gas light is no more a duty of sovereignty than the supply of water.'

In the case of *Jolly v. Monaca Borough*, supra, Justice Potter speaking for the Court said:

“We think the court below overlooked the fact that a municipal corporation, in supplying water, or any other commodity, to its inhabitants individually, acts in a private, and not in a public, capacity, and the relation established with the individuals with whom it deals is purely one of contract.”

In his opinion Justice Potter cited with approval and quoted from the opinion of Judge Pershing in *Brumm's Appeal*, 22 W. N. C. 137, wherein the latter held that when a municipal corporation supplies its inhabitants with gas or water it does so “in its capacity of a private corporation, and not in the exercise of its powers of local sovereignty. If this power is granted to a borough or city, *it is a special private franchise*, made as well for the private emolument and advantage of the city as for the public.”

In view of the foregoing the effect of the passage of the Act of May 20, 1891, P. L. 90, which appears to have been the first authorization given to boroughs to engage in the business of manufacturing and supplying electricity to the public for commercial purposes, was to grant to boroughs which exercised the powers conferred by the Act “a special private franchise” to engage in the electric light business, a franchise differing not at all from that which the State under the general incorporation statutes grants to private citizens.

The words in the Act, “to manufacture electricity for commercial purposes,” convey the meaning of a conduct of such business with the same motive of private emolument and advantage to the borough which moves private citizens for their private emolument and advantage to apply for a corporate franchise to engage in a similar business. The further provisions in the Act enabling a borough to acquire the works of corporations already engaged in such business in the borough support this view. Clearly in the case where the borough, under the legislative power conferred, acquires the works of an existing corporation, it occupies the same relationship with reference to the service to be rendered to its inhabitants by it as the corporation it superseded.

What has been said with reference to the Act of 1891 applies, in my opinion, with equal force to the provisions of Chapter 6, Article 17 (b) of The General Borough Act of 1915, Chapter 13 of which Act repealed the said Act of 1891, supra.

It is to be borne in mind that neither the said Act of May 20, 1891, P. L. 90, nor The General Borough Act of 1915, Chapter 6, Article 17, (b) made it the duty of the borough to engage in such business. The Acts are purely empowering Acts. They did not make it the duty of the borough in its capacity as a local sovereign to engage

in such business. The language of these Acts does not lead to the conclusions that a borough which engages in such business is as to such business performing a public duty in its capacity as a local sovereign. In other words, the borough when it engages in such business is not performing a function of government "delegated by the State to its agencies as public instrumentalities;" it is acting in its "corporate character, or business capacity."

If, therefore, a borough by virtue of a grant of power given to it by the General Assembly engages in the manufacture and supply of electricity to the public, which is to say, engages in such manufacture and supply for commercial purposes, I am of the opinion that it is, as to such exercise of corporate power, a private corporation.

Given (as a major premise) the proposition that all private electric light corporations which in the exercise of their franchises engage in the manufacture and supply of electricity to the public, that is to say, for commercial purposes, are subject to the provisions of Section 23 of the Act of June 1, 1889, P. L. 420, and

Given (as a minor premise) the proposition that a borough which by virtue of a legislative grant engages in business for purposes of private advantage or emolument, as, for example, the manufacture and supply of electricity to the public, that is to say, for commercial purposes, is as to such exercises of corporate power a private corporation and subject to the liability of a private corporation.

The conclusion logically results that such borough is, as to such business so engaged in by it, subject to the provisions of said Section 23 of the Act of June 1, 1889, P. L. 420.

I am, therefore, of the opinion that boroughs, which by virtue of legislative authority granted to them by the General Assembly, own and operate electric light plants for commercial purposes, are subject to the provisions of Section 23 of the Act of June 1, 1889, P. L. 420, and to the tax imposed thereby.

Yours very truly,

DEPARTMENT OF JUSTICE,

JOHN ROBERT JONES,

*Deputy Attorney General.*

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OPINIONS TO THE BANKING DEPARTMENT

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## OPINIONS TO THE BANKING DEPARTMENT

*Trust companies—Acting as co-trustees—Examination of securities—Duties of Commissioner of Banking—Act of May 21, 1919.*

1. Where a trust company is a co-trustee with another and shares in the actual control or custody of the securities of the trust estate, or has a liability with respect thereto, such securities should be included in the trust assets to be reported and submitted to the Commissioner of Banking for examination.

2. If the co-trustee is an officer of the trust company, and the trust company has appointed another of its officers as agent to co-operate in administering the trust, and the securities are actually in the vaults of the company, the company cannot say that it is not in control or custody of the trust assets.

The Banking Department Act of May 21, 1919, P. L. 209, considered.

January 11, 1923.

Honorable Peter G. Cameron, Commissioner of Banking, Harrisburg, Pa.

Sir: In reply to your communication of December 29th last, making inquiry concerning your authority or duty to examine trust assets and property in the actual or constructive possession of a trust company under supervision of your Department, where such trust company is a co-trustee, I beg to advise you as follows:

Under the Banking Department Act approved May 21, 1919, P. L. 209, you are required in Section 14 thereof to examine trust companies and "to make a thorough examination into all the business and affairs of the corporation or person in all departments, and of all property, assets, and resources wherever situated."

Section 15 of the same Act requires every corporation and person subject to the supervision of the Banking Department, excepting building and loan associations, to render to the Commissioner of Banking not less than two nor more than five reports of its condition during each year, each such report to exhibit in detail and under appropriate heads the resources and liabilities of the corporation or person, etc.

Undoubtedly the purpose of the examinations and reports required by the Act of 1919 is to enable the Commissioner of Banking to determine the condition of the several institutions under his supervision, and to require the restoration of the capital of any institution the report of which may show an impairment thereof.

Under the provisions of the second paragraph of Clause I, Section 29, of the Act of May 9, 1889, P. L. 159, relating to trust companies, it is provided as follows:

"To receive and hold on deposit and in trust and as security estate, real and personal, including the notes, bonds, obligations of States, individuals, companies and



corporations, and the same to purchase, collect, adjust and settle, sell and dispose of in any manner, without proceeding in law or equity, and for such price, and on such terms as may be agreed on between them and parties contracting with them: Provided, That nothing herein contained shall authorize said companies to engage in the business of banking."

It is imperative that trust companies shall show on their books and in their reports all liabilities of the company on account of trust funds as well as of deposits, etc., and that the Examiner shall examine the accounts and securities of the trust department in order to determine the liability of the trust company on account thereof.

I understand that in a particular instance coming before you for consideration, under the Will of A the X Trust company, the testator's widow, and B, a vice-president of the Trust Company were appointed co-trustees; that the Trust Company has formally accepted the trust and has appointed C, a vice-president of the Trust Company its agent to act with the other two co-trustees in the administration of the estate; that the Trust Company keeps no records of the estate, the same being kept in the office of B, a vice-president of the Trust Company, one of the co-trustees; and that the estate does not appear in any way on the books of the Trust Company, except in the deposit ledgers as a depositor.

That, furthermore, the Trust Company does not report its liability to your Department on account of the estate, in the reports required by Section 15 of the Act of May 21, 1919, *supra*, and further refuses to permit the Examiners of your Department to examine the securities held for the estate for the following reasons, as stated in a letter addressed to your Department:

"Inasmuch as we do not have sole custody of the assets of these estates, they are not carried on our books or included in our statements," etc.

The trust assets referred to are said to be in the vaults of the Trust Company, under the control of B, one of the co-trustees and a vice-president of the Trust Company, and C, another vice-president, in his capacity as "Agent" of the Trust Company.

It was decided by the Supreme Court of Pennsylvania in *Adams's Estate*, 221 Pa. 77, that—

"The joint receipt of trust funds imposes upon co-trustees a joint liability and neither by neglect should permit the other to dissipate or appropriate the trust property. If either trustee had any reason to believe

that his co-trustee was not acting in good faith or might convert the trust funds to his own use it was incumbent upon him to take the necessary steps to prevent such misapplication of the funds. Failure to do so renders him liable for loss,"

and that—

"Where one trustee removes securities without his co-trustee's consent from the bank deposit box in which they were kept, the incident is sufficient to arouse the co-trustees' suspicions and raises a duty to prevent the possible repetition of such conduct."

It was likewise decided in *Graham's Estate*, (No. 1), 218 Pa. 344, that if a co-trustee through neglect of duty never receives any of the trust funds he and his estate may be liable.

The general rule with regard to the responsibility for the custody of trust assets is that—

"Co-trustees are liable, each individually no further than the assets which have come into his hands, except for his own fraud or negligence. *Beatty's Estate*, 214 Pa. 449; *Aspell's Estate*, 16 Dist. 424, 34 Pa. C.C. 549; *Fesmire's Estate*, 134 Pa. 67, 25 W. N. C. 544."

The question, therefore, arises, are the trust assets in any way in the custody or control or a liability of the Trust Company and subject to your supervision? If they are in such custody or control, or involve a liability on the part of the Trust Company arising from its obligation as a trustee,—whether such liability be direct and potential, resulting from its wrong-doing through its agents, or contingent resulting from its connivance or negligence in not acting to prevent wrong-doing or loss on the part of its co-trustee,—in my opinion, such trust assets come under your supervision and should be submitted to your Examiners. The fact that they may not be in the "sole custody" of the Trust Company is not important or relevant. If the Trust Company shares in their actual custody or control, or has a liability with respect thereto, they should be included in the trust assets to be reported and submitted to your Department for examination.

If they are in the joint custody or control of the Trust Company as co-trustees with the other trustees, one of whom is an officer of the Trust Company, they should properly be included among the trust assets as a liability of the Trust Company.

I can conceive of no situation where a trust company acting as a trustee may be relieved entirely from liability, whether direct or contingent, for the acts and conduct of its co-trustees in connection with

either the custody or administration of trust assets which are subject to joint direction or control.

It is begging the question for the Trust Company to say,—with the trust assets admittedly in its vaults,—that they are not in its actual custody or under its control, or impose no liability on the part of the Trust Company, but are under the sole control and direction of its two vice-presidents, one of whom is a co-trustee, and the other acting as its designated agent to co-operate in administering the trust.

It seems to me that a reputable trust company acting as a co-trustee who had even constructive possession of the trust assets by having them in its vaults, though in the name of its co-trustee, or even a contingent liability for the proper administration there,—would not attempt to stand upon a strained technicality of the law as a subterfuge to evade examination and inspection by your Department in the manner and to the extent contemplated by law.

The purpose of the law under which your Department functions is not only to protect depositors of trust funds, but also cestui que trustent, for whom trust companies may be directed to act as fiduciaries under the law.

I, therefore, advise you that, in my opinion the trust assets heretofore withheld from your inspection and examination, as aforesaid, are properly under your supervision and should be examined the same as other assets or liabilities of trust companies.

Very truly yours,  
FRED TAYLOR PUSEY,  
*Deputy Attorney General.*

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*Foreign Trust Company—Incorporated by Congress—Capital—Doing Business in State—Letters Testamentary—Act of May 20, 1921, P. L. 991.*

A company incorporated under a special Act of Congress, known as a savings and trust company, not doing business in Pennsylvania as a savings and trust company, and having no part of its capital employed in the State, cannot legally act as an executor of the will of a testator who died in Pennsylvania, and to grant letters testamentary to it violates the Act of May 20, 1921, P. L. 991. The will takes effect as of the date of death of the testator and not as of the date of its execution.

January 11, 1923.

Captain John W. Morrison, First Deputy Commissioner of Banking,  
Harrisburg, Pa.

Sir: I beg to acknowledge receipt of your communication of January 5th, 1923, inquiring as to whether or not a company incorporated under a special Act of Congress, known as a savings and trust

company, can legally engage in safe deposit, trust, loan or mortgage business in Pennsylvania.

Your question may be properly subdivided as follows:

1. The doing of a "Safe deposit" business is not involved in the questions presented.

The National Savings and Trust Company, referred to in your communication in its letter under date of December 21, 1922, addressed to your Department, states that "it is not doing business in Pennsylvania as a savings and trust company, and has no part of its capital employed here." It, therefore, does not come under the provision of the law of Pennsylvania, heretofore referred to, prohibiting it from engaging in the safe deposit or banking business because it has no such intention.

2. A "trust" business also cannot be carried on by a corporation in Pennsylvania excepting under and in accordance with the provisions of an Act of Assembly approved May 20, 1921, P. L. 991, which provides as follows:

"Section 1. 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 to 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. Hereafter neither any court nor register of wills in this Commonwealth shall have power to appoint as administrator, trustee, guardian, receiver, committee 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 busi-

ness 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 to 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 made by the court or register of wills, in violation of the provisions of this section, after the date of the approval of this act, shall be null and void."

The National Savings and Trust Company states that, while it is not engaged in the savings and trust business, it has been specially designated as a fiduciary to-wit, an executor of the will of a testator who died in Pennsylvania on June 23, 1922, and that Letters Testamentary were duly granted thereon to said Company on September 14, 1922, by a register of wills in Pennsylvania.

In my opinion, the issuance of Letters Testamentary, accordingly, was contrary to the provisions of the said Act of Assembly of May 20, 1921, P. L. 991, and were improperly issued, notwithstanding the will designating the Company as executor was executed March 22, 1919, a date prior to the enactment of the Act of May 20, 1921, *supra*. A will takes effect as of the date of the death of the testator and not as of the date of its execution.

(Note: The question as to whether or not a National bank can act as a fiduciary in Pennsylvania is now pending before the Supreme Court of Pennsylvania in the Estate of Edna Frisbie Turner, Deceased, Nos. 273-274, January Term, 1923.)

3. As to a "loan and mortgage" business, the Act of Assembly of June 7, 1907, P. L. 446, in my opinion, applies to a corporation organized under special Act of Congress desiring to engage in such business in Pennsylvania. Such company must first obtain a license from your Department in the manner prescribed in said Act, and otherwise comply with the provisions thereof. The National Savings and Trust Company, however, having advised you that it "has no part of its capital here," is evidently not engaging in such business at present. Should it attempt to do so, it would come under the ban imposed by the Act of June 7, 1907, aforesaid.

Yours very truly,

FRED. TAYLOR PUSEY,

*Deputy Attorney General.*

*Banks and Banking—John Wanamaker Foundation of Philadelphia—Necessity to take out license under the Act of 1911, P. L. 1060.*

The John Wanamaker Foundation of Philadelphia, having filed an approved bond with the Commissioner of Banking, in the sum of \$100,000, is not subject to the supervision of the Banking Department.

February 1, 1923.

Mr. G. H. Orth, Chief, Bureau of Private Banks, Harrisburg, Pa.

Sir: I have received your letter asking to be advised whether the Wanamaker Foundation now licensed under the Act of June 19, 1911, P. L. 1060, entitled "An act to provide for licensing and regulating private banking in the Commonwealth of Pennsylvania; and providing for the violation thereof," is required to take out the license provided for in said Act.

The John Wanamaker Foundation, of Philadelphia, Pa., was organized for the purpose of encouraging in the employes of the Wanamaker Store habits of economy and thrift. For that purpose the Foundation received from any of the employes of said store, and from no one else, deposits of money, the deposits of any one person not to exceed five dollars per month. For each five dollars thus saved the Wanamaker Store added a certain amount, such amount depending upon the length of service of the depositor with the Wanamaker Store. All expenses are paid by the Store. The deposits are invested in a certain way and at the end of each year the profits are distributed to or divided among the depositors.

The Foundation is an unincorporated association engaged in the business of receiving deposits of money for safe-keeping and as such comes squarely within the provisions of Section 1 of the Act of June 19, 1911, P. L. 1060, which provides as follows:

"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."

But certain exemptions are provided for by Section 8 of said Act and may relieve the Foundation from obtaining a license and complying with the other requirements of the Act if it comes within the scope of any of such exemptions. Clause four of Section 8 of said Act contains the following exemptions:

“Nor 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 \* \* \*.”

By complying with this requirement and the filing of the bond, as set forth, the Foundation may carry on its work and engage in the business of receiving deposits of money without procuring a license under the Act of June 19, 1911, and without being subject to the other provisions of said Act. This is the only method for the Foundation to pursue in order to be relieved of the duty of procuring a license and of being free from the supervision of the Banking Department.

If, therefore, the Wanamaker Foundation files a bond with the Commissioner of Banking in the sum of one hundred thousand dollars (\$100,000.00) and the bond is approved by the Board, consisting of the State Treasurer, the Secretary of the Commonwealth and the Commissioner of Banking, it is under the Act relieved from the supervision of the Banking Department.

Very truly yours,

J. W. BROWN,  
*Deputy Attorney General.*

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*Financial Assistance Union, Incorporated, of Pittsburgh—Licensure by the State Banking Department under the Act of 1907, P. L. 446.*

The corporation in question may not lawfully carry on the business which it proposes without being licensed by the State Banking Department under the Act of 1907, P. L. 446.

May 4, 1923.

Mr. G. H. Orth, Chief, Bureau of Private Banks, Banking Department, Harrisburg, Pa.

Sir: This Department has your request for an opinion as to whether or not the Financial Assistance Union, Incorporated, of Pittsburgh, is such a corporation as would come within the provisions of the Act of 1907, P. L. 446, or the Act of 1921, P. L. 374, or either of them.

I have considered the purchase agreement which the Financial Assistance Union has submitted to you together with the statement of conditions which they propose to impose upon the purchasers of their "One Thousand Dollar Gold Debenture Bond." These papers show that the Company proposes to issue a One Thousand Dollar Gold Debenture Bond, for which the purchaser agrees to pay \$910.00 in weekly payments. The agreement to purchase does not contain the conditions under which the purchase is to be completed. The bonds are not sold for the purpose of financing any person or corporation engaged in a manufacturing, mercantile or other operating business dealing in tangible assets.

I am satisfied that the Financial Assistance Union comes within the corporations intended to be licensed under the Act of 1907. The Section of this Act applying to this corporation is as follows:

"That any and every \* \* \* investment company, loan company, \* \* \* security company, or any other similar company, \* \* \* organized under the laws of any other State \* \* \* who shall engage within this Commonwealth, either directly or indirectly, in the negotiation, offering for sale, or sale of any bond or bonds, debentures, certificate or certificates, scrip, mortgage or mortgages; or of receiving single payments, regular installment payments, or contributions to be held or used in accordance with any plan of accumulation or investment; or corporations or associations who assume the payment of fixed obligations, and issue in connection therewith a contract based upon payments being made upon installments or single payment plan, under which all or any part of the total amount received is to be prepaid at some future time upon contract issued, either with or without profit, shall be deemed a foreign corporation, under the meaning of this act: \* \* \*."

Act of 1907, P. L. 446, Sec. 1.

The Act thereupon proceeds to require that all such corporations shall be licensed, with which procedure you are entirely familiar.

To sum up, therefore, I am of the opinion that the Financial Assistance Union, Incorporated, may not lawfully carry on a business such as it proposes without being licensed by your Department under the aforesaid Act of 1907, P. L. 446.

Yours very truly,

STERLING G. McNEES.

*Special Deputy Attorney General.*



*Commissioner of Banking—Fiduciary Capacity—Examination of Trust Funds—  
State Statutes—Federal Reserve Act—Conflict of Authority.*

It is lawful and proper for the State Commissioner of Banking to examine the segregated trust assets held by a national bank engaged in a fiduciary business in Pennsylvania, together with the books and records thereof, under the Act of May 21, 1919, P. L. 209, but he is not required or legally empowered, under the provisions of the Federal law, to examine into and supervise books, records and assets of a national bank which are not held in trust. This duty is imposed upon Federal authorities under the Federal Reserve Act adopted by Congress on September 26, 1918 (40 Stat. at L. 967; U. S. Comp. Stat., 1919, Supp., 9794-K).

A national bank desiring to engage in business in a fiduciary capacity in Pennsylvania must comply with the provisions of the State law, including the Acts of May 9, 1889, P. L. 159, supplied by the Act of June 27, 1895, P. L. 402, as well as the "Banking Department Act of 1919," approved May 21, 1919, P. L. 209, and the Act of July 19, 1919, P. L. 1032, and likewise the Act of May 20, 1921, P. L. 991, in so far as the same are not inconsistent or in conflict with the provisions of the Federal Reserve Act.

May 29, 1923.

Honorable Peter G. Cameron, Commissioner of Banking, Harrisburg, Pa.

Dear Sir: Receipt is acknowledged of your communication under date of April 27th inquiring as to whether or not, in view of the recent opinion, (per Frazer J.) of the Supreme Court of Pennsylvania, in the Estate of Edna Turner Frisbie, deceased, Nos. 272 and 274, January Term, 1923 E. D. (Not yet reported),—your Department should abandon its supervision of National Banks doing a fiduciary business in Pennsylvania, or whether your Department should continue as heretofore in your examinations of National Banks and the enforcing of the laws of the State of Pennsylvania with relation thereto.

In reply to your inquiry, I beg to advise you that the decision of the Supreme Court of Pennsylvania does not relieve your Department of the responsibility of examination of National Banks transacting fiduciary business in Pennsylvania imposed upon it by the provisions of the Act of Assembly of Pennsylvania, approved May 21st, 1919, P. L. 209, known as the "Banking Department Act of 1919," excepting in so far as the said Act of Assembly may be in conflict with the provisions of the amended Federal Reserve Act adopted by Congress on September 26th, 1918 (40 Stat. at L. 967; U. S. Comp. Stat.; 1919 Supp. 9794K), which, in Paragraph "K" thereof, extended authority to the Federal Reserve Board the right:

"To grant by special permit to National Banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardians of estates, assignee, receiver, committee of estates of luna-

tics or in any other fiduciary capacity in which State Banks, Trust Companies or other corporations which come into competition with National Banks are permitted to Act under the laws of the State in which the National Bank is located."

The Act further provides as follows:

"Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State Banks, Trust Companies or other corporations which compete with National Banks, the granting to and the exercise of such powers by National Banks shall not be deemed to be in contravention of State or local law within the meaning of this Act.

"National Banks exercising any or all of the powers enumerated in this sub-section shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this sub-section. Such books and records shall be open to inspection by the State authorities to the same extent as the books and records of corporations organized under State law which exercise fiduciary powers, but nothing in this Act shall be construed as authorizing the State authorities to examine the books, records and assets of the National Bank which are not held in trust under authority of this sub-section.

"No National Bank shall receive in its Trust Department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the Trust Department United States bonds or other securities approved by the Federal Reserve Board.

"In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

"Whenever the laws of a State require corporations acting in a fiduciary capacity to deposit securities with the State authorities, for the protection of private or court trusts, National Banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts as provided by the State law.

"National Banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement.

"National Banks shall have the power to execute such bond when so required by the laws of the State.

"In any case in which the laws of a State require that a corporation acting as a trustee, executor, administrator, or in any capacity specified in this section shall take an oath or make an affidavit, the president, vice-president, cashier or trust officer of such National Bank may take the necessary oath or execute the necessary affidavit.

"It shall be unlawful for any National Banking Association to lend any officer, director or employee any funds held in trust under the powers conferred by this Section. Any officer, director, or employee making such loan or to whom such loan is made may be fined not more than Five Thousand Dollars (\$5,000.) or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the Court.

"In passing upon applications for permission to exercise the powers enumerated in this sub-section, the Federal Reserve Board may take into consideration the amount of capital, and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served and any other facts and circumstances that seem to it proper and may grant or refuse the application accordingly: PROVIDED, that no permit shall be issued to any National Banking Association having a capital and surplus less than the capital and surplus required by State law of State Banks, Trust Companies and corporations exercising such powers."

While the "Banking Department Act" above referred to, in Section 13 thereof, imposes upon you the duty with respect to State Banking institutions of inspection and supervision, of "*all property, assets and resources of such corporation;*" and Section 14 of the same Act authorizes your examiners "to make a thorough examination into all the business and affairs of the corporation in all departments and of all property, assets and resources wherever situate, and in so doing examine under oath, or otherwise, any of the officers, agents or employees, etc.," the Federal Reserve Act above referred to limits your examination and supervision to the books, records and assets of a National Bank which are held *in trust* and expressly excludes from your authority examination and supervision the books, records and assets of the National Bank which are *not* held in trust.

I understand that it has also been a ruling practice of your Department, in addition to requiring the segregation of trust funds, that funds deposited or held in trust by State Banking Institutions awaiting investment shall be deposited elsewhere than in the deposit accounts of the fiduciary institution, and shall not under any cir-

umstances be used by the fiduciary institution in the conduct of its banking business.

The Federal Reserve Act above referred to varies slightly from this ruling and requirement of your Department. The Federal Act provides that "funds deposited or held in trust by the 'National' Bank awaiting investment shall be carried in a separate account and shall not be used by the Bank in the conduct of its business, *unless it shall first set aside in the Trust Department United States bonds or other securities approved by the Federal Reserve Board,*" and, "in the event of the failure of such Bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claims against the estate of the Bank."

It is, therefore, lawful and proper for you to continue your examination of the segregated trust assets held by National Banks engaged in fiduciary business in Pennsylvania, together with the books and records thereof, but you are not required or legally empowered, under the provisions of the Federal Law, to examine into and supervise books, records and assets of a National Bank which are not held in trust.

I am further of the opinion that a National Bank desiring to engage in business in a fiduciary capacity in Pennsylvania must comply with the provisions of our State Law, including the Acts of Assembly of May 9th, 1889, P. L. 159, supplied by the Act of June 27th, 1895, Sec. 1, P. L. 402 as well as the provisions of the "Banking Department Act of 1919" approved May 21st, 1919, P. L. 209, and the Act of Assembly of July 19th, 1919, P. L. 1032, and likewise the Act of Assembly of May 20th, 1921, P. L. 991, in so far as the same are not inconsistent or in conflict with the provisions of the Federal Reserve Act above referred to.

The Act of Assembly of May 20th, 1921, *supra*, provides that no person shall have power by any last Will or Testament to appoint as fiduciary any corporation, nor shall any Court or the Register of Wills in this Commonwealth have power to appoint as administrator, trustee, guardian, receiver, committee, or other fiduciary, any such corporation unless such corporation shall agree in writing filed with the Commissioner of Banking "to place itself under and to 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."

In my opinion, National Banks are required to enter into and file a stipulation of this kind with the Commissioner of Banking the same as State Banks or other corporations desiring to engage in the fiduciary business in Pennsylvania are required to do; but, as I be-

fore remarked, the examination and supervision of your Department in contemplation must exclude those features which are expressly enjoined by the Federal Reserve Act.

In the Estate of Edna Frisbie Turner, deceased, above referred to, Mr. Justice Frazer in delivering the Opinion of the Supreme Court, remarked:

"The Act of May 21, 1919, P. L. 209 provides, *inter alia*, that the banking department shall have supervision of all corporations or persons receiving money on deposit for safe keeping, including banks incorporated under the laws of the United States, which shall, pursuant to federal law or regulations, be permitted to act in any fiduciary capacity and make all such corporations subject to inspection and examination by the banking commissioner. By Act of May 20th, 1921, P. L. 991, it was provided that no person should have the right to appoint, in a fiduciary capacity, any corporation other than a corporation organized and doing business under the laws of Pennsylvania and subject to the supervision and examination of the banking department of the state, or a corporation organized under the laws of the United States and doing business in Pennsylvania by resolution of its Board of Directors agreeing to place itself under and subject to the supervision and examination of the state banking department "in the same manner and to the same extent as corporations organized and existing under the laws of this state."

"A comparison of the foregoing federal and state acts shows the main points of difference is that the federal statute allows inspection of the books and records of only that part of the assets of the national banks as are received in a fiduciary capacity and requires them to segregate all assets held in a fiduciary capacity and prohibits commingling them with other assets in its business, unless it shall first set aside in the trust department United States bonds or other securities approved by the Federal Reserve Board, while on the other hand, the state acts authorize supervision by the banking department of *all* assets of the corporation and forbids substitution of securities for the funds but requires the companies, in all cases, to keep trust funds separate from its other assets and to indicate all investments made as fiduciaries, so that the trust to which the investment belongs shall be clearly known. It is argued this difference in the two provisions produces a conflict, making the Federal Reserve Act in direct violation of state law by permitting uninvested funds to be mingled with the general assets and removing such funds from the inspection and supervision of state authorities. The Corn Exchange National Bank has complied with every provision of the state rules, regulations and laws, by consenting to the examination of all its assets by the

state bank examiners and agreeing to keep trust securities on deposit in a separate bank. This voluntary compliance with state rules would, in itself, seem to render unnecessary a further discussion of the questions raised. Appellant contends, however, that the national bank can not, validly, agree to be bound by state law or by local rule of court, which is contrary or inconsistent with the federal law and that, consequently, the question still remains whether it was not beyond the power of the bank to agree to comply with the state regulations where they are in conflict with federal practice.

"The answer to this contention is that in so far as the state law is inconsistent with the federal act, the former must yield to the latter, even though the result may be to place upon federal banks a benefit or burden not received or assumed by the state bank and trust companies.

"The definition given in the federal act as to what constitutes a violation of the state law takes no cognizance of the fact that certain administrative details in the regulation of federal banks were different from those governing state institutions. The existence of these differences, however, are not sufficient to deprive a national bank of the enjoyment of its powers under the federal law. The establishment of the Federal Reserve Bank was a matter within the scope of federal power and a state cannot, in any way, interfere with the powers of such banks, except in so far as Congress has permitted them to do so. When the Federal Act was passed Congress had knowledge of the fact that various states had adopted different laws and systems governing persons or corporations acting in a fiduciary capacity. Having this knowledge, they gave to the Federal Reserve Board power to prescribe regulations for the government of federal banks. Regulations thus established are paramount to state rules and the latter must yield whenever a conflict arises. It was with knowledge of this situation and the existing difference between rules governing state and federal banks that Congress undertook to define, by the Act of 1918, what would be construed "in contravention of state law." It will be observed the definition refers to "powers" only and not the rules governing the exercise of such powers. It is the right itself, not the rules governing the exercise of the right, to which reference is made. Concede the existence of the right in the state banks and trust companies and we have the same right bestowed upon national banks. Had Congress intended the latter to be governed by state laws in the exercise of the right given, surely expression of that intention would be found in the statute. In the absence of much utterance, we must assume Congress was satisfied with the rules already prescribed by the Federal Reserve Board. If these rules happen to conflict with state regulations on the subject,

the latter must yield to the former because the right being conceded the power to regulate the exercise of the right would follow as a necessary incident. We believe this view is fully supported by the opinion in *First National Bank v. Union Trust company*, 244 U. S. 416, and cases therein cited."

You have mentioned the fact that a large number of National Banks have filed with you a stipulation to comply with all of the provisions of the laws of Pennsylvania with regard to examination and supervision by your Department, including the privilege of examining all of their assets whether segregated in the trust department of such institution or included in its general banking business. It is readily perceivable that an examination by your Department of the segregated trust assets only of a corporation would be incomplete and probably inefficient to maintain the factor of safety required in connection with examination by your Department, and while such National Banks may, if they choose, assent to your examination of *all* of their books, records and assets whether held in trust or otherwise, the Federal Law, which is paramount under the decisions above referred to, does not permit you to examine and supervise other than the segregated trust assets of a National Bank engaged in the business of a corporate fiduciary in Pennsylvania.

Yours respectfully,

FRED TAYLOR PUSEY,  
*Special Deputy Attorney General.*

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*Banks and banking—Directors—Loans—Bond and mortgage loans—Act of June 14, 1901.*

Lending money to a director, even when secured by a bond and mortgage, is a loan made to the director within the contemplation of Section 1 of the Act of June 14, 1901, P. L. 561, and such loans must be included in the amount of loans made to directors.

June 19, 1923.

Honorable John W. Morrison, First Deputy Commissioner of Banking, Harrisburg, Pa.

Dear Sir: Your inquiry as to whether or not loans to directors of a bank on unencumbered improved real estate situated in this State secured by a bond and mortgage shall be included in the amount of loans to such directors has been received by this Department. The Act of June 14, 1901, P. L. 561, in Section 1 provides:

"That no director of any banking institution, trust company, or savings institution, having capital stock, heretofore or hereafter incorporated in this Commonwealth, shall receive as a loan an amount greater than ten per centum of the capital stock actually paid in, and surplus; and the gross amount loaned to all officers and directors of such corporations, and to the firms or houses in which they may be interested directly or indirectly, shall not exceed at any time the sum of twenty-five per centum of the capital stock paid in, and surplus."

When a director of a bank secures money from the bank and gives as security a bond and mortgages, it is money received from the bank as a loan. The Act makes no distinction in the character of the loans, neither does it mention anything about the security to be given by the borrower. It clearly provides that no director shall receive as a loan an amount greater than ten per centum of the capital stock actually paid in and the surplus. This includes loans of all kinds made to a director, mortgage as well as any other.

The object was to limit the liability of any director to ten per cent. of the amount of capital stock and surplus, to the end that the bank should not depend upon the credit of any one of its directors for more than ten per cent. of the amount of its capital stock and surplus.

In an opinion by Attorney General Hensel given to your Department, April 27, 1892, and found in 12 C. C. 40, it was held in reference to Section 21 of the Act of May 13, 1876, "I am of the opinion that it is a substantial compliance with Section 21, if no corporation under that Act invests or loans more than ten per centum of its capital upon the credit, in any form of any one of its directors." Lending money to a director, even when secured by a bond and mortgage, is a loan made to the director and comprehended by the Act.

You are, therefore, advised that loans to directors secured by bond and mortgage must be included in the amount of loans made to such directors.

Very truly yours,

J. W. BROWN,  
*Deputy Attorney General.*



*Corporations—National banks—Title—"Trust" companies—Act of April 22, 1909, and May 19, 1923.*

The Act of April 22, 1909, P. L. 121, as amended by the Act of May 19, 1923 (Act No. 175), forbidding the use of the word "trust" as part of the name or title of corporations or partnerships not subject to the supervision of the Commissioner of Banking of this Commonwealth, is not applicable to national banks authorized by Federal law to make such use of that word.

July 10, 1923.

Honorable J. W. Morrison, First Deputy Secretary, Department of Banking, Harrisburg, Pa.

Sir: Your letter of June 27, directed to the Attorney General asking whether National Banks doing business in this State may use the word "trust" as part of their corporate title, has been received by this Department.

The Act of April 22, 1909, P. L. 121, as amended by the Act of May 19, 1923, Act No. 175, provides in Section 2 as follows:

"No person, copartnership, limited copartnership, or corporation, except only corporations created under the laws of this Commonwealth and reporting to, and under the supervision of, the Commissioner of Banking (of this Commonwealth), or corporations created under the laws of some other State and reporting to, and under the supervision of, the Commissioner of Banking of (some other State or Commonwealth) such State, shall, in this Commonwealth, advertise or put forth any sign as a trust company, or use the word 'trust' as a part of its name or title: Provided always, That this act shall not be held to prevent any individual, as such, from acting in any trust capacity as heretofore. Any violation of any provision of this section shall constitute a misdemeanor, and, on conviction thereof, the offender shall be sentenced to pay a fine of not exceeding five hundred dollars for each offense."

A national bank may act in this State in a fiduciary capacity after obtaining from the Federal Reserve Board a permit so to act and complying with the Acts of Assembly requiring the filing of an affidavit with the Secretary of the Commonwealth and a certified copy of a resolution filed with the Secretary of the Commonwealth agreeing to accept the provisions of the Act of 1889 and also a certified copy of a resolution filed with the Commissioner of Banking agreeing to put itself under the supervision and examination of the State Banking Commissioner. The right of the Federal Reserve Board to issue such permits is found in Section 11, Subdivision (k) of the Federal Reserve Act.

Having at least some of the powers of a trust company the question arises has such bank, a national bank, the right to use the word "trust" in its title in view of the provisions of the Act of 1923?

In relation to national banks Section 5134 of the Revised Statutes of the United States provides:

"The persons uniting to form such association shall under their hands make an organization certificate which shall specifically state the name assumed by such association, which name shall be subject to the approval of the Comptroller of the Currency."

And the Act of Congress approved May 1, 1886, Chapter 73, Section 2, provides:

"That any national bank association may change its name \* \* \* with the approval of the Comptroller of the Currency by a vote of shareholders owning two-thirds of the stock of such association."

Thus we see the national bank may assume a name which shall be subject to the approval of the Comptroller of the Currency, may change that name subject to like approval, and the Federal Reserve Board by permit under a valid Act of Congress has the authority to clothe the national bank with power to act in the same fiduciary capacity "in which State banks, trust companies or other corporations which come into competition with national banks are permitted to act under the laws of the State, in which the national bank is located." It is true that it is provided that the permit shall be granted only "when not in contravention of State or local laws." But the same section provides

"Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act."

The expression "when not in contravention of State or local law" refers to the power conferred upon a national bank to act in a fiduciary capacity and does not refer in any way to the name of the bank, and to what title may or may not be used.

In Missouri the law in reference to using the word "trust" or "trust company" is practically the same as in our State under the Act of April 22, 1909, and the same question that is involved here was brought before the United States District Court for the Western District of Missouri in *Fidelity National Bank and Trust Company vs. Enright State Banking Commissioner*, 264 Federal

Reporter 236. The Court held where a national bank has been authorized by the Federal Reserve Board to act as trustee and in other fiduciary capacities, and its name as a bank and trust company has been approved by the Comptroller, its right to use the name and to exercise such functions cannot be impaired by any action of the State or its officers.

The Court said

"No good reason is perceived why anyone authorized to do both kinds of business may not use both names."

\* \* \* \*

"When the government of the United States enters any field over which Congress is given express, or necessarily implied, jurisdiction, it appropriates that field to the fullest extent necessary to insure the complete and effective exercise of its sovereignty. The name of a national bank must be approved by the Comptroller of the Currency. It can be changed, or its use interfered with, by no other authority. We have here, then, a national bank, empowered by the laws of the United States to act in a fiduciary capacity, and bearing a name confirmed by national authority. Clearly, any act on the part of the state which impairs, hampers, embarrasses, restricts, or, in effect, wholly prevents, the discharge of its functions as a national banking institution with the incidental powers enumerated, must be void, because in express conflict with the paramount laws of the United States."

The object of all interpretations and construction of statutes is to ascertain and if possible carry out the intention of the Legislature and to apply such intention to the facts of a given case. However, with the Missouri case decided as it has been there seems but one conclusion in the matter under consideration.

It can hardly be contended that if valid authority is granted to a national bank to exercise certain functions, under a name which no State agency is entitled to question, that an Act of Assembly can limit or destroy the privileges granted.

I am, therefore, of the opinion that a national bank doing business in this State and authorized to use the word "trust" or "trust company" in its title or name by the paramount laws of the United States cannot be prevented from using such title by the Act of 1923.

Very truly yours,

J. W. BROWN,  
*Deputy Attorney General.*

*The Beneficial Loan Society, a foreign corporation—Authority to do business within this Commonwealth without a license—Act of June 7, 1907, P. L. 446.*

The Beneficial Loan Society, a foreign corporation, under its statement of purpose contained in its registration with the Secretary of the Commonwealth, cannot sell certificates of indebtedness or debenture bonds issued by it without taking out a license for the purpose pursuant to the Act of 1907.

July 10, 1923.

Honorable Peter G. Cameron, Secretary of Banking, Harrisburg, Pa.

Sir: The Beneficial Loan Society, a corporation incorporated under the laws of the State of Delaware, is engaged in selling certificates of indebtedness or debenture bonds in this State. This company registered on May 5, 1914, in the office of the Secretary of the Commonwealth of Pennsylvania and the paper filed shows that it declared itself "to act as pawnbroker subject to and entitled to all the benefits of all the provisions of the laws covering pawnbrokers where it may transact such business. It may advance money to such persons as shall be deemed to be in need of pecuniary assistance and may take as security for the payment of such advance either a pledge or mortgage on personal property, together with other lawful securities."

I have been furnished with a copy of the certificate of indebtedness or debenture bond issued by it and the coupons attached thereto. The bond in substance sets forth that the Society promises to pay to the bearer or to the recorded owner thereof upon presentation of the certificate of indebtedness and due surrender to the Society at its bank depository in New York \$1,000 in gold coin of the United States, and further promises to pay interest upon the said sum in like gold coin at the agency of the Society in New York or at any designated bank depository upon presentation and surrender of the annexed coupons as they severally come due.

In witness whereof the Society has caused the certificate to be signed by its President or Vice-President, and its corporate seal to be affixed. The form of coupon attached is as follows:

\$15.00 Beneficial Society will pay to the bearer on the first day of ..... at its agency in the City of New York, N. Y., \$15.00 in gold coin being quarterly interest then due on its certificate of indebtedness or bond.

FREDERICK C. ARNOLD,  
*Treasurer.*

In my judgment the Society is not authorized under the statement of its purpose, as appearing by the paper on file in the office of the Secretary of the Commonwealth of Pennsylvania to transact

any such business as is embodied in the certificate of indebtedness or debenture bond.

If, however, the Society continues selling its certificate of indebtedness or bonds in this State it should be compelled to take out a license under the Act of 1907. The primary corporate business of the Society as set forth in the paper filed with the Secretary of the Commonwealth is to act as pawnbrokers and it can scarcely be contended that issuing and selling bonds is an incident to that business.

The Society being a foreign corporation within the meaning of the Act of 1907, and being engaged within this Commonwealth in the sale of certificates or bonds, you are advised that it comes under the provisions of the Act of 1907 and should be licensed under that Act.

Very truly yours,

J. W. BROWN,  
*Deputy Attorney General.*

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*Building and loan associations—Borrowing power—Paid up stock—Instalment stock—Act of June 25, 1895.*

A building and loan association may borrow up to 25 per cent. of the withdrawal value of all stock issued by it, and this is the case whether it is instalment or paid up stock.

Act of June 25, 1895, P. L. 303, considered.

August 24, 1923.

Mr. H. H. Eshbach, Chief of Building and Loan Bureau, Harrisburg, Pa.

Sir: Your letter asking to be advised whether a Building and Loan Association may borrow up to twenty-five per cent of the withdrawal value of all stock, or twenty-five per cent of the withdrawal value of the instalment stock only of the Association, has been received by this Department. The Act of June 25, 1895, P. L. 303, provides:

“In addition to the corporate powers conferred on building and loan associations by the thirty-seventh section of the act of twenty-ninth of April, one thousand eight hundred and seventy-four, 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, but not exceeding in the aggregate of such loan at any time twenty-five per centum of the withdrawal value of *the stock issued* by said association at a rate of interest less than six per centum, and secure the payment of the same by interest bearing order, note or bond as collateral; said loans to be repaid out of the *accumulations* in the treasury as soon as sufficient is paid in and there is no demand therefor by borrowing stockholders."

All Building and Loan Associations issue instalment stock and some issue instalment and paid up stock. The right of a Building Association to issue paid up dividends bearing stock has been put upon an express statutory basis in England, as well as in some of the States of this country. In our own State on distribution of the assets of an insolvent Building Association the holders of "cash matured stock, for which payment was made in advance" were adjudged to come in *pari passu* with other stockholders. (Cristwell's Appeal, 100 Pa. 488).

Without doubt it was originally the idea that all members of an association would become borrowers, but it was soon found that accumulations were too slow and sufficient money was not coming in to accommodate those who wished to borrow. It was to meet this need that full paid stock was issued. The mere investor was always needed by the Association and has become at this time indispensable.

The paid up stock bears a fixed dividend and participates in no other way in the profits of the business. In case of failure or difficulty it is entitled to no preference upon distribution.

Remembering that a Building Association cannot successfully carry on its business without members who are simply investors, the stock issued to such investors should be treated as any other stock issued by the Association. The Act authorizing Building Associations to make temporary loans makes no distinction between paid up and instalment stock, and speaks of "the withdrawal value of stock issued by said Association."

Paid up stock has a withdrawal value. It is stock issued by the Association and is comprehended by the language of the Act of 1895.

I, therefore, advise you that a Building and Loan Association may borrow up to twenty-five per cent. of the withdrawal value of all stock issued by it.

Yours truly,

J. W. BROWN,

Deputy Attorney General.

*Banks and banking—Authority to require the publication in legal newspapers of abstract summaries of reports of institutions made to the State Banking Department—Acts of April 30, 1901, P. L. 109, June 15, 1923, P. L. 809.*

The Secretary of Banking is not required by Act of 1923, P. L. 809, Sections 3 and 15, to publish in legal newspapers a statement of the conditions of the institutions reporting to him.

August 24, 1923.

Honorable Peter G. Cameron, Secretary of Banking, Harrisburg, Pa.

Sir: Your letter, asking to be advised whether or not you should require publication of the abstract summaries of reports of institutions made to your Department in legal newspapers, has been received.

The Act of June 15, 1923, provides in Section 15, inter alia, as follows:

“Abstract summaries of two of said reports designated by the Secretary in each year, except the reports of building and loan associations doing business exclusively within this State, shall forthwith be published by the corporation or person in a newspaper and proof of such publication, verified by affidavit, shall be furnished to the Secretary.”

Section 3 of the same Act relates to “Advertisements, Notices and Fees” and provides that whenever, under any of the provisions of the Act, advertisement is required to be made in a newspaper such advertisement shall be made, unless otherwise provided for, in a newspaper of general circulation and in counties of first and second class in the legal newspaper, if any, designated by the rules of Court for the publication of legal notices.

Practically the same question arose in relation to the provisions of the Act of April 30, 1901, P. L. 109. That Act provides that:

“\* \* \* every advertisement and notice required by authority of law to be published in any county of the Commonwealth shall, \* \* \* in addition to the publication thereof in a newspaper printed in the English language, be also published in one German daily newspaper \* \* \*.”

In an opinion construing the Act, Attorney General Carson held:

“Replying to your request of June 4 for advice as to whether the act of April 30, 1901 (P. L. 109) requires publication of an abstract of the reports of banks and trust companies, made by your Department, in a German daily newspaper in such localities as might be affected by the act, I answer that, in my judgment, the act has no application. In terms it relates to ‘every ad-

vertisement and notice,' required by authority of law to be published in any county of the Commonwealth. I do not interpret the words 'advertisement and notice' as covering the reports of banks and trust companies. I therefore advise you that it is not necessary to publish those reports in a German daily newspaper."

The Act of June 15, 1923, in Section 3, relates to advertisement required to be made in a newspaper and, as decided by Attorney General Carson, the word "advertisement" does not cover statements of institutions furnished to your Department nor does it cover abstract summaries of reports published by the corporation or person making the reports.

I therefore advise you that you need not require publication of the statements of condition of institutions reporting to you in legal newspapers.

Yours very truly,

J. W. BROWN,  
*Deputy Attorney General.*

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*Trusts and Trustees—Investments—Bonds of joint-stock land banks—Constitution of Pennsylvania, Article III, Section 22—Act of April 5, 1917.*

Joint-stock land bank bonds are comprehended as farm loan bonds within the meaning of the Act of 1917, P. L. 46, and as such are not a legal investment for trust funds in this State, inasmuch as they are bonds of a private corporation; the Act is in this respect unconstitutional.

The joint-stock loan bank is a private corporation within the meaning of Article III, Section 22 of the Constitution which forbids investments of trust funds "by executors, administrators, guardians or other trustees, in the bonds or stock of any private corporation."

August 29, 1923.

Honorable Peter G. Cameron, Secretary of Banking, Harrisburg, Pa.

Sir: Your letter asking for an opinion as to whether or not Joint Stock Land Bank bonds are legal investments for trust funds in Pennsylvania has been received.

The Act of Congress of July 17, 1916, known as the Federal Farm Loan Act, provides that Joint Stock Land Banks, corporations for carrying on the business of lending on farm mortgage security and issuing farm loan bonds may be formed by any number of natural persons not less than ten. Share holders shall be held individually responsible for all contracts, debts and engagements of such bank to



the extent of the amount of stock owned by them at the par value thereof in addition to the amount paid in and represented by their shares.

The Act also provides "that the Government of the United States shall not purchase or subscribe for any of the capital stock of any such bank."

Bonds are issued by the Joint Stock Land Banks and are secured by deposit of farm mortgages with the registrar "to be by him held as collateral security for farm loan bonds." The bonds are the obligations of the bank issuing them and are in no sense the obligations of the United States Government nor are they in any way guaranteed by the Government.

Sec. 2 of the Act of Congress above mentioned provides:

"The term 'Farm loan bonds' shall be held to include all bonds secured by collateral deposited with a farm loan registrar under the terms of this Act; they shall be distinguished by the addition of the words 'Federal' or 'Joint Stock' as the case may be."

The Act of April 5, 1917, P. L. 46 provides:

"That executors, administrators, guardians, and other trustees are hereby authorized to invest trust funds, in their possession or under their control, in farm loan bonds issued by Federal Land Banks, under the provisions of the Act of Congress of the United States of July seventeenth, one thousand nine hundred and sixteen, and its amendments or supplements; and that such bonds are hereby declared to be legal investments of moneys by executors, administrators, guardians, and other trustees.

Section 2. All acts or parts of acts inconsistent herewith be, and the same are hereby, repealed.

It would therefore seem that Joint Stock Land Bank bonds are comprehended as "Farm Loan Bonds" within the meaning of the Act of April 5, 1917.

The question now arises are such bonds legal investments for trust funds in this State.

Article 3 Sec. 22 of the Constitution of the State provides:

"No Act of General Assembly shall authorize the investment of trust funds by executors, administrators, guardians, or other trustees in the bonds or stock of any private corporation, and such acts now existing are avoided saving investments heretofore made."

Considerable more than half a century ago Chief Justice Black in Hemphill's Appeal 18 Pa. 303, laid down the rule which has never been disturbed:

"In England it has been held for more than a century past to be settled law, that a trustee can only protect himself from risk, when he invests the trust fund in real or government securities or makes the investment in pursuance of an order by the court \* \* \*. The same rule has been adopted in its whole length and breadth by the Courts of New York and New Jersey\* \* \* \* \*. In Pennsylvania this doctrine does not appear ever to have been either affirmed or denied \* \* \* \* \*. But the time has come when the interests and rights of trustees, as well as orphans, married women and insane persons, demand the settling of it, and we think the rule here ought to be as it is elsewhere."

This doctrine has been affirmed in a number of cases and in *Com. vs. McConnell* 226 Pa. 244 Judge Mestrezat says:

"The doctrine thus firmly established in this State prohibits a trustee from investing the estate of his cestui que trust in the bonds or stocks of a private corporation. The people of the Commonwealth have attempted to enforce the rule by Art. III Sec. 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. Time has tested the wisdom of the rule, and, as our cases declare, it is firmly established in this Commonwealth."

A Joint Stock Land Bank is a private corporation and the bonds issued by it are the bonds of a private corporation. Under our Constitution and the decisions of our Supreme Court it is apparent that the investment by a trustee in such bonds is illegal and trustees have no right to so invest trust funds.

I therefore advise you that Joint Stock Land Bank bonds are not legal investments for trust funds in this State.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN,  
*Deputy Attorney General.*

*Banks and banking—Savings banks—Investments—Federal land bank bonds—Joint-stock land bank bonds—Constitutional law—Article iii, sect. 22—Acts of March 20, 1889, April 5, 1917, and June 28, 1923.*

1. The Acts of April 5, 1917, P. L. 47, and June 28, 1923, P. L. 884, authorizing savings banks to invest their funds in Federal land bank and joint-stock land bank bonds, do not contravene article iii, section 22, of the Constitution of Pennsylvania, which provides that "no act of general assembly shall authorize the investment of trust funds by executors, administrators, guardians or other trustees in the bonds or stock of any private corporation."

2. The relation between a bank and a depositor is one of debtor and creditor.

3. The directors or trustees of a savings bank are not trustees within the meaning of the constitutional provision.

4. The investments of saving banks are not limited to those enumerated in the Act of March 20, 1889, P. L. 246, but others may be added by proper legislative enactments.

5. The Acts of April 5, 1917, P. L. 47, and June 28, 1923, P. L. 884, are constitutional.

September 5, 1923.

Honorable John W. Morrison, First Deputy Secretary of Banking,  
Harrisburg, Pa.

Sir: Your letter asking to be advised whether or not savings banks may invest their funds in Federal Land Bank and Joint-stock Land Bank bonds, has been received by this Department.

The Act of March 20, 1889, P. L. 246, was passed for the incorporation and regulation of savings banks and in Section 17 provides:

"It shall be lawful for the trustees of any saving bank to invest money deposited therein only as follows:

"First. In the stocks or bonds of interest bearing notes or the obligations of the United States, or those for which the faith of the United States is pledged to provide for the payment of the interest and the principal.

"Second. In the stocks or bonds of the Commonwealth of Pennsylvania bearing interest.

"Third. In the stocks or bonds of any State in the Union that has not within ten years previous to making such investments, by such corporation, defaulted in the payment of any part of either principal or interest of any debt authorized by any legislature of such State to be contracted.

"Fourth. In the stocks or bonds of any city, county, town or village of any State of the United States, issued pursuant to the authority of any law of the State, or in any interest bearing obligation issued by the city or county in which such bank shall be situated.

"Fifth. In bonds and mortgages on unincumbered, improved real estate, situate in this State."

The Act of April 5, 1917, P. L. 47, added to the list of securities in which trustees or directors of savings banks, savings institutions, and provident institutions may invest money deposited therein, bonds issued by Federal Land Banks, and the Act of 1923 amended the Act of 1917 by adding bonds issued by Joint-stock Land Banks.

Are the trustees or directors of savings banks such trustees as are contemplated by Article III, Section 22 of the Constitution of this State, which provides:

“No Act of General Assembly shall authorize the investment of trust funds by executors, administrators, guardians, or other trustees in the bonds or stock of any private corporation \* \* \*.”

The answer depends upon what is the relation between the directors or trustees of savings banks and the depositors. Is it of such a confidential character that the rule governing express trustees applies? The unquestioned tendency of the courts is not to regard them as express trustees, but to look upon the relationship between the bank and the depositor as that of debtor and creditor.

All the cases in our State recognize the relation of a bank to its depositor to be one of debtor and creditor and not one of trustee and cestui que trust. *Bank of Northern Liberties vs. Jones*, 42 Pa. 536; *Reiff vs. Mack*, 160 Pa. 265, *Prudential Trust Company's Assignment*, 223 Pa. 409. In *Spering's Appeal*, 71 Pa. 11, a company commenced the savings fund business advertising extensively and generally carrying on the business of a savings bank. In speaking of the directors of the company Judge Sharswood said:

“They are undoubtedly said in many authorities to be trustees, but that as I apprehend is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees.”

The directors or trustees of a savings bank are not such trustees as report to or are under the supervision of any court. Concluding, therefore, that the trustees or directors of a savings bank are not such trustees as are forbidden to invest trust funds in a certain way, the only other question is, are the investments of savings banks limited to those enumerated in the Act of 1889, or can others be added?

Savings banks receive deposits and lend on security specified by statute. In 1907 Deputy Attorney General Cunningham in the opinion said:

“Investment \* \* \* may be made in bonds which now are or hereafter may be authorized by law as legal in-

vestments for savings banks or savings institutions in Pennsylvania.”

The same power, the legislature, which set forth and enumerated in the Act of 1889, what should be legal investments for savings banks can add to what is provided in that Act and increase the number of securities such banks may invest in. This has been done by the Acts of 1917 and 1923, and I am of the opinion that the provisions of said Act are constitutional and proper in all other respects.

You are, therefore, advised that savings banks may invest their funds in Federal Land Bank and Joint-stock Bank bonds.

Yours truly,  
DEPARTMENT OF JUSTICE,

J. W. BROWN,  
*Deputy Attorney General.*

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*Banks and banking—Executive committee—Cashier—Act of May 13, 1876.*

A cashier of a bank incorporated under the Act of May 13, 1876, P. L. 161, has the right to be a member of its executive committee, composed of two directors and himself.

December 12, 1923.

Honorable John W. Morrison, First Deputy Secretary of Banking,  
Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your letter asking to “be advised whether or not the cashier of a bank incorporated under the Act of May 13, 1876, P. L. 161, can act as a member of the executive committee of a bank, which committee is composed of two directors and the cashier, if eligible.”

Section 12 of the Act of May 13, 1876, *supra*, provides:

“That the affairs of every corporation organized under this act shall be managed by not less than five directors, one of whom shall be president and another vice president; no cashier, clerk or teller, in any of the corporations organized under this act, shall be eligible as a director thereof; \* \* \*.”

The directors of every corporation organized under the Act shall manage its affairs, but in such management there is nothing in the Act which forbids them making rules and regulations and imposing

duties upon the managing officers of the corporation. In imposing such duties a certain authority in the cashier or managing officer necessarily follows so that at this time the exercise of a bank's authority is generally divided between the directors and the cashier. The tendency on the part of the directors is to lessen their functions and increase those of the cashier. Some of the very things which were regarded as the most important duties of the directors are now largely confided to cashiers or committees and so long as no positive law is disregarded this granting of authority to, and imposing duties upon, a cashier is legal.

Formerly the line of division in the exercise of authority by directors and cashier was marked and distinct. At this time, except in express statutory requirements, their official authority is often blended, and there is no longer any material difference in the authority exercised by them.

The directors must manage the affairs of the corporation, but this they may do with the advice, aid and assistance of the managing officer and in no way can this assistance be given to better advantage to the corporation than as a member of the executive committee. The cashier is necessarily more familiar with the affairs of the bank than any director can be. He devotes all his time to it while they are but occasionally occupied with its management. It is, therefore, but proper when an executive committee is named that it should have the benefit of the cashier's knowledge and experience, and that he should be a member of such committee, and this is in no wise forbidden by the Act of 1876.

"The cashier is the general executive officer of the bank. He is the general agent of the bank in dealing with its customers, and the general rule resulting from his situation is that his contractual acts bind the bank, unless they are contrary to law or to what stands for the bank's charter or to public policy. He is not the agent of the board of directors, but of the bank itself. \* \* \*"

*Zane on Banks and Banking, p. 151.*

This was held to be the rule in this State and in *Bissell vs. First National Bank of Franklin*, 69 Pa. 415, it was laid down:

"The cashier of an incorporated bank is the general executive officer to manage its concerns in all things not peculiarly committed to the directors; he is agent of the corporation not of the directors."

This was reaffirmed in *National Bank of Bedford vs. Stever*, 169 Pa. 574.

The cashier being the executive officer of a bank to manage its concerns, why should he not be a member of the executive committee?

Section 18 of the Act bears out the views here expressed, for it provides:

"That before the cashier, teller, book keeper or other persons necessary for executing the business of the corporation shall enter upon their duties, they shall each enter into articles of agreement with the corporation for the proper discharge of his duty, in which it shall be provided, among other things, that he will give the business of the corporation his care and attention. \* \* \*"

This is a provision for the cashier to execute the business of the corporation. The executive committee is one of the means used in executing that business, and the cashier as the general executive officer to manage its concerns has a right to be a member of that committee.

You are, therefore, advised that the cashier of a bank incorporated under the Act of May 13, 1876, P. L. 161, has a right to be a member of the executive committee of such bank.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

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*Banks and banking—When banks cannot qualify to do trust company business—Acts of April 29, 1874, May 13, 1876, and May 9, 1889.*

1. A bank incorporated under the General Banking Law of May 13, 1876, P. L. 161, has no right to accept the provisions of the Act of May 9, 1889, P. L. 159, amending the Act of April 29, 1874, P. L. 73, and cannot thereby be qualified to conduct a title insurance business and such business as is generally conducted by a trust company.

2. A corporation incorporated under the Act of May 13, 1876, P. L. 161, is one which is formed for the purpose of carrying on the business of banking.

3. A corporation has only such powers as are conferred by the act under which it is incorporated or given to it by subsequent acts of assembly, and one formed under the Act of May 13, 1876, is confined to the powers and privileges conferred by that act alone, unless a subsequent act specifically grants to it additional powers. This the Act of 1889, amending the Act of 1874, has not done.

January 17, 1924.

Hon. Peter G. Cameron, Secretary of Banking, Harrisburg, Pa.

Sir: You have requested an opinion as to whether or not a bank incorporated under the General Banking Law of May 13, 1876, P. L. 161, has a right to accept the provisions of the Act of May 9, 1889,

P. L. 159, amending the Act of April 29, 1874, P. L. 73, and thereby be qualified to conduct a title insurance business and such business as is generally conducted by a trust company.

The Act of April 29, 1874, P. L. 73 is an act for the incorporation of certain corporations, and Section 29 provides:

“Companies incorporated under the provisions of this act for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens and incumbrances, shall have the power and right to make insurances of every kind pertaining to or connected with titles to real estate, and shall have the power and right to make, execute and perfect such and so many contracts, agreements, policies and other instruments as may be required therefor.”

This Section was amended and supplemented by the Act of May 9, 1889, P. L. 159, and both the original act and the amendment relate, *inter alia*, to insurance of titles. The amendment provides as follows:

“Section 29—Clause 1. Companies which may have been heretofore, or which may hereafter be, incorporated under the provisions of this act for the insurance of owners of real estate, mortgages and others interested in real estate, from loss by reason of defective titles, liens and incumbrances, shall have the power and right—

“First. To make insurance of every kind pertaining to or connected with titles to real estate, and to make, execute and perfect such and so many contracts, agreements, policies and other instruments as may be required therefor.

“Second. To receive and hold on deposit and in trust and as security estate, real and personal, including the notes, bonds, obligations of states, individuals, companies and corporations, and the same to purchase, collect, adjust and settle, sell and dispose of in any manner, without proceeding in law or equity, and for such price and on such terms as may be agreed on between them and parties contracting with them: Provided, That nothing therein contained shall authorize said companies to engage in the business of banking.

“Third. To make insurance for the fidelity of persons holding places of responsibility and of trust, and to receive upon deposit for safe-keeping jewelry, plate, stock, bonds, and valuable property of every description, upon terms as may be agreed upon.



"Fourth. To act as assignees, receivers, guardians, executors, administrators, and to execute trusts of every description not inconsistent with the laws of this state or of the United States.

"Fifth. To act as agent for the purpose of issuing or countersigning the certificates of stock, bonds or other obligations of any corporation, association, or municipality, state or public authority, and to receive and manage any sinking fund thereof on such terms as may be agreed upon.

"Sixth. To become sole surety in any case where, by law, one or more sureties may be required for the faithful performance of any trust, office, duty, action or engagement.

"Seventh. To take, receive and hold any and all such pieces of real property as may have been, or may hereafter be, the subject of any insurance made by such companies under the powers conferred by their charter, and the same to grant, bargain, sell, convey and dispose of in any such manner as they see proper.

"Eighth. To purchase and sell real estate and take charge of the same.

"Ninth. To act as security for the faithful performance of any contract entered into with any person, or municipal or other corporation, or with any state or government, by any person or persons, corporation or corporations.

"Tenth. To become the sole security for the faithful performance of the duties of any national, state, county or municipal officer, and to execute such bonds or recognizances as may be required by law in such cases.

"Eleventh. To become security for the faithful performance of the duties of any clerk or employe of any corporation, company, firm or individual.

"Twelfth. To become surety for the payment of all damages that may be assessed and directed to be paid for lands taken in the building of any railway, or for the purposes of any railway, or for the opening of streets or roads, or for any purpose whatever where land or other property is authorized by law to be taken.

"Thirteenth. To become security upon any writ of error or appeal or in any proceeding instituted in any court of this Commonwealth, in which security may be required: Provided, however, That nothing in this act shall be so construed as to dispense with the approval of such body, corporation, court or officer as is by law now required to approve such security: Provided, however, That before exercising any of the powers hereby conferred, each such corporation shall have a paid

up capital of not less than one hundred and twenty-five thousand dollars, an affidavit of which fact, made by the treasurer thereof, shall be filed in the office of the Secretary of the Commonwealth, and each such company, heretofore or hereafter incorporated, shall file in the office of the Secretary of the Commonwealth a certificate of its acceptance hereof, made by formal resolution adopted at a regular or called meeting of the directors, trustees, managers or other proper officers thereof and certified under the corporate seal of such company, and a copy of such affidavit and of such resolution certified under the seal of the office of the Secretary of the Commonwealth shall be evidence of compliance with the requirements hereof.

“Clause II. That whenever such companies shall receive and accept the office or appointment of assignees, receiver, guardian, executor, administrator, or to be directed to execute any trust whatever, the capital of said company shall be taken and considered as the security required by law for the faithful performance of their duties as aforesaid, and shall be absolutely liable in case of any default whatever.

“Clause III. That any executor, administrator, guardian or trustee having the custody or control of any bonds, stock, securities or other valuables belonging to others, shall be authorized to deposit the same for safe-keeping with said companies.

“Clause IV. That whenever any court shall appoint said companies assignees, receiver, guardian, executor, administrator, or to execute any trust whatever, the said court may, in its discretion, or upon the application of any person interested, appoint a suitable person to investigate the affairs and management of the company so appointed, who shall report to such court the manner in which its investments are made and the security afforded to those by or for whom its engagements are held, and the expense of such investigations shall be defrayed by the said company, or the court may, if deemed necessary, examine the officers of said company under oath or affirmation as to the security aforesaid.

“Clause V. The said companies shall keep all trust funds and investments separate and apart from the assets of the companies, and all investments made by the said companies as fiduciaries shall be so designated as that the trust to which such investment shall belong shall be clearly known.”

It will be observed that the Act of 1889 in the second Section of Clause I provides that nothing contained in the act shall authorize the company to engage in the business of banking. “While trust

companies, in carrying on their business, must necessarily, to some extent, transact business that generally belongs to banks, when they do so however, such separate transactions can not be considered as being a banking business." *Guardian Trust Company vs. Grove*, 16 Dis. Rep. 975.

What corporations are entitled to the privileges and powers conferred by the Act of 1874 and the amendment of 1889 is fixed by the act itself, for it specifically sets forth:

"Corporations for any of the purposes named, and covered by the provisions of this act, heretofore created by any special act, or in existence under the provisions of any general law of this Commonwealth, upon accepting the provisions of the constitution and of this act by writing under the seal of said corporation, duly filed in the office of the secretary of the commonwealth, shall be entitled to all of the privileges, immunities, franchises and powers conferred by this act upon corporations to be created under the same; and upon such acceptance and approval thereof by the governor he shall issue letters patent to said corporation reciting the same."

Only such corporations formed for the purposes named and covered by the Act of 1874 and its amendment are allowed to claim the benefits conferred by that Act. This includes corporations created by special Act of Assembly before the Act of 1874 was passed and corporations in existence at that time under the provisions of any general law of the Commonwealth, but however created, they must be corporations for the purposes named and covered by the provisions of the Act.

A corporation incorporated under the Act of May 13, 1876, P. L. 161, is one which is formed for the purpose of carrying on the business of banking. The certificate which the persons forming such corporation are required to make must set forth that it is made to enable them to form a corporation for banking purposes. Nowhere in the Act or in the charter granted under it is it set forth that a corporation is formed for the purposes named by the Act of 1874 or its supplement of 1889.

A corporation has only such powers as are conferred by the Act under which it is incorporated or given to it by subsequent Acts of Assembly, and one formed under the Act of May 13, 1876 is confined to the powers and privileges conferred by that act unless a subsequent act specifically grants to it additional powers. This the Act of 1889, amending the Act of 1874 has not done.

Banking companies incorporated and organized under the Act of 1876, if they have a capital stock at least equal to the capital stock which trust companies are required by law to have, may acquire

additional rights and powers. They may accept the provisions of the Act of July 17, 1919, P. L. 1032, and by so doing may be granted by special permit

“the right and power to act as trustees, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and habitual drunkards, or in any other fiduciary capacity in which trust companies organized under the laws of this Commonwealth have authority and are permitted to act.”

If banks incorporated under the Act of 1876 were allowed to exercise the powers and privileges conferred by the Act of 1874 and its amendments, there would be grave danger of transgressing the constitutional provision contained in Article XVI, Section 6:

“No corporation shall engage in any business other than that expressly authorized by its charter.”

I, therefore, advise you that a bank incorporated under the Act of May 13, 1876 has no right to accept the provisions of the Act of May 9, 1889, P. L. 159, and to exercise the powers and privileges conferred by that act.

Yours very truly,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

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*Banks and banking—Reserve fund—Claims payable in future—Act of May 8, 1907.*

Under the Act of May 8, 1907, P. L. 189, a bank is not required to maintain a reserve fund for the protection of claims payable in the future.

January 21, 1924.

Honorable John W. Morrison, First Deputy Secretary of Banking,  
Harrisburg, Penna.

Sir: Your letter asking to be advised whether or not a bank shall maintain a reserve fund for bills or claims payable in the future, has been received.

The Act of May 8, 1907, P. L. 189, the Act providing for the creation and maintenance of a reserve fund in all banks, banking companies, savings banks, savings institutions, etc., provides for the creation and maintenance of two reserve funds.

The first is found in Section 2 of the Act, and is 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.”

In the absence of legislative definition or judicial construction there might be room for some discussion as to the meaning of “immediate demand liabilities” as used in the Act. But Section 4 has defined the phrase as follows:

“Immediate demand liabilities shall include all deposits payable on demand and all items in the nature of claims payable on demand.”

As was said by Attorney General Todd in an opinion found in 34 C. C. 641:

“It is clear that one of the purposes of the act is to provide for a reserve equal to fifteen per cent. of the immediate demand liabilities of the institutions subject to its provision, and I am of the opinion that a liability given for borrowed money payable on demand is an item in the nature of a claim payable on demand, and is a liability that requires the protection of the reserve as fully as such protection is required for deposits subject to check or payable on demand.”

But this provision of the Act applies only to “immediate demand liabilities”, whether deposits subject to check or payable on demand, or items in the nature of claims payable on demand.

The reserve fund created under Section 2 of the Act cannot therefore be extended to cover claims payable in the future.

The second provision for a reserve fund is found in Section 3 of the Act and is as follows:

“Every such corporation, receiving deposits of money payable at some future time, shall, at all times, have on hand a reserve fund equal to at least seven and one-half per centum of all its time deposits.”

The Act further defines “time deposits” in Section 4:

“Time deposits shall include all other deposits not payable by the contract of deposit on demand.”

This provision of Section 3 deals only with deposits payable at some future time.

By the terms of the Act provision is made for reserve funds protecting deposits subject to check or payable on demand, items in the nature of claims payable on demand, and deposits of money payable at

some future time. Claims payable on demand are specifically mentioned as being within the protection of the reserve fund in that section of the Act dealing with "immediate demand liabilities."

The section of the Act dealing with money payable at a future time does not mention claims payable in the future, but deals solely with deposits. There is not the slightest reference to the obligation of the corporation to have on hand a reserve fund to protect claims payable in the future, and the protection of the fund created by Section 3 of the Act is confined to deposits of money payable at some future time.

This is significant and evinces the intention of the Legislature. If it had been the intention to include claims payable in the future in the protection of the reserve fund it would have been so provided in Section 3. Just as in Section 2, it is provided that claims payable on demand shall be within the protection of the fund there established. But it is not so provided and nothing appears in the Act making it the duty of a bank to maintain a reserve fund for claims payable in the future.

You are therefore advised that the Act of May 8, 1907, P. L. 189, does not impose upon banks the duty of maintaining a reserve fund for the protection of claims payable in the future.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

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*Banks and banking—Savings bank—Agency to receive deposits—Act of May 20, 1889.*

1. A savings bank has no authority to appoint an agent for the collection of deposits in a locality other than that particularly designated in its certificate of incorporation.

2. Savings banks should be held strictly within the privilege expressly granted to them by the Act of May 20, 1889, P. L. 246.

May 8, 1924

Honorable Peter G. Cameron, Secretary of Banking, Harrisburg, Pa.

Sir: This Department is in receipt of your request for an opinion upon the following state of facts:

A savings bank in this State, incorporated under the Act of May 20, 1889, P. L. 246, has an agency in a town some miles distant from the town in which the bank is located. This agency is in charge of a man who acts in the capacity of a clerk for the bank and is under bond for the faithful performance of his duties. He receives deposits and receipts for them, and deposits so received are placed to the credit of the savings bank in a National Bank in the town where they are received, but such deposits can be withdrawn only at the main office of the savings bank. No other business is transacted at this agency. You ask to be advised if such transaction is legal.

In Section 2 of the Act of May 20, 1889, P. L. 246, it is provided that in the certificate of incorporation of savings banks the location or place of business shall be particularly designated.

Section 3 of the same Act provides that the location shall be convenient of access to depositors and that the Auditor General is to determine whether the population in the neighborhood designated affords reasonable promise of the support of the bank.

By the provisions of Section 6, process is to be served on the president or cashier during the usual hours of business, and according to the provisions of Section 9, the name and post office address of each officer and trustee, and the place where the bank's business is to be carried on, designating the same by street and number, are to be sent to the Auditor General, and Section 10 provides that there must be no change of location of the bank without the consent of the Auditor General.

By the establishment of a Banking Department the Auditor General has been relieved of the duties imposed by the Act and they have been placed upon the Commissioner, now Secretary of Banking.

It will be seen that in the Act of 1889, the law contemplates that the savings bank is to have one place of doing business and is to be located in one place, and this is to be in a community of sufficient population to make its success a certainty. Nowhere in the Act does it provide that there are to be different places of doing business. Neither does it contemplate that agents are to be employed for the purpose of soliciting or receiving deposits, nor is there any provision in the law for the payment of agents to solicit or receive deposits, or for any appropriation of the funds of depositors for any such employment.

The designation of places or persons simply to receive deposits is not doing business at a different place from the location of the bank to as great an extent as if a general business was transacted at such agency, but where the person receiving such deposits is the agent of the bank, whether paid for his services or not, even the receiving of a deposit and the issuing of the bank's credit in return for the deposit so made is such a doing of business at different places as is not

clearly permitted or contemplated by the Act. If one or a dozen such agencies may be established there can be no limit placed upon their number or upon the amount of deposits which may be received by them.

I have no doubt that depositors or groups of depositors may select any one of their number, a shareholder or trustee of the bank, or any other person, and designate such a one as their agent to receive their deposits and take them to the savings bank. This is not a doing of business by the bank itself at different places or through different agencies, but when the bank goes beyond this and designates agents at different points distant from the bank itself to receive deposits on the credit of the bank, it is doing business in different places at the same time and in a manner not authorized by law.

The Act of 1889, so far as I am able to find, has never received judicial construction. In view of the fact that the institutions for which it provides are without capital stock and in their supervision grave responsibilities are imposed upon the Department of Banking, and in view of the fact that these institutions obtain their credit and standing in great degree from the fact that their operations are under the supervision of the Department of Banking, it is clear that they should be held strictly within the privileges expressly granted them by the Legislature. To permit these to be transcended would be a violation of the plain intent of the law.

I am of the opinion, and, therefore, advise you that no authority exists for savings banks to establish agencies for doing business in different places, in any place other than that particularly designated in their certificate of incorporation or to that to which it is changed by proper legal proceeding.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN

*Deputy Attorney General.*



*Trust Companies—Branch Offices—Charter—Designation of Location—Statutory Authority.*

Trust companies, whether their charters have been amended or not, are confined in the establishment of branch offices to the place, city, borough or township, designated in their charter as the principal place of business of the company.

July 10, 1924.

Honorable Peter G. Cameron, Secretary of Banking, Harrisburg, Pa.

Sir: Your letter in reference to trust companies establishing and maintaining branch offices at places other than the ones designated in their charters as their principal places of business, has been received by this Department. The letter as received really involves two questions: First, as to trust companies whose charters designate the place where the business of the corporation is to be transacted; and second, as to trust companies whose charters designate the place where the business of the corporation is to be transacted, but whose charters have been amended so as to read "In the county of \_\_\_\_\_ Commonwealth of Pennsylvania, with its principal office in \_\_\_\_\_."

The establishment of branch offices by trust companies was first attempted in pursuance of an opinion of Attorney General Hensel dated December 10, 1894, and reported in Attorney General's Opinions 1887-96, page 114. But even in that opinion the learned Attorney General only goes so far as to say that he 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.*"

A trust company incorporated under the laws of this State must have a certain fixed place to transact its business, and this place is designated in the charter. Nowhere in the law is any authority given for it to extend its business by establishing branches outside of the place designated in its charter. While in the opinion of Attorney General Hensel above referred to the intimation is given that branch offices may be established, it only goes so far as to intimate that such branches may be established in another part of the same place where the principal place of business is located.

Attorney General Elkin in an opinion dated January 19, 1903, and reported in 27 County Court, 526, said:

"It is clear to me that a banking institution, incorporated under the laws of our state, must have a fixed place for the transaction of its business. It is also apparent that it was the intention of the legislature to confine the business of such banking institutions to one place. I can not find any authority for a bank with its location fixed undertaking to widen the scope of its

banking privileges by creating one or several branch offices at different points, either in the city or the county where the principal banking institution is located. It is my opinion that such institution does not have this privilege conferred upon it by our acts of assembly."

Deputy Attorney General Kun in an opinion dated September 18, 1917, in reference to the establishment of branch offices by trust companies said: "I beg to advise you that it is my opinion that the establishment of such offices is limited to the place designated in their charters as the principal place of business of the corporation."

The Deputy Attorney General also called attention to the Act of July 28, 1917, P. L. 1233. This act is a supplement to the Act of May 13, 1876, relating to the incorporation of banks of discount and deposit and authorizes the creation and maintenance of sub-offices or sub-agencies. By this Act of 1917 it was intended to give to banks of discount and deposit the same right in regard to establishing branches or sub-agencies as trust companies enjoyed under the rulings of the Attorney General's Department, but the authority given is expressly confined to "The city, borough or township in which its principal place of business is located."

There being no express authority in the law for trust companies to establish branches and the establishment of such branches being entirely under authority of the rulings of the Attorney General's Department, the company should be held strictly to what is laid down in those rulings and not allowed to exceed what is expressly ruled in the opinions of the Attorney General's Department.

I am of the opinion that trust companies, whether their charters have been amended or not, are confined in the establishment of branch offices to the place designated in their charter as the principal place of business of the company.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

*Banks and banking—Trust companies—Suretyship—Sureties on contractors' bonds—Acts of April 29, 1874, May 9, 1889, May 9, 1923, and May 16, 1923.*

1. Trust companies incorporated under the Act of April 29, 1874, P. L. 73, and having the powers and privileges conferred by the Acts of May 9, 1889, P. L. 159, and May 9, 1923, P. L. 173, and banks have no power to become sureties on the bonds of contractors for the faithful performance of a contract.

2. Such trust companies and banks may not become sureties on bonds, except as provided in section 2 of the Act of May 16, 1923, P. L. 248.

September, 26, 1924.

The Honorable Peter G. Cameron, Secretary of Banking, Harrisburg, Penna.

Sir: Your inquiry, "Have banks or trust companies the right to become surety on the bonds of contractors for the faithful performance of any contracts entered into by said contractors", has been received. I understand your inquiry to include trust companies created under the provisions of the general corporation act of 1874 and deriving their powers and privileges under the Act of May 9, 1889, P. L. 159, and other supplemental acts.

Prior to 1923 the powers, privileges and duties of modern trust companies were well defined.

In *De Haven vs. Pratt*, 223, Pa. 633, the Supreme Court speaking through Mr. Justice Elkin, said;

"A brief review of the legislation relating to the incorporation of title insurance companies on which have been engrafted the modern trust companies, will conclusively show that the legislature never intended that they should possess banking and discounting privileges. The incorporation of title insurance companies was first authorized in paragraph twenty-nine section nineteen of the act of 1874. Their powers were limited to the making of contracts of policies of insurance pertaining to or connected with titles to real estate. In 1881 an act was passed enlarging their powers and giving them the right to receive and hold on deposit and in trust, and as security, real and personal property, including the notes, bonds, obligations of states, individuals, companies and corporations, with the power to purchase, collect, adjust and settle, sell, and dispose of the same. It was expressly provided in said act that nothing therein contained shall authorize such companies to engage in the business of banking. The act of 1889, also supplementary, added some additional powers, as, for instance, that such companies could act as assignees, receivers, guardians, executors and administrators. This act also denied such companies the right to engage in the business of banking. The act of 1895 amended the fourth section of the act of 1889 by adding the additional power

‘to receive deposits of moneys and other personal property, and issue their obligations therefor, to invest their funds in and to purchase real and personal securities, and to loan money on real and personal securities.’”

Thus stood the law until 1923. By the act of May 9, 1923, P. L. 173, it is provided—

“That every trust company and bank organized and incorporated under the laws of the Commonwealth of Pennsylvania is hereby authorized and empowered to discount, buy, sell, negotiate, and assign promissory notes, drafts, bills of exchange, trade and bank acceptances, bonds, and other evidences of debt, and to receive and retain in advance interest on loans and discounts made.”

By the Act of May 29, 1895, P. L. 127, trust companies are given the power “to receive deposits of money and other personal property” and by the Act of May 9, 1923, P. L. 173, the authority and power “to discount, buy, sell, negotiate, and assign promissory notes, drafts, bills of exchange, trade and bank acceptances, bonds, and other evidences of debt.”

That trust companies incorporated under the Act of 1874 and its supplements are intended to be covered by the Act of 1923 is shown by the title of the act, “extending and enlarging the powers and rights of trust companies and banks organized and incorporated under the laws of the Commonwealth of Pennsylvania.”

In the days of special legislation the legislature created some trust companies and authorized them to do a general banking business. This included the right to discount, and companies so created and empowered need no extending and enlarging of their powers.

The power to discount having been conferred in trust companies, it must be determined if they are banks and doing a banking business. “The distinguishing characteristic of a banking business as banking is conducted now, is discounting and negotiating promissory notes, bills and negotiable paper.”

*Anderson’s Executrix vs. P. R. R. Co.*, 22 C. C. 76.

The business of banking as defined by law and custom, consists in the issue of notes payable on demand intended to circulate as money when the banks are banks of issue; in receiving deposits payable on demand, in discounting commercial paper, making loans of money on collateral security.

*Mercantile Bank vs. N. Y.*, 121 U. S. 138.

In *Oulton vs. German Savings Society*, 17 Wallace (U. S.) 118, it was held that banks are of three kinds:

1. Of deposit; 2. Of demand; 3. Of circulation.

They generally perform all these operations, but an institution performing but one is a bank.

The trust companies in our state incorporated under the Act of 1874 receive deposits, now under the Act of 1923, discount commercial paper, and are banks as defined by the Act of May 16, 1923.

Have banks and trust companies the right to become security on the bonds of contractors?

The Act of May 16, 1923, P. L. 248, deals with the subject of banks and trust companies becoming surety on bonds and is an act "Limiting the power of state banks, banking companies, trust companies, savings banks and unincorporated banks to become surety on bonds."

The act is brief and the provisions that are material to the question now being considered are as follows:

"Section 1. Be it enacted, etc., That the word 'bank', as used in this act, means any State bank, incorporated banking company, trust company, savings bank, or unincorporated bank, heretofore or hereafter organized.

"Section 2. No bank shall become surety on any bonds, except that any bank, which has qualified itself under the laws of the Commonwealth to engage in a fiduciary business, may become sole surety in any case where, by law, one or more sureties are or may be required for the faithful performance of the duties of any assignee, receiver, guardian, committee, executor, administrator, trustee or other fiduciary, and may also become sole surety on any writ of error or appeal, or in any proceeding instituted in any court of this Commonwealth in which security is or may be required:

\* \* \*

"Section 3. Any bonds executed and delivered in violation of the provisions of this act shall be null and void.

"Section 4. All acts and parts of acts inconsistent with this act are hereby repealed."

By the express terms of this act any State bank, incorporated banking company, trust company, savings bank, or unincorporated bank is forbidden to become surety on any bonds, "except that any bank which has qualified itself under the laws of this Commonwealth to engage in a fiduciary business" may become sole surety for certain fiduciaries.

The purpose of the act is to limit and restrict the power of banks to become surety, and it is clear that any institution embraced in the definition of "bank" in Section 1 of the act may not become surety on general bonds and is limited to those enumerated in Section 2.

Trust companies incorporated under the Act of 1874 and its supplements are very numerous, and do a large part of the banking business of the Commonwealth. They are the trust companies which were in the legislative mind when the Act of May 9, 1923 enlarging and extending the powers and rights of trust companies was passed. They are the only trust companies which needed the powers and rights conferred. Having the powers conferred by the Act of May 9, 1923, such trust companies were again in the legislative mind when the Act of May 16, 1923, limiting the power of banks and trust companies to become surety on bonds, was passed. "It is to be taken as a fundamental principle, standing as it were, at the threshold of the whole subject of interpretation, that the intention of the legislature is invariably to be accepted and carried into effect."

Endlich on the Interpretation of Statutes, Section 72.

Being therefore of the opinion that the Act of May 16, 1923, P. L. 248, includes trust companies created under the Act of 1874 and its supplements, in its limitations and restrictions, I advise you that trust companies, including the above named, and banks, may not become surety on bonds, except as provided in Section 2 of said Act of May 16, 1923.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN.

*Deputy Attorney General.*

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**OPINIONS TO THE DEPARTMENT OF  
FISHERIES**

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## OPINIONS TO THE DEPARTMENT OF FISHERIES

*Fish Commissioners, Board of—Authority to pay for printing, supplies, etc.—From what fund payable.*

The Board of Fish Commissioners under the Act of May 16, 1921, P. L. 559, Section 18, should pay for printing, supplies, telephone and telegraph charges from the fund created by said Act known as the "Resident Fish License Fund," to be purchased through the Department of Property and Supplies.

July 13, 1923.

Honorable Nathan R. Buller, Commissioner of Fisheries, Harrisburg, Pa.

Sir: I am in receipt of your letter of July 5, 1923 inquiring whether your Commission should pay for its printing, supplies, telephone, telegraph, etc., under the Administrative Code, and if so, whether or not the same should be paid out of the fund known as the "Resident Fish License Fund."

The Administrative Code, in defining the powers and duties in general, of the Board of Fish Commissioners, provides in Section 2601, Article XXVI that

"The Board of Fish Commissioners shall \* \* \* continue to exercise the powers and perform the duties by law vested in and imposed upon the Department of Fisheries, the Commission of Fisheries and the Fisheries Commission, and shall exercise such additional powers and perform such additional duties as are vested in and imposed upon it by this Act."

The additional powers and duties vested in the Board of Fish Commissioners by the said Code, however, in no way relate to the payment of such items as printing, supplies, telephone and telegraph. The provisions of the prior law would therefore apply.

The Act of May 16, 1921, P. L. 559, commonly known as the "Resident Fisherman's License Act", in Section 18 provides as follows:

"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 of the Commissioner of Fisheries, clerks, stenographers, fish wardens; traveling expenses; counsel



fees; court expenses; contingent expenses; for the propagation, protection, and distribution of fish, the stocking of the waters, and the employment of necessary labor, and the purchase of material, motor vehicles, machinery, and implements therefor; for necessary repairs and improvements to fish hatcheries; for field work, stream investigations, gathering spawn, transferring fish and the necessary employment of labor and the purchase of necessary motor vehicles, machinery and implements therefor; for the purchase of necessary land and water supplies for State fish hatcheries; for the purchase and erection of buildings, ponds, and other extensions, incidental to State fish hatcheries; for the maintenance and operation of a boat on Lake Erie and the cruiser Anna at Torresdale on the Delaware River and for dredging the approach to the fish hatchery at Erie.

"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."

An examination of the appropriation acts of 1917 and 1919 shows the appropriation to the Department of Fisheries covered practically the same items as enumerated in said Section 18, without specifically providing for the payment of such items as printing, supplies, telephone and telegraph. There was provided, however, a fund "for the payment of contingent expenses." The Appropriation Act of 1921 to the Department of Fisheries, page 57, has this proviso attached:

"Provided, that the Department of Fisheries pay for all printing and out of the funds collected from license fees by said Department from and after January first, in the year one thousand nine hundred and twenty-two."

The Resident Fisherman's License Act became effective, by Section 25 thereof, on the first day of January, 1922. The Legislative Session of 1923 made no appropriation to the Board of Fish Commissioners. Your appropriation is that provided in said Act of 1921 wherein the fees are specifically appropriated not to exceed four hundred thousand dollars (\$400,000) in any one year. The purpose was clearly to provide that all the expenses of the Board of Fish Commis-

sioners should be paid out of the fund derived from the Resident Fisherman's License fees. Section 18 of said act of 1921, among the other purposes for which money may be expended provides for "contingent expenses". The adjective "contingent" as used in appropriation bills to qualify the word "expenses" has a technical and well understood meaning. Legislative bodies in making appropriations usually provide and enumerate the specific major objects for which expenditures are to be made, and then provide a reasonable appropriation for the minor disbursements incidental to the proper operation of any department. A sum is appropriated generally for such minor disbursements under the head of "contingent expenses." Printing, supplies, telephone and telegraph are certainly such minor and incidental expenses as would usually be paid out of a contingent fund or as contingent expenses.

I am, therefore, of the opinion such charges for printing, supplies, telephone and telegraph are to be paid by the Board of Fish Commissioners and should be paid from the fund known as the "Resident Fish License Fund", the same to be purchased, or procured, however, through the Department of Property and Supplies, in the manner heretofore in use.

Yours very truly,

JOHN N. ENGLISH,

*Deputy Attorney General.*

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*Aliens—Right to Fish for Sport, Pleasure or Profit on their individual Account—  
Act of April 21, 1915, P. L. 160.*

The Act of 1915, *supra*, does not prohibit unnaturalized foreign-born residents of Pennsylvania from pursuing in good faith their usual employment on fishing tugs duly licensed for commercial purposes.

September 13, 1923.

Honorable N. R. Buller, Commissioner of Fisheries, Harrisburg, Pa.

Sir: Your inquiry of August 14, 1923, has been received, wherein an opinion is requested as to whether or not under the Act of April 21, 1915, P. L. 160, it is legal for aliens to work on the fishing tugs in Pennsylvania waters out of the Port of Erie for commercial purposes, the aliens being employed by the owners of the tugs, who pay a license to the Commonwealth according to their size. I further understand from my conversation with you that the owners of these fishing tugs are residents of Pennsylvania, duly licensed under

Pennsylvania law, and that the aliens working on them actively engage in hauling in the nets and perform the physical work of fishing as their regular work or employment at fixed wages; further, that these aliens are originally non-resident aliens, who are thus employed for specific periods of time in which they live in Erie, and under the provisions of the Pennsylvania law become resident aliens.

The question is, therefore, narrowed down as to whether or not the laws of Pennsylvania relating to fishing cover merely those engaged in Pennsylvania waters in fishing as (a) a sport, or (b) for their own use or profit as individuals, and also (c) those fishing on a commercial scale when done by duly qualified residents, or whether they cover every one actually engaged in the work of fishing.

The provisions of the Act of April 21, 1915, P. L. 160, in Sections 1 and 2 are as follows:

"Section 1. \* \* That from and after the passage of this act, it shall be unlawful for any unnaturalized foreign-born resident to go fishing for, or capture or kill, in this Commonwealth, any fish of any description. Each and every person violating any provisions of this section shall, upon conviction thereof, be sentenced to pay a penalty of twenty dollars for each offense, or undergo imprisonment in the common jail of the county for the period of one day for each dollar of penalty imposed.

"Section 2. For the purpose of this act, 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."

Legislation, in a measure similar, relating to possession of dogs and firearms by unnaturalized foreign-born residents has received the attention of this Department and the appellate courts, and has been accorded a very strict interpretation—that the use of the guns, or purpose for which a dog was possessed, did not enter into the determination. Upon consideration of the question here involved it will be seen that use or possession of property is not involved, but the right to pursue one's regular work or occupation, which is otherwise lawful and commendable labor. It is clear such unnaturalized foreign-born resident may not engage in fishing either for sport, pleasure, or profit on his individual account under the provisions of the Act of April 21, 1915, P. L. 160. If his regular work or employment, however, is that of a fisherman, may he do such work as a mere employe for a licensed individual or concern? I think he may. The express purpose of the Act of 1915 is "To give additional pro-

tection to the fish in the waters within the Commonwealth of Pennsylvania." This protection is afforded by the licensing of the fishing tugs, and the holding of them to accountability. The physical work of the "fisherman", as such, is impersonal in that it would make no difference whether he hauled in the nets as a citizen or an alien. It certainly was not the intention of the Legislature, under *the guise of protection to fish*, to take away from *worthy workers their regular occupation, otherwise entirely lawful and their means of livelihood*.

I am, therefore, of the opinion the Act does not prohibit unnaturalized foreign-born residents from pursuing in good faith their usual employment on fishing tugs duly licensed for commercial purposes. It is understood, however, that this opinion is merely for the guidance of your Commission in its enforcement of the Act under Section 4 thereof, as prosecutions may be brought by any one, in which cases the construction of the Act would be entirely for the courts.

Yours very truly,

DEPARTMENT OF JUSTICE,

JOHN N. ENGLISH,

*Deputy Attorney General.*

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**OPINIONS TO THE DEPARTMENT OF FORESTS  
AND WATERS**

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## OPINIONS TO THE DEPARTMENT OF FORESTS AND WATERS

*Auxiliary Forest Reserves—Exemption from Taxes until after the Three Year Valuation has passed—Acts of June 5, 1913, P. L. 405 and 426—County Commissioners—Duty of.*

The classification of timberland in McKean County having been completed and in the hands of the County Commissioners on November 13, 1922, it became their duty to so classify the land upon their records and the taxes for the next tax year, to wit, 1923, and so long thereafter as the land remains under the Auxiliary Forest Reserve, classification to be on a valuation not to exceed One Dollar (\$1.00) per acre.

April 9, 1923.

Honorable Robert Y. Stuart, Commissioner of Forestry, Harrisburg, Pa.

Sir: In answer to your letter of January 20, 1923, as to whether the Auxiliary Forest Reserve certificate exempts taxes until after the three year valuation has passed, which question is raised in connection with the classification of 6,655 acres of timberland in McKean County, for which a formal certificate was sent to the McKean County Commissioners on November 13, 1922, you are advised as follows:

The Act of June 5, 1913, P. L. 426, provides for a separate and distinct class of land to be known as "Auxiliary Forest Reserves," and provides for the manner in which land may be so classified. The Act of June 5, 1913, P. L. 405, in Sections 1, 2 and 3, provides for the valuation for taxation and manner of assessment as follows:

"All surface land which may hereafter be classified and set apart as auxiliary forest reserves, in the manner provided by law, shall be rated in value, for the purpose of taxation, not in excess of one dollar (\$1.00) per acre and shall continue to be so rated so long as the said land remains within the class designated as auxiliary forest reserves: Provided, however, That if the said surface land be underlaid with coal, iron ore, oil, gas, or other valuable minerals, said minerals may be separately assessed. The assessors in the several districts in which such lands are situate shall assess such lands in the manner now or hereafter provided for the assessment of real estate for purposes of taxation, as if they had not been set apart as auxiliary forest reserves, and shall make their returns to the

county commissioners in like manner as is now or hereafter may be provided by law, subject to exception, appeal, and final adjustment.

"Upon receipt of assessment returns from the various assessors, the county commissioners shall reduce, in their records, to a sum not in excess of one dollar (\$1.00) per acre, the assessment on all those lands which shall have been placed in the class known as auxiliary forest reserves, in accordance with certificates filed with them by the State Forestry Reservation Commission, and the original assessment returns made by said assessors shall be preserved.

"Upon receipt by the County Commissioners of such certificate of the Commission, it shall be their duty at once to place said surface land in the class established by section one of this Act \* \* \*."

The several Acts relating to the triennial assessments in the counties of the State were passed prior to the year 1913, to meet conditions as they existed at that time. By the above Act of 1913, a *new classification of land* was made, and the provisions of such Act with regard to taxation control as to such new class of land. In creating these "auxiliary forest reserves," it is very clearly provided that "*all surface and which may hereafter be classified and set apart as auxiliary forest reserves, in the manner provided by law, shall be rated in value, for the purpose of taxation, not in excess of one dollar (\$1.00) per acre*" and that "*the county commissioners shall reduce, in their records, to a sum not in excess of one dollar (\$1.00) per acre, the assessment on all those lands which shall have been placed in the class known as auxiliary forest reserves in accordance with certificates filed with them by the State Forestry Reservation Commission,*" and shall further "*upon receipt \* \* \* of such certificate, at once place said surface land*" in said class.

The provisions that the assessors of the several districts shall assess the lands in the manner as provided by law and that such original assessment shall be preserved by the county commissioners, are made necessary by, and clearly relate to, other provisions in the Act for compelling payment of "the tax which would have been paid by said owner at the rates established," under such usual assessments in those cases where the owners have failed to meet the requirements to continue land in the Auxiliary Forest Reserve.

I am, therefore, of the opinion that the classification of 6,655 acres of timber in McKean County having been completed and in the hands of county commissioners on November 13, 1922, it became their duty to so classify the land upon their records, and the taxes for the next tax year, to wit 1923, and so long thereafter

as the land remains under the auxiliary forest reserve classification, to be on a valuation not to exceed one dollar (\$1.00) per acre.

Yours truly,

JOHN N. ENGLISH,  
*Deputy Attorney General.*

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*State Highway Department—Injury or Removal of Trees by Adjacent Land Owners or Others—Right-of-way—Overhead Wires—Jurisdiction.*

The State Highway Department has full authority to protect trees planted on the highway right-of-way from injury or removal by adjacent land owners or other persons by criminal proceedings or otherwise, and it has further authority to protect such trees from wanton or unwarranted injury or removal by overhead wire companies and others.

June 4, 1923.

Honorable R. Y. Stuart, Commissioner of Forestry, Harrisburg, Pa.

Sir: This Department is in receipt of your letter of February 20, 1923, requesting an opinion as to whether the Highway Department has authority to protect trees planted on the highway right-of-way from injury or removal by adjacent land owners, representatives of overhead wire companies, and others.

There are a number of Acts of the Legislature that in one way or another affect this problem. Those that would apply to actions of individuals are as follows:

The Act of June 13, 1836, P. L. 551, as amended by Act of April 6, 1921, P. L. 111, in Section 5, provides for the breadth of roads as follows:

“The breadth of a private road shall not, in any case, exceed twenty-five feet, and the width of a public road shall not be less than thirty-three feet nor more than one hundred and twenty feet.”

As the usual width of public roads is thirty-three feet, this will necessitate the actual ascertainment, in any particular case, of the width of the road upon which trees are planted, and, if and when the trees are planted on that portion of the road which is actually established as the public road, no adjacent land owner or other person has any right to interfere with the road.



The Act of June 7, 1911, P. L. 679, Section 1, makes interference with or injury to shade or fruit trees a crime, punishable by fine or imprisonment, and is as follows:

"Any person who shall wilfully and maliciously club, stone, cut, break, climb upon, injure, or destroy any shade-tree or any fruit-tree, growing on or along any street, road, or other highway, shall be guilty of a misdemeanor; and upon conviction thereof, before any alderman, magistrate, or justice of the peace, shall be sentenced to pay a fine not exceeding ten dollars, or to undergo an imprisonment in the jail of the proper county not exceeding five days, or both, at the discretion of the alderman, magistrate, or justice."

The Act of April 1, 1909, P. L. 97, in Sections 1, 2, 4 and 6, further provides for the care of shrubs or trees on wild and improved or cultivated lands and removal of trees menacing travel, as follows:

"Section 1. \* \* \* Where any public highway in this Commonwealth passes through or along forested lands, wild lands, or uncultivated lands, no trees growing within the limits of the said highway, at a distance beyond fifteen feet on either side of the centre-line of said highway, which shall measure four inches or over in diameter at a point two feet from the surface of the ground, shall be cut down or destroyed by the commissioners, supervisors, or road-masters employed by them, or any other person, without first obtaining the consent of the abutting owners. If any board of commissioners or supervisors deem the removal of any such trees, beyond said limit of fifteen feet on each side of the centre-line of said highway, necessary for the improvement of the road, and the consent of the abutting property owners cannot be obtained, the board of commissioners or supervisors may appeal the matter to the judge of the court of the proper district; who is hereby directed to examine and inquire into all such subjects of dispute which may be referred to him, and, having due regard for the demand for road improvement as well as for the preservation of the trees, shall, after hearing all parties in interest, make such order in respect thereof as to him shall appear reasonable, equitable, and just; and from whose decision there shall be no appeal. Provided, That the commissioners or supervisors shall at all times have the right to clear out brush and other refuse from along the sides of the road, to the legal width thereof; And, Provided further, That all such clearing and removal of brush and refuse shall be confined to growth that is under the limit hereinabove described, and to the removal of branches that in any way may interfere with public

travel; and that no other injury, by fire, cutting, abrasion, or otherwise, shall be done to the standing timber.

"Section 2. Whenever any public highway running through improved or cultivated lands in this Commonwealth, has been opened, and there shall be growing along the roadsides, and within the road limits, shrubs or trees not interfering with public travel, no board of supervisors or road-masters, or other persons in their employ, shall remove, cut, injure, or destroy or in any other manner interfere, with, such shrubs or trees, unless said removal or cutting shall be absolutely necessary for the purpose of maintaining the highway at its best and highest efficiency; and, then, not until the abutting property owners shall have received notice thereof, and an agreement shall have been entered into between the local highway authorities and the abutting property owners relating to the removal, cutting or interference with said trees. If the said parties shall be unable to arrive at an agreement in respect thereto, the same shall be referred to a judge of the proper court, as aforesaid. Said judge shall examine and inquire into the subject of controversy, and, in like manner, render his decision, as provided for in section one of this act; and from which decision there shall be no appeal."

"Section 4. Nothing in this act shall be so construed as to prevent the local highway authorities, anywhere in this Commonwealth from removing such roadside trees which may be thrown down by the wind, or lodged in such position as to be a menace to public travel, or which, by reason of any other cause, become a source of danger to the public and ought to be removed; but every such act of removal on the part of the highway authorities shall always be made with due regard to the circumstances in such case, so as to preserve the true intent and purpose of this act."

"Section 6. If any commissioner, supervisor, road-master, or person in their employ, or any other person, shall cut down, kill, or injure any living tree, growing as aforesaid, and of a size four inches in diameter, or greater, at a point two feet from the surface of the ground, or shall violate any other provision of this act, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a penalty of not more than five dollars for every tree so cut, injured, or destroyed, with costs of suit; to be recovered in an appropriate action to be brought before any magistrate, alderman, or justice of the peace of the county wherein the said offence was committed, who, upon affidavit of any person, duly presented, is hereby authorized and directed to issue his warrant to any person empowered

to make arrests, directing him to arrest the person so charged. The said magistrate, alderman, or justice of the peace shall, thereupon, proceed to hear both the complainant and the defendant and their witnesses, and shall forthwith decide as to him shall appear to be just and right. If any defendant upon conviction for any offence shall fail or refuse to pay the fine and costs which may be imposed upon him, or shall not give bond with approved surety to pay the same within ten days, he shall be committed to the jail of the county wherein the offense was committed, there to remain for a period not to exceed thirty days, or until he shall, in the meantime, have paid the said fine and costs in full."

There is a provision in the Crimes Act of March 31, 1860, P. L. 382, Section 149, which also gives authority to proceed against persons damaging trees, and is as follows:

*"If any person shall wilfully and maliciously break down any tree or shrub growing on the public grounds as enclosed on capitol hill, or otherwise injure or destroy the same, or shall break or destroy the fence around such enclosure, or any part thereof, or shall maliciously and wilfully injure any part of the public grounds, or the buildings belonging to the state; or if any person shall wilfully or maliciously injure or destroy any fruit or ornamental trees, shrub, plant or grape vines growing or cultivated in any orchard, garden or close, or upon any public street or square in this commonwealth, he shall be guilty of a misdemeanor, and, on conviction, be fined not exceeding one hundred dollars, and undergo an imprisonment not exceeding six months, or both, or either, at the discretion of the court."*

From the above it will be clearly seen that when it is definitely established the trees are upon the highway, there is adequate provision in the law for criminal proceedings against any person, adjacent land owner or otherwise, who wilfully or maliciously injures or destroys such trees.

There are many Acts giving public service corporations the right to use the highways of the State and in the use of which it has been conceded they may cut or trim trees which interfere with their lines or wires. In this, as in the general question of conservation, there always arises the question as to whether the benefit to the community in having shade-trees along its roads should be paramount to the good that may result to the citizens through the advantages of electric light, telephone and other utilities.

Among the many Acts covering the use of the public roads, streets, lanes or highways in the Commonwealth by corporations, the following may be noted:

Telegraph and telephone companies by Act of April 22, 1905, P. L. 294. (Subject to the reasonable regulations of municipalities through which they pass.)

Telegraph and telephone companies by Act of July 22, 1919, P. L. 1123. (Must obtain consent of municipality.)

Water companies by Act of May 16, 1889, P. L. 226. (Subject to regulations of borough, town, city or district \* \* \* for the protection and convenience of public travel.)

Water companies developing electric power by Act of July 2, 1895, P. L. 425.

Water, light, heat and fuel companies by Act of June 2, 1887, P. L. 310.

Gas companies by Act of March 11, 1857, P. L. 77.

Water supply companies by Act of March 11, 1857, P. L. 77.

Motor power companies by Act of March 22, 1887, P. L. 8.

Natural gas companies by Act of May 11, 1897, P. L. 50.

Pipe line companies by Act of June 2, 1883, P. L. 61.

Street railway companies by Act of May 3, 1905, P. L. 368.

Underground and elevated passenger railways by Act of June 7, 1901, P. L. 523.

Traction and motor power companies by Act of May 15, 1895, P. L. 63.

Transportation of natural gas by Act of May 29, 1885, P. L. 29.

Refrigerating companies by Act of April 25, 1903, P. L. 303.

Railway companies by Act of June 1, 1907, P. L. 368.

In many of the grants of the use of the streets, lanes, alleys or highways throughout the State, there is a provision restricting the use to limitations imposed by the authorities of the city, town or borough. The restriction in the Act of June 25, 1885, P. L. 164, with regard to telegraph and telephone companies is typical of such restrictions and is as follows:

“\* \* \* before the exercise of any of the powers given under this act, application shall be first made to the municipal authorities of the city, town or borough, in which it is proposed to exercise said powers, for permission to erect poles, or run wires on the same, or over, or under any of the streets, lanes or alleys of said city, town or borough, which permission shall be given by ordinance only, and may impose such conditions and regulations as the municipal authorities may deem necessary.”

Therefore in the present state of legislation, it is my opinion that if trees are planted along the highways and attain sufficient height as to in any way interfere with existing telephone, electric light wiring, or similar utilities, such utilities could trim or, where reasonably necessary, remove such trees. If such electric light and telephone rights-of-way are granted subsequent to the planting of the trees the question would be open to dispute on the general principle of eminent domain and its implied necessity and benefits.

It would be well to consider the question of legislation that would protect trees planted by the State along the public highways and limit the rights-of-way to use as not to interfere with such trees.

In my opinion, therefore, the Highway Department has full authority to protect trees planted on the highway right-of-way from injury or removal by adjacent land owners, and that it has further authority to protect such trees from wanton or unwarranted injury or removal by overhead wire companies and others.

Yours very truly,

JOHN N. ENGLISH,

*Deputy Attorney General.*

*Bureau of Forestry—Lands Under State Warrant—Obstruction—Removal—Court Proceedings—Act of April 4, 1901, P. L. 65, and of June 13, 1836, P. L. 551.*

A private club owning land by warrant from the State cannot close a road used by the public and others as a means of ingress, egress and regress to their lands without proper Court proceedings and any obstruction placed in the roadway may be removed without liability.

The Bureau of Forestry, under the Act of April 4, 1901, P. L. 65, and of June 13, 1836, P. L. 551, has authority to establish a private road in gaining access from a public highway to lands under its control. Others desiring to use such road may do so by sharing in the necessary expenses incident to the Court proceedings in establishing such a road.

June 4, 1923.

Honorable Robert Y. Stuart, Commissioner of Forestry, Harrisburg, Pa.

Sir: I return herewith your file in the case of the Charleroi Rod and Gun Club, relative to the right-of-way to permanent Camp 11C86.

From an examination of the files I understand the facts to be substantially as follows:

The Charleroi Rod and Gun Club owns a tract of land, under Warrant No. 5024, through which a road leads from Grant Station to and through State forest land covered by Warrant No. 5342, and then over the mountain to Medix Run, a distance of 8-1/3 miles. Camp Wainwright occupies permanent Camp 11C86 under lease from the Department of Forestry, and the Charleroi Rod and Gun Club has closed the road to these lessees of State forest land. They state they will allow access to the Forestry Department, although the barrier placed across the road is a barrier to all persons. It is undetermined, as yet, from an examination of the records in Elk County, whether the road from Grant Station to Medix Run was laid out as a public or private road by order of court. It is established, however, that the road has been open for fifty years or more and used continuously, although infrequently. *The question before us, therefore, is whether or not the Charleroi Rod and Gun Club under these facts, has the right to close the road to the lessees of the State Forestry Department.*

If an examination of the records in Elk County should disclose this road to have been opened by order of court, either as a township or a private road, it would require the approval of the Court of Quarter Sessions of Elk County to vacate or change it. The Act of June 7, 1907, P. L. 444, in Section 1, relating to public roads, provides as follows:

*“Change or vacation of road between townships; petition; viewers—whenever any public road—or turn-pike, which, under existing laws, becomes a public road*

—is between two or more townships or on any division line between the same, in any county of this Commonwealth, has become useless, inconvenient, or burdensome, the court of quarter sessions of the county in which the said road is located shall have the authority, upon application to it by petition, signed by at least fifteen property owners of each of said townships, who are qualified electors therein, setting forth the facts, to inquire of and to change or vacate the whole or any part of said road, whenever the same shall have become useless, inconvenient, or burdensome; and the same court shall proceed therein, by views and viewers, in the manner provided for the laying out of roads and highways under existing laws.

Under the Act of June 13, 1836, P. L. 551, Section 18, relating to both private and public roads, the provision is as follows:

“Authority of courts—The courts aforesaid shall, within their respective counties, have authority, upon application to them by petition, to inquire of and to change or vacate the whole or any part of any private or public road which may have been laid out by authority of law, whenever the same shall become useless inconvenient or burdensome, and the said court shall proceed therein by views and reviews, in the manner provided for the laying out of public roads and highways.”

The power of the Courts of Quarter Sessions was *extended to all roads, whether laid out by authority of law, or existing by prescription or lapse of time*, under the Act of April 21, 1846, P. L. 416. Section 1 of which is as follows:

“The powers of the Courts of Quarter Sessions of this Commonwealth to vacate public and private roads, are hereby extended to all roads, whether laid out by authority of law, or existing by prescription or lapse of time; and generally to all roads, except private roads resting upon express grant, the evidence of which is still in existence, excepting in such counties as the power to lay out and vacate public roads is, or may be, vested in some other tribunal, than in the court of quarter sessions of the peace; excepting, also, roads laid out by act of assembly, and are expressly exempted from the jurisdiction of said courts.”

Under the facts as above stated, you are, therefore, advised that the Charleroi Rod and Gun Club cannot lawfully close the road from Grant Station to Medix Run unless it is by proper authority of court. Any obstruction placed by them across the road may be removed without liability.

For your further information you are advised that if this roadway should be closed by Court order after view, and report of Viewers,

your Department or your lessees may obtain a private road under the provision of the Act of April 4, 1901, P. L. 65, the principal provisions of which Act, together with Act of June 13, 1836, P. L. 551, relating to use, repair and damages, are as follows:

“Proceedings to open private roads—The several courts of quarter sessions shall, in open court as aforesaid, upon the petition of one or more persons, associations, partnerships, stock companies or corporations, for a road from their respective lands or lease-holds to a highway or place of necessary public resort, or to any private way leading to a highway, direct a view to be had of the place where such road is requested, and a report thereof to be made, in the same manner as is directed by the said act of thirteenth June, one thousand eight hundred and thirty-six.”

“Proceedings on report of viewers—If it shall appear by the report of viewers to the court directing the view, that such road is necessary, the said court shall direct what breadth the road so reported shall be opened, and the proceedings in such cases shall be entered on record, as before directed, and thenceforth such road shall be deemed and taken to be a lawful private road.”

“Repair of Private roads—All private roads shall be opened, fenced and kept in repair by and at the expense of the person or persons respectively at whose request the same were granted and laid out, and by their heirs and assigns.”

“Damages—The damages sustained by the owners of the land through which any private road may pass, shall be estimated in the manner provided in the case of a public road, and shall be paid by the persons at whose request the road was granted or laid out; Provided, That no such road shall be opened before the damages shall be fully paid.”

“Use by others than petitioners—Whenever any person shall be desirous to make use of a private road laid out on the petition and at the expense of others, such person may apply by petition to the court of quarter sessions of the respective county, to be admitted to participate in the privilege of the said road, and thereupon such court shall have power to determine what sum he shall contribute to the persons at whose expense the said road was laid out, and also what further sum he shall pay to the owners of the soil over which the said road was made, and upon the payment thereof, such person shall be entitled to equal rights and privileges, and be subject to like duties and liabilities with the original applicants for said road.”

Yours truly,

JOHN N. ENGLISH,

*Deputy Attorney General.*



*Lake Erie and Ohio River Canal Board, Pennsylvania State Park and Harbor Commission of Erie, Washington Crossing Park Commission, Valley Forge Park Commission—Authority under Act of June 7, 1923, P. L. 498, to elect a person, not a member of such board or commission, as secretary.*

Neither the Lake Erie and Ohio River Canal Board, Pennsylvania State Park and Harbor Commission of Erie, Washington Crossing Park Commission nor Valley Forge Park Commission may under the Act of 1923, above cited, elect as secretaries persons who are not members of such board or commission.

July 19, 1923.

Major Robert Y. Stuart, Secretary of Forests and Waters, Harrisburg, Penna.

Dear Sir: This will acknowledge receipt of your letter of June 28, 1923 requesting to be advised whether the Lake Erie and Ohio River Canal Board, the Pennsylvania State Park and Harbor Commission of Erie, the Washington Crossing Park Commission and the Valley Forge Park Commission may under the provisions of the Administrative Code elect secretaries who are not members of the Boards or Commissions named, and whether if they may elect secretaries outside of the membership of the respective Boards and Commissions such secretaries are entitled to receive compensation.

Under Section 202 of the Administrative Code the Boards and Commissions mentioned are departmental administrative Boards and Commissions within your Department. Section 210 of the Code provides that:

“Except as in this act otherwise provided the members of departmental administrative Bodies, Boards and Commissions and of advisory Boards and Commissions shall serve without compensation.”

Nowhere in the Code is the payment of compensation to the members of the four boards and commissions mentioned by you specifically authorized.

You are, therefore, advised that members of these commissions cannot receive compensation for acting either as secretaries thereof or for serving their respective boards or commissions in any other capacity.

The organization of the Lake Erie and Ohio River Canal Board is governed by section 427 of the Administrative Code, the organization of Pennsylvania State Park and Harbor Commission of Erie, by section 428, the organization of Washington Crossing Park Commission by section 429, and the organization of Valley Forge Park Commission by section 430.

In each of these sections authority is given to the Board or Commission, as the case may be, to "elect a Secretary."

In the case of the Lake Erie and Ohio River Canal Board, section 427 of the Code provides that "The Governor shall designate one member of the Board as Chairman and the Board shall elect a Secretary." With reference to the other three Commissions the language used is "The Commission shall annually elect a Chairman and a Secretary."

There is no limitation in the language quoted upon the right of any of these Boards or Commissions to select a Secretary so that, standing alone, it would seem to permit a person not a member to be elected Secretary. However, by reference to the other sections in Article IV of the Code it appears that the Legislature has expressly authorized the selection of a Secretary from outside the membership of departmental administrative boards and commissions in a number of cases.

In section 409 the Pennsylvania Historical Commission is authorized to elect a Secretary "who need not be a member of the Commission." A similar provision is contained in Section 410 with regard to the State Board of Medical Education and Licensure, and in Section 411 to 422 inclusive with regard to the other professional examining boards. Section 424 contains a similar provision with regard to the organization of the State Fair Commission, and Section 435 with regard to the various Boards of Trustees of State Institutions.

It is clear, therefore, that in cases in which the Legislature intended that Secretaries of departmental administrative boards and commissions might be elected outside of the membership of such boards or commissions it expressly so provided, and that in the absence of express authority to elect a Secretary who is not a member of the board or commission any board or commission whose organization is governed by Article IV of the Code must elect one of its members to this position.

You are advised, therefore, that neither the Lake Erie and Ohio River Canal Board, the Pennsylvania State Park and Harbor Commission of Erie, the Washington Crossing Park Commission nor the Valley Forge Park Commission can elect any person not a member of such Board or Commission, as the case may be, as Secretary.

Very truly yours,

WILLIAM A. SCHNADER,  
*Special Deputy Attorney General.*

*Lake Erie and Ohio River Canal Board—Appropriation to under Act of May 28, 1923, P. L. 36A—Acts of June 27, 1913, P. L. 652, Section 8; June 7, 1923, P. L. 498, Sections 2, 202, 223, 1610.*

The appropriation under the Act of 1923, No. 36A, is payable to the Board but must be requisitioned for in the manner provided in Section 223 of the Act of 1923, P. L. 498.

August 25, 1923.

Major R. Y. Stuart, Secretary of Forests and Waters, Harrisburg, Pa.

Sir: We have your letter of yesterday requesting us to advise you whether there is an irreconcilable conflict between the provisions of the Administrative code and of Act No. 36-A of the 1923 Session.

Act No. 36-A of the 1923 Legislature appropriated ten thousand dollars (\$10,000) directly to the Lake Erie and Ohio River Canal Board and provided that expenditures under the appropriation should be made in the manner provided in the eighth section of the Act of June 27, 1913, P. L. 652.

The Administrative Code repealed section eight of the Act of June 27, 1913, P. L. 652.

The question is whether in view of this situation the appropriation to the Lake Erie and Ohio River Canal Board can be paid.

The Lake Erie and Ohio River Canal Board was not abolished by the Administrative Code. (See Section 2). On the contrary Section 202 of the Code placed this Board as it existed prior to the passage of the Code in the Department of Forests and Waters. Section 1610 of the Code provides that "subject to any inconsistent provisions in this Act contained the Lake Erie and Ohio River Canal Board shall continue to exercise the powers and perform the duties by law vested in and imposed upon the said Board."

Act No. 36-A was approved prior to the passage of the Administrative Code. It prescribed the manner in which the appropriation should be requisitioned. Section 223 of the Administrative Code provided an inconsistent method of requisitioning this and all other appropriations to Departmental Administrative Boards as follows:

"All warrants for the payment of salaries, compensation or other disbursements of or for Departmental Administrative Boards or Commissions, or of advisory Boards or Commissions, shall be drawn upon requisition of the head of the Department with which such Departmental Administrative Boards or Commissions or Advisory Boards or Commissions are connected."

As Section eight of the Act of 1913 was inconsistent with the above sentence of Section 223 of the Code it was specifically repealed by Section 2901 of the Code. Section 223 of the Code superceded and Section 2902 of the Code, therefore, repealed the provision of Act No. 36-A of the 1923 Session prescribing the method of drawing requisitions against the appropriation therein contained.

The Supreme Court has repeatedly held that two acts of Assembly passed at the same session and dealing with the same subject must be construed together if at all possible. Appropriation acts come within this rule just as fully as acts which do not carry appropriations. Act No. 36-A and the Administrative Code can be construed together without the slightest difficulty.

Clearly the only possible conclusion which can be reached is that the 1923 appropriation to this Board is payable, but that it must be requisitioned in the manner provided in Section 223 of the Administrative Code.

Accordingly you are advised that it is your duty to issue and transmit to the Auditor General requisitions in due form for the proper expenditures of the Lake Erie and Ohio River Canal Board, such requisitions to be drawn against the appropriation contained in Act No. 36-A of the 1923 Session.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*Auxiliary Forest Reserves—Forests and Waters—Department of—Authority to certify private lands for classification as Auxiliary Forest Reserves—Act of June 5, 1913, P. L. 405, 408, 426.*

The Department of Forests and Waters may in its discretion declare what land should be classified as Auxiliary Forest Reserves, under Section 1, Act of June 5, 1913, P. L. 426, and also may certify the same to the Forestry Reserve Commission. The Department may in its discretion refuse to so certify any land which is not chiefly valuable for the growing of merchantable forest products.

October 24, 1923.

Honorable R. Y. Stuart, Secretary of Forests and Waters, Harrisburg, Pa.

Sir: Your letter is received asking whether or not the Department of Forests and Waters has discretion, in certifying private lands for classification as Auxiliary Forest Reserves, to refuse such

certification of lands not chiefly valuable for the production of merchantable timber, or as you put it, "primarily suited to the growing of timber."

The statutes providing for the creation, management and control of Auxiliary Forest Reserves are the three Acts of June 5, 1913, P. L. 426, 408, and 405, which are embodied in Sections 11156-11171 inclusive of West's Pa. Statutes, 1920. The first of these statutes above cited (P. L. 426) provided for the creation of Auxiliary Forest Reserves; the second statute above cited (P. L. 408) imposed on Auxiliary Forest Reserves an annual charge of two cents per acre for the benefit of schools; and the third statute above cited (P. L. 405) provided for the taxation of Auxiliary Forest Reserves on the principle that all surface land therein included "shall be rated in value for the purpose of taxation not in excess of one dollar per acre, and shall continue to be so rated so long as the said land remains within the class designated as Auxiliary Forest Reserves," with provision as to timber thereon about to be harvested, for a special yield tax at the rate of ten per centum of the value of the trees immediately at and before the time of harvesting.

The purpose of this legislation is clear from its general tenor and is expressly declared in Section 1 of the Act first above cited (P. L. 426) as follows:

"That in order to encourage the growing of such trees, now existing or hereafter produced, as will at the proper age be suitable for merchantable forest products, whether such be of natural reproduction or from seed sown, or trees planted out, or all combined,"

Section 2 of the same Act provides that when the State Forestry Reserve Commission (now the Department of Forests and Waters) receives notice from a land owner that he "desires" to have land classified as an Auxiliary Forest Reserve, if upon "consideration of this notice, the commission shall in its discretion, deem the condition such as to warrant action on its part to determine whether such land should rightfully be placed in the class established by Section 1 of this act, it shall cause the same to be examined by some person learned in the practice and principles of forestry and a report made thereon, and if, upon receipt and consideration of such report, it decides that such land should be placed in the class established by section one of this act, it shall so declare and certify." This language implies a very wide discretion in your Department in deciding whether or not to so classify the land. It implies no right whatever in the land owner to have any particular piece of land classified. The word used with respect to him is "desires." The words used with respect to your Department are "in its discretion," "deem the

conditions such as to warrant action," "whether such land should rightfully be placed in the class," "upon consideration of this notice," "upon consideration of such report," "if it decides that such land should be placed in the class."

In the exercise of its discretion your Department should have in view the purpose of the legislation, which was the growing of merchantable timber to maturity. The present intention of the present owner may be of little weight on the question, whether or not a crop of merchantable timber is likely to be grown upon the land in question. He may sell the land or by death it may pass to his heir or devisee, or he may change his mind.

It appears from your letter that the various tracts heretofore offered and accepted as Auxiliary Forest Reserves have been lands of a character to raise no question as to their having value for other than forest purposes, such as cultivation for grain or other food products, or as suburban lands having present or prospective value for residential purposes. "Now for the first time an application is before the Department \* \* \* for the listing, as an Auxiliary Forest Reserve, of a tract having considerable present and prospective value as suburban property, comprising about fifty-five acres located near Wynnwood Station on the Pennsylvania Railroad, having a present assessed valuation of \$650 per acre. The owner states that he has not been able to make the land pay for agricultural purposes, and he has no present intention of disposing of it for the location of suburban residences." He wishes to devote it exclusively to growing trees, and has planted it, under the advice of your Department, with young trees furnished by the Department, which have been examined and found to be doing well. You state that there is no question but that the land is admirably adapted to the growing of trees.

It should be borne in mind that this legislation gives an extraordinary exemption from the common burdens of taxation for the promotion of a public purpose, to wit, the growing to maturity of merchantable timber. It should be broadly construed with respect to the effectuation of that purpose but narrowly construed with respect to the advancement of private interests. There is a vast area of land in the Commonwealth chiefly valuable for the growing of merchantable timber. By the law as it existed before the enactment of this legislation for the establishment and taxation of Auxiliary Forest Reserves, growing timber upon such land in private ownership was subject to taxation each year upon its value as of that year, the growing timber being for this purpose a part of the realty. It was then the general opinion, and is now substantially the unanimous opinion of foresters, that the literal enforcement of such a system of taxation of growing timber would compel the cutting of the timber crop as soon as it acquired any substantial value, and

before it reached maturity. For this reason it was desired to substitute a yield tax upon the mature crop in place of an annual tax upon the full value of the growing timber, provided the land were put under conservative forest management, such as would reasonably insure the maturing of a crop of reasonable quantity and quality.

None of these purposes would be subserved by exempting from the normal burden of taxation suburban property having a value for residence purposes so great that its present or future owner could not reasonably afford to devote it to raising of merchantable timber.

The name used by this legislation for lands classified for taxation under it is significant. That name is "Auxiliary Forest Reserves." At the time the name was given to the land so classified, the name of the State forests was "Forest Reserves." The State Forest Reserves had been and are being created out of lands chiefly valuable for the growing of timber and having a very low market value, apart from the timber standing upon them, for other purposes. The term "Auxiliary Forest Reserves" in itself suggests that the land in view is of like quality with the land in the State "Forest Reserves" now known as State forests, that is to say, land chiefly valuable for tree growth.

You are advised that your Department has discretion, in declaring what land should be placed in the class established by Section 1 of the Act of June 5, 1913, P. L. 426 ("Auxiliary Forest Reserves") and in certifying to the Commission thereon, to refuse to so certify any land which is not, in the judgment of the Department, chiefly valuable for the growing of merchantable forest products.

Very truly yours,

DEPARTMENT OF JUSTICE

By PHILIP P. WELLS,  
*Deputy Attorney General.*

*Water Supply Commission—Change of name—Water and Power Resources Board—Administrative Code of June 7, 1923.*

The "Water Supply Commission" was not abolished by the Administrative Code of June 7, 1923, P. L. 498, but was continued under the name of "Water and Power Resources Board" in the "Department of Forests and Waters."

November 7, 1923.

Major R. Y. Stuart, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Dear Major Stuart: We are in receipt of your letter of October 13th, enclosing a copy of a letter which you received from the Auditor General declining to approve a requisition drawn against the appropriation made by Act No. 42-A of the 1923 Session to the Water Supply Commission for work on the Matamoras project. As we understand it, the Auditor General has taken the position that the Administrative Code of 1923 abolished the Water Supply Commission and that by reason of this fact the appropriation contained in Act No. 42-A lapsed.

The Administrative Code did not abolish the Water Supply Commission. All of the Departments, Boards, Commissions and Agencies which that Act abolished are specifically listed in Section 2 thereof. The Water Supply Commission is not named in that Section. On the contrary by reference to Section 202 of the Code it appears that the Legislature treated the Water Supply Commission as an existing body which was to be continued under a new name.

Section 202 provides that:

"The following \* \* \* \* Commissions \* \* \* \* are hereby placed and made Departmental administrative \* \* \* \* Commissions \* \* \* \* in the respective administrative departments mentioned in the preceding section as follows:

In the Department of Forests and Waters:

"Water Supply Commission of Pennsylvania hereafter to be known as Water and Power Resources Board."

Section 425 of the Code provides for the reorganization of the Water and Power Resources Board. After designating the persons who shall be members thereof and providing for the compensation of one of the members this section provides:

"The terms of the present members of the Water Supply Commission of Pennsylvania shall expire upon the date when this act becomes effective."



In passing it may be remarked that if the Water Supply Commission had been abolished by the Code the above sentence would have been unnecessary.

Section 1608 of the Code provides that:

“The Water and Power Resources Board shall have the power and its duty shall be:

(a) Subject to any inconsistent provisions in this act contained to continue to exercise the powers and perform the duties by law vested in and imposed upon the Water Supply Commission of Pennsylvania.”

with regard to eight enumerated classes of business which under existing law had been charged to the Water Supply Commission of Pennsylvania.

Section 2802 provides that:

“The provisions of this act so far as they are the same as those of existing laws shall be construed as a continuation of such laws and not as new enactments.”

Section 2807 of the Code provides, inter alia, that

“Unless expressly otherwise provided in this Act the appointive members of Departmental Administrative \* \* \* \* Commissions \* \* \* \* which are not abolished by this Act shall continue in office until the term for which they are respectfully appointed shall expire or until they shall die, resign or be removed from office.”

Section 2901 of the Code (at page 156 of the Advance Sheets of the Pamphlet Laws) repeals Section 1 of the Act of May 4, 1905, P. L. 385, which section created the Water Supply Commission of Pennsylvania.

Act No. 42-A of the 1923 Session appropriated \$3,000 to the Water Supply Commission of Pennsylvania to be used to pay the cost of work on the Matamoras Project. This Act was approved on June 14, 1923,—the day before the Administrative Code became effective.

The Auditor General's assertion that the Water Supply Commission was abolished by the Administrative Code is based exclusively upon the fact that Section 1 of the Act of 1905 is repealed. Whether or not the repeal of this Section resulted in abolishing the Water Supply Commission depends entirely upon the intention of the Legislature as expressed in the entire administrative Code of which the Repealer is but one Section. Except for the words “there is hereby created the Water Supply Commission of Pennsylvania” everything contained in Section 1 of the Act of 1905 is clearly

supplied by or inconsistent with the provisions of the Administrative Code. It was entirely appropriate, therefore, that the supplied or inconsistent provisions of the Act of 1905 should be repealed.

The only remaining question is whether by repealing the words quoted, notwithstanding any other provisions in the Administrative Code, the Code must be interpreted as having abolished the Water Supply Commission. The answer to this question is clearly in the negative.

The Water Supply Commission was on June 7, 1923 when the Administrative Code was approved an existing agency of the State Government. It is referred to in Section 202 of the Code as such. It was placed for purposes of fiscal control within the Department of Forests and Waters. Its name was changed. Its membership was modified and the terms of the appointive members of the Commission in office when the Code was passed were expressly terminated as of that date. The Legislature directed that the Commission under its new name should "continue" to perform certain functions theretofore performed by it.

These provisions of the Code clearly treat the Water Supply Commission as an agency which is to be continued and not abolished. The only purpose which is indicated by the repeal of the words "there is hereby created the Water Supply Commission of Pennsylvania" is to eliminate from the statute books an unnecessary provision—unnecessary because completely supplied by the provisions of the Code to which reference has just been made and which are quoted earlier in this opinion.

The appropriation to the Water Supply Commission for the Matamoras project was made after the Code was passed but before it became effective. Two Acts of the same Legislature dealing with the same subject must be given effect if at all possible. If there were any real doubt as to the question whether the Water Supply Commission was abolished or continued the fact that after the passage of the Code an appropriation to the Water Supply Commission was made would resolve such doubt against the view that the Commission was abolished.

You are accordingly advised that the appropriation contained in Act No. 42-A is available to the Water Supply Commission under its new name, to wit, Water and Power Resources Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

By WM. A. SCHNADER,

*Special Deputy Attorney General.*

*State Insurance Fund; liability for loss or damage to the steel scow in the custody of the Pennsylvania State Park and Harbor Commission, and owned by the Commonwealth of Pennsylvania—Act of May 14, 1915, P. L. 524.*

The State Insurance Fund, created by Act of May 14, 1915, is liable for any loss or damage to the steel scow in the custody of the Pennsylvania State Park and Harbor Commission and owned by the Commonwealth of Pennsylvania, and the Commission is not permitted to obtain an additional policy of insurance.

February 11, 1924.

Honorable R. Y. Stuart, Secretary of Forests and Waters, Harrisburg, Pa.

Sir: In your letter of the 19th instant to this Department you present the following facts:

"The Pennsylvania State Park and Harbor Commission of Erie, an administrative body in the Department of Forests and Waters, owns a steel scow equipped with a sixty (60) H. P. boiler and other machinery necessary for dredging purposes. This equipment is valued at \$11,000.00 and should be covered by fire and other insurance that will protect the Commonwealth against loss should the dredge be damaged or destroyed,"

and you make the following inquiry:

"Whether the Pennsylvania State Park and Harbor Commission is wholly protected by the State Insurance Fund Act of May 14, 1915, against loss or damage to the certain steel scow or dredge, owned by the Commonwealth of Pennsylvania and in their custody, by fire, storm or other agency?"

The Act of May 14, 1915, P. L. 524, created a State Insurance Fund "for the rebuilding, restoration and replacement of any structure, buildings, equipment, or other property owned by the Commonwealth of Pennsylvania, and damaged or destroyed by fire or other casualty." Section 3 of this Act is as follows:

"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 of the Act provides the method for reporting such loss or damage; and Section 7 provides that it shall be unlawful for any department, commission or other branch of the State Government, or any board of trustees or other custodians of State property, to

purchase any policy of insurance on any property owned by the Commonwealth for a term which shall extend beyond December 31, 1920.

By the plain wording of said Section 3 and the intention of the legislature therein clearly expressed, this scow or dredge in question which is the property of the Commonwealth of Pennsylvania is covered by the said State Insurance Fund for loss or damage by *fire*. But the problem arises under your question as to whether this scow or dredge is protected by said State Insurance Fund Act in case of loss or damage by storm or flood, which character of loss is quite possible because of its location on Lake Erie. Does the use of the words "or other casualty" in said Act include such a loss or damage?

In the new Standard Dictionary we find the definition of "casualty" as follows:

"That which occurs by chance; chance. Inevitable accident; an event not to be foreseen or guarded against."

In the case of *McCarty vs. New York & E. R. Co.*, 30 Pa. 247, 251, the Court says:

"'Casualty' like its synonyms 'accident' and 'misfortune', may proceed or result from negligence or other cause known or unknown."

In an opinion rendered by Deputy Attorney General Brown to Superintendent Boyd of Public Grounds and Buildings on April 25, 1923, in a case where a tornado or cyclone had damaged the hospital and other buildings of the State Hospital for the Insane at Norristown, Pennsylvania, he said that "the loss or damage suffered at Norristown was caused by such a casualty as is contemplated by the Act of 1915." I thoroughly agree with his opinion.

And so equally well in this case, damage to the scow or dredge by a storm or flood would be such a casualty as was intended to be covered by the State Insurance Fund Act.

In your inquiry you refer to loss by fire, storm or *other agency*. The only "other agency" that suggests itself to me in this connection is a loss from a collision. And we say likewise that damage to the scow from collision would be a casualty clearly within the intentment of the Act. But damage to third persons or their property as a consequence of a collision with the scow is an entirely different problem.

I am of the opinion, therefore, that any loss or damage to the steel scow in the custody of the Pennsylvania State Park and Harbor Commission and owned by the Commonwealth of Pennsylvania which

would result to it by fire, storm, flood or collision would be covered by the State Insurance Fund Act of May 14, 1915; and the Pennsylvania State Park and Harbor Commission is not permitted to purchase or obtain any policy of insurance covering this property from loss by casualties aforementioned.

Yours very truly, .

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,  
*Deputy Attorney General.*

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*Valley Forge Park Commission—Authority to expend revenues derived from three certain trust funds which, by decree of court and by wills, have come into the possession of the said Commission—Acts of July 3, 1895, P. L. 508, Section 2, and June 7, 1923, P. L. 498, Sections 503, 507, and 1613.*

The Valley Forge Park Commission may use the income accruing from the investment of said funds for the purposes specifically prescribed in the decree of the court and the bequests, respectively, subject only to the provisions of Sections 202, 503, 507 and 1613, of the Act of 1923, *supra*.

April 25, 1924.

Honorable Robert Y. Stuart, Secretary of Forests and Waters, Harrisburg, Pa.

Sir: The Department has received your favor of April 19, 1924, enclosing the letter of Judge R. H. Koch, Trust Officer of the Valley Forge Park Commission. You ask to be advised respecting the matters to which Judge Koch's letter refers.

As we understand the facts three trust funds have come into the possession of the Valley Forge Park Commission as follows:

(1) A fund awarded to the Commissioners of Valley Forge Park by decree of the Court of Common Pleas of Montgomery County to be used "to purchase, improve and preserve the lands and improvements thereon, occupied by General George Washington at Valley Forge, and maintain them as a memorial park for all time to come";

(2) A fund bequeathed to the Valley Forge Park Commission by the Will of Selden Twitchell, in trust, to invest the same and "to pay, expend, use and apply the net income therefrom when and as the same may be received, for the care and maintenance of said Valley Forge Camp Ground"; and

(3) A fund bequeathed to the Valley Forge Park Commission by said Selden Twitchell, in trust, to invest the same and "to pay, expend, use and apply the net income therefrom when and as the same may be received for the care and maintenance of said Washington's Head Quarters."

The Act of July 3, 1896, P. L. 508, Section 2, provides that the Commissioners of Valley Forge Park "be and are hereby authorized to accept, on behalf of the State, any gift or gifts of money or of lands contiguous or adjacent to the lands taken or to be taken for the said public park, and to be held and used for the purposes thereof."

Under Section 503 of the Administrative Code (Act of June 7, 1923, P. L. 498) in all matters involving the expenditure of money departmental administrative boards and commissions are made subject and responsible to the departments with which they are respectively connected. Under Section 202 of the same act, the Valley Forge Park Commission is designated a departmental administrative commission and placed within your department.

Section 507 of the same act provides that it shall be unlawful for any departmental administrative commission to purchase any furniture, materials or supplies except "any \* \* \* commissions which by law are authorized to purchase materials or supplies and pay for the same out of fees or other moneys collected by them or out of moneys appropriated to them by the General Assembly: Provided, That every such \* \* \* commission shall make its purchases through the Department of Property and Supplies as its purchasing agency."

You desire to be advised whether the revenues derived from the trust funds above-mentioned may be expended by the Valley Forge Park Commission or whether they must be turned into the State Treasury.

It is the opinion of this Department that the power given to the Valley Forge Park Commission under the Act of 1895 expressly authorizes the Commission to hold and use moneys donated or bequeathed to the Commission for the purposes of Valley Forge Park. Obviously such gifts or bequests when accepted by the Commission are accepted "on behalf of the State," as the Commission is a State administrative agency and the park which the Commission administers is State property. There is, however, no obligation upon the part of the Commission to turn into the State Treasury either the principal of or income from such gifts as the Commission is expressly authorized both to hold and use such gifts.

The Administrative Code expressly confirms the existing powers of the Valley Forge Park Commission except insofar as the Code contains inconsistent provisions. (Section 1613). Accordingly, in

expending revenue derived from the trust funds in question, the Commission must have the approval of your Department (Code, Section 503), and any purchases of materials or supplies to be paid for out of such revenue must be made through the Department of Property and Supplies as purchasing agent (Section 507). These are the only restrictions upon the pre-existing power of the Commission to employ the income from these trust funds for the purposes of the park as specified in the decree of the court and the will under which they have, respectively, come into the Commission's possession.

You are accordingly advised that the Valley Forge Park Commission may hold these funds and use the income accruing from their investment for the purposes specifically prescribed in the decree of the Court and the Twitchell will, respectively, subject only to the provisions of Sections 503 and 507 of the Administrative Code as we have applied them in this opinion.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

*Forests and Waters, Department of—Water and Power Resources Board—Jurisdiction of the Department and Board, respectively, to determine questions relating to waters—Authority of the Board to expend moneys originally appropriated to the Water Supply Commission—Acts of July 18, 1919, App. Acts, page 246; June 7, 1923, P. L. 498, Sections 1604, 1608, and 2803; June 14, 1923, P. L. 776.*

The Department of Forests and Waters does not have any powers or duties with respect to dams or water obstructions not yet completed. The powers and duties of the Water and Power Resources Board with respect to supervision over dams and other water obstructions in course of construction are the same as were those of the Water Supply Commission, abolished by the Code of 1923. The said Department, under Section 1604 of the Code, after the said Board has heard and determined matters relating to the safety of a dam and water obstruction and has found the same to be unsafe, may make any order which it is deemed necessary to make in the premises. The said Board will continue to perform the work connected with the Pymatuning, Lackawaxen, French Creek, and Matamoras projects, which was formerly conferred by earlier Acts upon the the Water Supply Commission. The appropriation contained in the Act of 1919, *supra*, as amended by Act of June 14, 1923, *supra*, to the Water Supply Commission, is now available to the Water and Power Resources Board, its successor. The said Department cannot use any appropriation made to the Water Supply Commission prior to the change of its name to the Water and Power Resources Board by the Act of June 7, 1923.

April 28, 1924.

Major R. Y. Stuart, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

**Sir:** We have your request to be advised upon the following matters:

1. The jurisdiction of the Water and Power Resources Board of the Department of Forests and Waters with respect to the construction and maintenance of dams.

2. The circumstances under which the Department of Forests and Waters can call upon the Water and Power Resources Board to hold hearings upon and determine questions relating to waters.

3. Whether the Department of Forests and Waters has taken over the duties formerly imposed upon the Water Supply Commission with respect to the Pymatuning, Lackawaxen, French Creek and Matamoras projects, and

4. Whether the Water and Power Resources Board can continue to expend the moneys reappropriated to the Water Supply Commission by the Act of June 14, 1923, P. L. 776.

We shall discuss these questions in the order in which they have been stated.



## I.

Section 1604 of the Administrative Code of 1923, P. L. 498 transferred from the Water Supply Commission to the Department of Forests and Waters a number of functions among which is the power and the duty:

"To investigate or examine dams and other water obstructions, determine whether they are unsafe, need repair, or should be removed, notify owners to repair or remove the same, remove the same in emergencies without notice and at the cost of the owners, and apply for injunctions to enforce compliance with, or restrain the violation of, the law in regard to the safety of dams or other water obstructions, or the violation of any lawful order or notice of the department in regard thereto."

This is the only power conferred upon the Department of Forests and Waters with respect to dams. All other powers to regulate the construction and maintenance of dams formerly exercised by the Water Supply Commission are still to be exercised by that body under its new name, to wit, Water and Power Resources Board.

Section 1608 of the Administrative Code gives the Water and Power Resources Board the same power theretofore exercised by the Water Supply Commission to regulate the construction and maintenance of dams by granting:

"Consents or permits for the construction of dams and other water obstructions or of any change therein or addition thereto, and consents or permits for changing or diminishing the course, current, or cross section of any stream or body of water."

The fact that the Board is not expressly authorized to inspect the work of construction and see that the persons or corporations to whom permits have been granted are complying with the conditions contained in the permits, does not prevent the Board from exercising these powers if they were formerly exercised by the Water Supply Commission. This will appear by reference to Section 2803 of the Code in which the Legislature specifically provided that the enumeration of the powers and duties of any executive agency shall not be construed to be in derogation or limitation of the powers and duties heretofore performed by such board or commission unless (a) any power or duty as enumerated and defined in the Code is clearly inconsistent with the exercise of the power or the performance of a duty heretofore exercised or performed, or (b) there is a specific statement in the Code that a power or duty heretofore exercised or performed shall be no longer exercised or performed by such board, or that such power or duty shall be exercised in a different manner.

The Department of Forests and Waters has heretofore been advised by this Department that the Water and Power Resources Board is not a new Board but the continuation of the Water Supply Commission under a reorganization and a new name.

You are accordingly advised that the Department of Forests and Waters does not have any powers or duties with respect to dams or water obstructions not yet completed; and that the powers and duties of the Water and Power Resources Board with respect to supervision over dams and other water obstructions in course of construction are the same as were those of the Water Supply Commission prior to the passage of the Administrative Code.

## II.

Section 1608 (a) of the Administrative Code specifically requires the Water and Power Resources Board to continue to hold hearings upon certain subjects which have always been within the jurisdiction of the Water Supply Commission. Section 1608 (b) empowers and requires the Board "to hold hearings upon and decide any other matter or thing relating to waters which may be within the jurisdiction of the Department of Forests and Waters and which the Secretary of Forests and Waters may request the Board to hear and determine." It is quite evident that Clause (b) of Section 1608 authorizes the holding of hearings on subjects other than those mentioned in Clause (a) of the same section. The Board does not, however, have the power to hold hearings upon any subject not specifically mentioned in Clause (a) without a specific request from the Secretary of Forests and Waters asking the Board to hear and determine a particular matter.

It is our opinion that it would be unlawful for the Secretary of Forests and Waters to make a general request asking the Water and Power Resources Board to take up all matters within the jurisdiction of the Department of Forests and Waters relating to waters. This would virtually be transferring from the Department of Forests and Waters to the Water and Power Resources Board the powers and duties which the Legislature has granted to and imposed upon the Department.

After the Secretary of Forests and Waters has asked the Water and Power Resources Board to hear and determine a matter relating to the safety of a dam or water obstruction and the Water and Power Resources Board has found the dam or water obstruction to be unsafe any order which it is deemed necessary to make in the premises should be made by the Department of Forests and Waters under Section 1604 (b) of the Code.

## III.

Section 1604 (g) of the Administrative Code authorizes and empowers the Department of Forests and Waters "to construct, maintain and operate works for water storage, flood control, channel improvement, or other hydraulic purposes."

This is a power not formerly conferred upon the Water Supply Commission. It is general in character and could not possibly be held to transfer to the Department of Forests and Waters the specific powers conferred by earlier Acts upon the Water Supply Commission to embark upon the Pymatuning, Lackawaxen, French Creek and Matamoras projects. The work on these projects authorized by earlier Acts of Assembly to be performed by the Water Supply Commission must continue to be performed by the body now called the Water and Power Resources Board. Section 1604 (g) of the Administrative Code merely grants general powers to the Department of Forests and Waters which cannot become effective until the Legislature by supplemental action has appropriated funds to the Department to enable it to carry on work of the kind mentioned in that provision of the Code.

## IV.

The Act of June 14, 1923, P. L. 776 amended the Act of July 18, 1919 (Appropriation Acts, page 246) by providing that nothing contained in any Act of Assembly lapsing appropriations to the general fund of the State Treasury at the end of the current fiscal year should be construed as affecting the appropriation made by the Act of 1919 which the Legislature declared "shall continue appropriated and be available for the purposes for which appropriated and re-appropriated." This Act was approved after the approval of the Administrative Code. If there were the slightest doubt about the Legislature's intention that the Water and Power Resources Board should be, under the Code, a continuation without interruption of the Water Supply Commission this Act would dispel such doubt. The Administrative Code became effective on June 15, 1923, the day following the approval of the Act now under discussion. On June 14, therefore, the name of the Water Supply Commission had not yet been changed to Water and Power Resources Board. The Legislature intended when it passed the Act of June 14 to continue to have available during the present biennium the funds reappropriated to the Water Supply Commission by the Act of 1919. It knew that on the 15th day of June 1923 the name of the Water Supply Commission was being changed to Water and Power Resources Board. There is nothing in the Administrative Code preventing the Legislature's intention as expressed in the Act of June

14th from being carried out, and you are accordingly advised that the appropriation contained in the Act of 1919 as amended by the Act of June 14, 1923 is now available to the Water and Power Resources Board. It is equally clear that the Department of Forests and Waters cannot make use of this or any other appropriation made to the Water Supply Commission prior to the change of its name to Water and Power Resources Board.

Very Truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,  
*Special Deputy Attorney General.*

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*Water Supply Commission of Pennsylvania—Appropriation to by Act of May 22, 1923, P. L. 305—Availability to the Water and Power Resources Board Acts of May 22, 1923, P. L. 305; July 25, 1913, P. L. 1270.*

The appropriation made to the Water Supply Commission by Act of 1923, *supra*, is now available to the Water and Power Resources Board, the successor to the Water Supply Commission.

June 14, 1924.

Major R. Y. Stuart, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Sir: You have requested to be advised whether the appropriation made by the Act of May 22, 1923, P. L. 305 is available to the Water and Power Resources Board.

By reference to the Act in question it appears that the Water Supply Commission or its successors in authority were authorized to make sale of certain property of the Commonwealth outside the basin of the Pymatuning Reservoir and to cut and sell timber, sell improvements on and rent or lease any part or parts of said lands. All the moneys derived from any of these sources were "permanently appropriated to the Water Supply Commission of Pennsylvania for use in the purchase of additional lands under the provisions of the Act to which this is a supplement and for such other purposes in connection with the Pymatuning Reservoir Project as the Commission deems expedient." The Act to which the Act of 1923 is a supplement is the Act of July 28, 1913, P. L. 1270.

There is not the slightest difference between this case and the case of the appropriation made by the 1923 Legislature by Act No. 42-A to the Water Supply Commission for work on the Matamoras

Project. You were advised by this Department under date of November 7, 1923, that the appropriation for the Matamoras Project is available to the Water and Power Resources Board, and you are accordingly now advised that the appropriation contained in the Act of May 22, 1923 is available to the Water and Power Resources Board for the reasons stated in our Matamoras Project opinion.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*Forests and Waters, Department of—Authority of Secretary to requisition for payment of the unexpended balances of the several appropriations made to the Water Supply Commission for the improvement of French Creek—Water and Power Resources Board—Acts of July 25, 1917, P. L. 1191; July 18, 1919, App. Acts, page 247; May 27, 1921, App. Acts, page 300; Act No. 42A, of 1923; June 7, 1923, P. L. 498; Article I, Section 10, of the Federal Constitution.*

The Act of June 7, 1923, did not abolish the Water Supply Commission, but reorganized and continued it under the name of the Water and Power Resources Board. The Secretary of Forests and Waters should requisition for the unexpended balances of the several appropriations made to the Water Supply Commission for the improvement of French Creek, which balances are now available to the Board.

June 14, 1924.

Major R. Y. Stuart, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the unexpended balances of the several appropriations made to the Water Supply Commission for the improvement of French Creek are available to the Water and Power Resources Board and if so upon whose requisition.

The French Creek Improvement Project was initiated by the Act of July 25, 1917, P. L. 1191, which authorized the Water Supply Commission to deepen, widen and improve French Creek in the City of Meadville and in certain townships of Crawford County. Twenty-five thousand dollars (\$25,000) was appropriated for the purpose on condition that citizens and corporations of the City of Meadville and County of Crawford should contribute a like amount for the project. Payment of moneys appropriated by the State was to be

on order of the Chairman of the Water Supply Commission countersigned by the Secretary and accompanied by itemized and verified vouchers and upon warrant of the Auditor General.

The citizens of Meadville and Crawford County subscribed and paid to the Water Supply Commission the twenty-five thousand dollars (\$25,000) upon which the State's appropriation was conditioned.

The 1919 Legislature by Act of July 18, 1919, (appropriation Acts, page 247) appropriated an additional twenty-five thousand dollars (\$25,000) to the Water Supply Commission for continuing the Project authorized by the Act of 1917; and by the Act of May 27, 1921 the unexpended balances of both the 1917 and 1919 appropriations were reappropriated to the Water Supply Commission (1921 Appropriation Acts, page 300). The Act of 1921 repeated without change the provision specifying the manner of withdrawing from the State Treasury the moneys appropriated.

On June 15, 1923,—the effective date of the Administrative Code,—the name of the Water Supply Commission was changed to Water and Power Resources Board, the Board was reorganized, and the former functions of the Water Supply Commission were divided between the Commission under its new name and the Department of Forests and Waters. We have already advised you in an opinion rendered November 7, 1923 that the Administrative Code did not abolish the Water Supply Commission but merely reorganized and continued it under a new name and that the appropriation to the Water Supply Commission made by Act No. 42-A of the 1923 Session for the Matamoras Project was available to the Water and Power Resources Board. That opinion is applicable to your present inquiry as well. There is, however, an additional element involved in the French Creek situation, in that the contribution of twenty-five thousand dollars (\$25,000) by citizens and corporations of Meadville and Crawford County was made upon the faith of the Act of 1917 appropriating a like amount if the citizens and corporations mentioned contributed the said twenty-five thousand dollars (\$25,000). The Act of 1917 is plainly a contract between the Commonwealth and the citizens and corporations which contributed their money on the faith of the Act. That being so, the Legislature could not by express repealer have rendered the appropriation of twenty-five thousand dollars (\$25,000) unavailable for the French Creek Project. Article I, Section 10 of the Federal Constitution would have rendered such an effort by the Legislature a nullity. The Legislature did not, however, attempt such a result, but on the contrary expressly continued the existing Water Supply Commission without in any way disturbing its right to expend the appropriations made to it by previous Legislatures.

One question remains, namely, whether requisitions awarded the French Creek appropriation should be drawn by the Chairman of the Water and Power Resources Board and countersigned by its Secretary as provided by the Acts of 1917 and 1921. You are advised that Section 223 of the Administrative Code established a new and different procedure in this and all similar cases for the withdrawal of money appropriated to departmental administrative boards and commissions of which the Water and Power Resources Board is one. That section provides that "all warrants for the payment of salaries, compensation or other disbursements of or for departmental administrative boards or commissions shall be withdrawn upon requisition of the head of the Department with which such departmental administrative boards or commissions are connected." This provision supersedes the provisions of the Acts of 1917 and 1921 with regard to the method of withdrawing the moneys appropriated and reappropriated by those acts.

Accordingly you are advised that you should draw requisitions against the appropriations in question as head of the Department of Forests and Waters.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*Lake Erie and Ohio River Canal Board—Appropriation to—Availability by reason of provisions contained in the Administrative Code, approved June 7, 1923—Act No. 36A, approved May 28, 1923, App. Acts. page 28; Act of June 8, 1891, P. L. 217; June 6, 1893, P. L. 300; February 11, 1895, P. L. 4; June 27, 1913, P. L. 652; June 17, 1915, P. L. 990; No. 36A, approved May 28, 1923, App. Acts, page 28; June 7, 1923, P. L. 498, Sections 202, 223, 427, 1610, 2807, 2961.*

The Lake Erie and Ohio River Canal Board was not abolished by Act of June 7, 1923. It continues to exist, subject to the reorganization effected by said Act. It is the same Board to which the Legislature of 1923 made an appropriation. The expenses of the Board are payable out of the unexpended balances of the said appropriation upon requisition of the Secretary of Forests and Waters, with which the Board is connected.

June 23, 1924.

Honorable R. Y. Stuart, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether the appropriation to the Lake Erie and Ohio River Canal Board contained in Act No. 36-A,

approved May 28, 1923 (Appropriation Acts, P. L. 28) lapsed by reason of the provisions contained in The Administrative Code approved June 7, 1923, P. L. 498.

By the appropriation act to which you refer, the sum of five thousand dollars (\$5,000) was appropriated "to the use of the Lake Erie and Ohio River Canal Board of Pennsylvania, created by the Act of Assembly, approved June twenty-seventh, one thousand nine hundred and thirteen" (P. L. 652), for various purposes enumerated in the Act. The act further provides that:

"All expenditures of the board shall be made in the manner provided in the eighth section of said act, approved June twenty-seventh, one thousand nine hundred and thirteen (Pamphlet Laws, six hundred fifty-two)."

The Board in question was created by Section 2 of the Act of 1913 which provided for the appointment of five members by the Governor, by and with the advice and consent of the Senate, two of whom may be non-residents of the Commonwealth of Pennsylvania. The Act of June 17, 1915, P. L. 990 amended this section by providing for a board of not less than five members or more than seven members, three of whom may be non-residents.

Section 202 of the Administrative Code placed the Lake Erie and Ohio River Canal Board within the Department of Forests and Waters. Section 427 provided that the Board should consist of the Secretary of Forests and Waters ex officio and seven members three of whom may be non-residents of Pennsylvania. Section 2807 continued existing members of the old Board in office "until the term for which they were respectively appointed shall expire, or until they shall die, resign or be removed from office." Section 2901 repealed Section 2 of the Act of 1913 and that part of the Act of 1915 which amended it.

Section 1610 of the Code provides that:

"Subject to any inconsistent provisions in this act contained, the Lake Erie and Ohio River Canal Board shall continue to exercise the powers and perform the duties by law vested in and imposed upon the said Board."

Section 2802 of the Code provides that:

"The provisions of this Act so far as they are the same as those of existing laws shall be construed as a continuation of such laws and not as new enactments."

The provisions of the Acts of 1913, 1915 and 1923 to which we have referred, make it clear that the Lake Erie and Ohio River Canal Board was not abolished by the Administrative Code. The Board



continued to exist, subject only to the reorganization effected by the Code. This reorganization made the Secretary of Forests and Waters an ex officio member of the Board upon the effective date of the Code, and fixed the membership of the Board definitely at seven members instead of a minimum of five and a maximum of seven. Old members of the Board continued to serve under their old commissions, and only as vacancies occur will the new appointments be made under the Code.

In view of this situation the Board now existing is the same Board to which on May 28, 1923 the Legislature appropriated five thousand dollars (\$5,000).

An identical case arose during the administration of Governor Hastings. The Banking Department was created by the Act of June 8, 1891, P. L. 217. By the Act of June 6, 1893, P. L. 300 an appropriation was made for the maintenance of the Banking Department for the bienniums ending May 31, 1895. By the Act of February 11, 1895, P. L. 4 a new Banking Department was created, and the Act of 1891 was repealed. Deputy Attorney General John P. Elkin in an opinion citing numerous authorities, ruled that the appropriation of 1893 was available for the payment of expenses of the new Banking Department. That opinion distinctly rules the instant case and is hereby reaffirmed. (See Attorney General's Report, 1895-6, p. 45).

The only remaining question is whether the reference in the Appropriation Act of 1923 to Section 8 of the Act of 1913 and the subsequent repeal of Section 8 of the Act of 1913 by Section 2901 of the Code, renders the appropriation inoperative.

Section 8 of the Act of 1913 provides that expenses of the Board "When properly certified upon voucher by the treasurer and countersigned by the president of the board, shall be audited by the Auditor General; and when audited and allowed shall be paid out of moneys herein specifically appropriated for this purpose by warrants drawn therefor by the Auditor General upon the State Treasurer."

The requirement of the Act of 1923 that all expenditures be made in this manner is procedural only. It is not an inseparable part of the appropriation itself.

Section 223 of the Administrative Code provided a different procedure for the payment of all moneys appropriated to departmental administrative boards of which this Board is one. Very properly, inconsistent provisions in prior acts were repealed expressly. One of these inconsistent provisions was Section 8 of the Act of 1913. The inconsistent provision contained in the Act of May 28, 1923 was nullified by Section 2902 of the Code which repealed "all other acts or parts of acts inconsistent herewith \* \* \* including all acts

or parts of acts inconsistent herewith enacted at this session of the General Assembly and approved by the Governor \* \* \* prior to the passage of this act."

Clearly, therefore, the expenses of the Lake Erie and Ohio River Canal Board are payable out of the appropriation of May 28, 1923, upon your requisition as head of the Department of Forests and Waters with which the Board is connected.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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## OPINIONS TO THE GAME COMMISSION

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## OPINIONS TO THE GAME COMMISSION

*Board of Game Commissioners—Authority to use the funds in the game fund for certain specified purposes—Acts of May 24, 1923, P. L. 359, Article XII and Act of June 7, 1923, P. L. 498, Section 216 and 223.*

The Board of Game Commissioners are entitled to receive the funds in the game fund upon advance requisition, and to use such funds for all of the purposes specified in Section 1201 of the Game Law of 1923 except for the payment of salaries of the officers and employes of the board.

August 25, 1923.

Honorable Seth E. Gordon, Secretary, Board of Game Commissioners, Harrisburg, Penna.

Sir: Your letter of August 3, requesting an opinion with regard to the interpretation to be placed on Article XII of "The Game Law" of 1923 (Act No. 228 approved May 24, 1923) and of sections 216 and 223 of "The Administrative Code" (Act No. 274 approved June 7, 1923), is before us.

Section 1201 of The Game Law provides, inter alia, that:

"All licenses, fees, fines and other moneys received and collected (a) under the provisions of any law repealed and replaced by this Act, \* \* \* \* or (b) that may be hereafter paid into the State Treasury under the provisions of any Act so repealed or re-placed, or (c) that may be paid into the State Treasury under the provisions of this Act shall be placed in a separate fund to be known as 'The Game Fund' and shall be held separately and apart solely for the purposes of the payment, under the supervision of the Board, (a) of the salaries and expenses of the officers and employes of the Board and contingent office expenses, (b) for wild bird, game, and fur-bearing animals protection and propagation. (c) for the purchase of game for propagation and stocking purposes, (d) for feeding game and wild birds, (e) for the creation, acquisition, maintenance, and administration of hunting grounds and game refuges, (f) for the purchase of other lands and buildings and for the erection of buildings, (g) for the purchase and maintenance of equipment, (h) for control of vermin, the payment of bounties, and expenses in connection therewith, (i) for the payment of all, or any part of, the cost of any printing, posters, notices, tags, badges, buttons, and such other like materials as, in the opinion of the Board, may be necessary to its work, (j) for the refund of fines erroneously collected and deposited \* \* \* \*

"All such moneys placed in the game fund under the provisions of this section are hereby made available immediately, and are hereby specifically appropriated to the Board, for the purposes herein specified."

Section 1202 is as follows:

"The money in such fund shall be paid to the use of said board monthly in advance, upon requisition by its secretary.

"The Auditor General shall upon requisition, from time to time, of the secretary of the board, and the proper accounting for moneys already advanced from the fund, draw his warrant upon the State Treasurer for the amount specified in such requisition, not exceeding, however, the amount in such fund available for the purposes before specified at the time such requisition is made."

Standing alone the meaning of these sections is clear and free from any doubt. They create a special fund in the State Treasury for the use of the Board of Game Commissioners, appropriate the fund specifically to the Board for the purposes set forth and require the Auditor General upon requisition of the Secretary of the Board to draw his warrant upon the State Treasurer for the payment to the use of the Board of the money in the fund monthly in advance.

The payment of the money in this fund to the use of the Board of Game Commissioners monthly in advance is not discretionary on the part of the fiscal officers of the State but is mandatory. The only limitation placed upon the honoring of Advance Requisitions is that the fiscal officers shall not pay to the Board an amount in excess of the amount in the fund available at the time the requisition is made and that the Auditor General shall not be required to draw a warrant upon the State Treasurer for an Advance Requisition until there has been the proper accounting for moneys already advanced from the fund.

The question arises whether the provisions of Sections 216 and 223 of the Administrative Code in any way modify the provisions of Section 1201 and 1202 of the Game Law.

Section 216 of the Administrative Code provides:

"The \* \* \* members of independent administrative Boards and Commissions \* \* \* and all persons employed under the provisions of this Act, shall be entitled to receive their traveling and other necessary expenses, actually incurred in the performance of their public duties, upon requisition of the head of the \* \* \* appropriate independent administrative Board or Commission."

Section 223 of the Administrative Code provides that:

"All salaries and other compensation, payable under the provisions of this Act, shall be paid out of the State Treasury upon the warrant of the Auditor General drawn upon the State Treasurer. The Auditor General shall draw warrants for salaries or other compensation upon requisition of \* \* \* the proper independent administrative Board or Commission \* \* \*."

It is quite evident that there is not anything in Sections 216 and 223 of the Administrative Code which conflicts with the right of the Secretary of the Board of Game Commissioners to draw advance requisitions to be used for purposes (b) to (j) inclusive as specified in Section 1201 of the Game Law. Purpose (a) as specified in Section 1201 is the payment "of the salaries and expenses of the officers and employes of the Board and contingent office expenses." It is between this purpose for which the Game Fund might otherwise be used and Sections 216 and 223 of the Administrative Code that a conflict exists, if there is any conflict.

Section 216 of the Administrative Code does not cover "contingent office expenses." Such expenses may, therefore, be paid out of funds advanced under Section 1202 of the Game Law.

Section 216 of the Administrative Code does apply to expenses of the officers and employes of the Board. It provides that such expenses shall be paid upon requisition of the appropriate independent administrative Board or Commission. This language in no sense excludes the possibility of having expenses paid out of funds advanced to the Board of Game Commissioners upon requisitions as provided in Section 1202 of the Game Law. Section 216 of the Administrative Code does not require expenses to be paid upon Direct Requisitions nor does it explicitly prohibit Advance Requisitions. Under the rule of interpretation laid down by our Supreme Court in numerous cases, the latest of which is *Buttorff et al. vs. York City et al.* 268 Pa. 143 (1920) statutes enacted at the same Session of the Legislature, if they deal with the same subject matter, are to be construed together. It is only if there is an irreconcilable conflict between the two that the earlier enactment must give way to the later. If Section 1201 and 1202 of the Game Law and Section 216 of the Administrative Code were contained in the same statute there would be no irreconcilable conflict between their provisions. Expenses actually incurred by employes of the Board of Game Commissioners are paid upon requisition of the Board even though the requisition calls for the payment of moneys to the Board in advance, the Board at a later date to give to the Auditor General the proper accounting for moneys so advanced.

You are advised, therefore, that funds received by your Board, upon Advanced Requisition may be used for the payment of expenses of the officers and employes of the Board.

The one remaining question is whether Section 223 of the Administrative Code prevents the use of funds advanced to your Board for the payment of the salaries of the officers and employes of the Board. It is our opinion that when the Legislature in Section 223 of the Administrative Code provided that all salaries and other compensation payable under the provisions of the Code should be paid out of the State Treasury upon the warrant of the Auditor General drawn upon the State Treasurer, it intended that prior to the payment of any salaries out of funds in the State Treasury there should be the customary settlement of accounts by the Auditor General and State Treasurer prior to the issuance of the warrants. This could not be accomplished if salaries and other compensation were payable out of funds advanced. It can be accomplished only by having salaries and other compensation payable by the check of the State Treasurer after the issuance of a warrant in the manner prescribed by the Act of March 30, 1811 and consistently followed since that date.

You are, therefore, advised that you cannot pay salaries out of funds advanced to you.

To summarize it is our opinion that your Board is entitled to receive the funds in the Game Fund upon Advance Requisition and to use the funds so received for all of the purposes specified in Section 1201 of the Game Law except for the payment of salaries of the officers and employes of the Board.

In view of this opinion it would seem advisable that you should not at any time exhaust the Game Fund through Advance requisition. You should always permit a sufficient amount of the fund to remain in the State Treasury to enable the State Treasurer to meet your semi-monthly pay rolls.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

*Game Commissioners—Board of—Authority to obtain aluminum enameled hunters' license tags, in lieu of the present printed tags, which are unsatisfactory. (Acts of February 7, 1905, P. L. 3; May 11, 1911, P. L. 210; July 23, 1919, P. L. 1128; and May 24, 1923, P. L. 359, Sections 306 and 1201.)*

The Board may obtain aluminum enameled hunters' license tags for the year 1924, without infringing upon the contract with the State Printer, who formerly printed these tags.

June 30, 1924.

Honorable Seth E. Gordon, Executive Secretary, Board of Game Commissioners, Harrisburg, Pa.

Sir: Recently you informed me that the Board of Game Commissioners, being dissatisfied with the legibility and wearing qualities of the hunter's license tags as they have been delivered during the past years, proposed to have an aluminum enameled hunter's license tag. You request an opinion as to whether or not such a proceeding was justified under the law.

I understand that you intend to have this tag made out of aluminum, the letters and figures to be stamped thereon by metal stamps, the whole to be covered by paint and to be baked in an oven, in other words, that it is an enameling job similar to that of the automobile license tag. You have submitted samples of the same to me and have presented opinions of certain printing experts, as also that of the Acting Director of Publications, to the effect that this proposed tag is in no sense a printing job.

You state that the proposed tag is superior to any tag that can be printed in its wearing qualities and in the legibility of the letters and figures impressed thereon. You also state that you can obtain these aluminum, resident and non-resident hunters' license tags, including all materials and labor, for approximately \$12,000 for the season of 1924, whereas the cost of the printed tags, including materials, would be approximately \$40,000.

Section 306 of the Act of May 24, 1923 P. L. 359, authorizes and directs your board to furnish free of charge with each hunter's license, a tag bearing the license number. Section 1201 of said Act establishes the game fund and appropriates the same inter alia for the payment of all or any part of, the cost of any printing, posters, notices, tags, badges, buttons and such other like materials as, in the opinion of the Board, may be necessary to its work.

Under authority of the Act of February 7, 1905, P. L. 3, and its amendment of May 11, 1911, P. L. 210, and of July 23, 1919, P. L. 1128, the designated officers of the Commonwealth entered into a contract with J. L. L. Kuhn, dated February 23, 1921, whereby all the printing, binding and other work generally executed in a printing and binding establishment for the Commonwealth was to be sub-



mitted to and done by the said Kuhn. The stamping and enameling of the hunter's license tags on aluminum, as proposed, is not, however, printing or binding or other work generally done in a printing establishment.

I am of the opinion that you would be legally correct if you should have these hunter's license tags, both resident and non-resident for the year 1924, manufactured as above outlined, and that the manufacture of such tags is not included within the terms of the said Kuhn Contract, and that you are authorized to contract for the manufacture of them as aforesaid with the lowest and best bidder.

This opinion confirms the verbal opinion given to you before you had made any positive commitments in this matter.

Yours truly,

DEPARTMENT OF JUSTICE,

By GEORGE W. WOODRUFF,  
*Attorney General.*

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## OPINIONS TO THE GOVERNOR

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## OPINIONS TO THE GOVERNOR

*Constitutional Law. Article III. Sections 3, 15, 17, 18 and 19 of the State Constitution. The term "ordinary expenses" as used in the General Appropriation Bills (House Bills Nos. 81 and 82) introduced January 29, 1923 and in the Special Appropriation Bills introduced on the same day (House Bills Nos. 83-111 inclusive) defined. Constitutionality of appropriations made by the State Legislature "in lump sums" in the General and Special Appropriation Bills under consideration.*

The General Appropriation Bills of 1923 (House Bills Nos. 81 and 82) appropriate only for the "ordinary expenses" of the government and are clearly constitutional. Each of the thirty Special Appropriation Bills under consideration are within the constitutional requirement that all appropriations not providing for the "ordinary expenses" of the government, "shall be made by Special Bills, each embraced by one subject." The objection raised to "lump sum appropriations" provided for in the bills under consideration is purely a legislative one having no constitutional aspect whatever; the "lump sum" feature of the thirty bills under consideration is constitutional.

February 26, 1923.

Honorable Gifford Pinchot, Harrisburg, Penna.

Dear Sir: At your request I hereby supplement my verbal opinion on the constitutionality of the appropriation bills introduced in the House of Representatives, January 29, 1923, to put into effect the budget for the Biennium beginning June 1, 1923; and on account of the great volume of bills involved the opinion will be confined to the following questions:

1. Are the general appropriation bills introduced January 29, 1923 (House Bill No. 81 and its supplement No. 82) within the Constitution, as providing only "for the ordinary *expenses* of the executive, legislative and judicial departments of the Commonwealth, interest on the public debt and public schools"?

2. Are the special appropriation bills introduced in the House of Representatives January 29, 1923 (House Bills No. 83 to No. 111 inclusive) constitutional in that said appropriations are "made by separate bills *each embracing but one subject*"?

3. Is it constitutional for the Legislature to appropriate *lump sums*, each lump sum in the General Appropriation Bills to cover a number of items of "ordinary" administrative expense, or the maintenance of State institutions clearly of the same class, and in the Separate Special Appropriation Bills to cover *extraordinary* administrative expenses, or assistance to State Aid Institutions of clearly the same class.

A. *The following are sections of Article III of the Constitution of the Commonwealth of Pennsylvania and comprise all constitutional provisions affecting and controlling the answers to the above questions:*

“Section 3. No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title.”

(Note that this Section 3 is completely replaced as far as appropriation bills are concerned by the following section 15, and can therefore be ignored.)

“Section 15. The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the Commonwealth, interest on the public debt and for public schools; all other appropriations shall be made by separate bills, each embracing but one subject.”

(Note that, as far as the preparation of appropriation bills is concerned, this Section 15 alone practically controls the answers to the above questions.)

“Section 17. No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each House.”

(Note that this Section merely makes it *advisable* to put the class of appropriations which must receive a “vote of two-thirds” in a bill separate from the general appropriation bills which may be passed by a majority only.)

“Section 18. No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association.”

(This Section merely makes it necessary to examine the beneficiaries to whom appropriations are made to see whether any one of them is a “denominational or sectarian institution, corporation or association.”

“Section 19. The General Assembly may make appropriations of money to institutions wherein the widows of soldiers are supported or assisted, or the or-

phans of soldiers are maintained and educated; but such appropriations shall be applied exclusively to the support of such widows and orphans."

(Note. The constitutionality of some appropriations might be determined by this Section, but only because of matters of fact which will not be touched upon in this opinion.)

### B. *General Principles.*

1. "The Legislature possesses all legislative power except such as is prohibited by express words or necessary implication" (67 Penna. 165). "In construing the Constitution of the State, whatever is not expressly denied to the Legislative power is possessed by it." (58 Penna. 345). Of like tenor are: 17 Penna. 119; 19 Penna. 260; 21 Penna. 164; 52 Penna. 477; 205 Penna. 19.

2. In interpreting the Constitution we must presume that words have been employed in their natural and ordinary meaning. Chief Justice Marshall says that the framers of the Constitution and the people who adopted it "must be understood to have employed words in their natural sense, and to have intended what they have said." (Gibbons vs. Ogden, 9 Wheaton, 188). "It seems so obvious a truism that one expects to see it universally accepted without question."

3. "The object of construction as applied to a written constitution is to give effect to the intent of the people adopting it." (Cooley's Constitutional Limitations, page 89, and the cases there cited).

4. We must not confuse the question as to whether a method of appropriation ("Lump Sum" or the like) is practically the best method to adopt, with the question as to whether that method is permitted or prohibited by the Constitution.

### C. *General Appropriation Bill (No. 81).*

This Bill provides "for the ordinary expenses of the executive, judicial and legislative departments of the Commonwealth, interest on the public debt and the support of the public schools for the two fiscal years beginning June 1, 1923."

Section 3, Article III, of the Constitution excepts general appropriation bills from the rule "no bill shall be passed containing more than one subject;" Section 15, Article III, confines the General Appropriation Bill to the "ordinary expenses" of the Government. Upon examination of Bill No. 81 we find that it purports to appropriate only for said "ordinary expenses." This, if true, establishes *prima facie* that the bill is a general appropriation bill and in accord with Section 15 of Article III of the Constitution. The *prima facies* having been established, I have examined the Bill beginning with the appropriation for the "Executive Department" on page 2 thereof

and ending with the appropriation for "Interest on Funded Debt and Miscellaneous Appropriations" on pages 659 to 661, inclusive, and have found no item of appropriation for other than the same class of expenses which were appropriated for in the General Appropriation Bills of the Session of 1921 and theretofore over a period of many years. In other words, the same "expenses of the executive, legislative and judicial departments of the Commonwealth, interest on the public debt and for public schools" are provided for by appropriation in this bill as have *ordinarily* been provided for in previous years over a long term.

Let us now see whether the expenses discussed above are "*ordinary expenses*" of the governmental departments and interests involved. Attorney General Bell, in his opinion to the Auditor General given November 11, 1913, discusses this question and shows by quotation from the Pennsylvania Supreme Court decision in *Commonwealth vs. Gregg*, 161 Pa. 482, that appropriation for the regular and ordinary work of any of the legislative, judicial or executive departments or officers, is an appropriation for "*ordinary expenses*," and further, by quotation from *Brown vs. City of Corry*, 175 Pa. 528, that:

"Any expense that recurs with regularity and certainty \* \* \* may well be called an 'ordinary expense';"

also that in "Words and Phrases Judicially Defined," Vol. 6, p. 5027, it is brought out that the significance of the word "*ordinary*" in statutes is "regular; according to established order; common; usual; often recurring."

Turning once more to the various appropriations found in said House Bill No. 81, it will be seen that the above definition of "*ordinary expenses*," fits all of the appropriations in said General Appropriation Bill; because all these appropriations are, as far as the history of General Appropriation Bills is concerned, "regular; according to established order; common; usual; often recurring," and are appropriated "to pay for part of the regular and ordinary work of the Department in question."

Appropriations heretofore have sometimes provided in separate special bills for the "*ordinary expenses*" of certain State work and State institutions like insane asylums, homes for the feeble-minded, etc., owned and operated *entirely* by the State and created by special statutes. The expenses incurred in the administration, operation and maintenance of such activities and institutions are "part of the regular and ordinary work" of the executive departments having charge. They are expenses contemplated by laws previously enacted by the Legislature. They are expenses which will continue to be appropriated for until the present attitude of the State Government is substantially changed, and until the statutes upon which they are

based are repealed. Therefore, they are "*ordinary expenses*" of the government and according to said Section 15, Article III, of the Constitution may be included in the General Appropriation Bill.

It is evident that every subject proper under the Constitution to be included in the General Appropriation Bill might be provided for in a special bill covering one subject. The Constitution does not forbid leaving "*ordinary expenses*" out of the General Appropriation Bill. It merely forbids putting any but "*ordinary expenses*" in that Bill. Moreover, the Legislature, having the free choice, with regard to "*ordinary expenses*" of the government, to put them in the General Appropriation Bill or provide for them in special appropriation bills, cannot by a practice with regard to any one class of such "*ordinary expenses*," no matter how long continued, destroy the constitutional right of the Legislature to put such "*ordinary expenses*" in the General Appropriation Bill, if at any Session it choose to include any or all of such "*ordinary expenses*" in the General Appropriation Bill.

Hence it is my opinion that the General Appropriation Bills (House Bill No. 81, and its Supplement, House Bill No. 82) appropriate only for the "*ordinary expenses*" of the Government and are clearly constitutional.

*D. Can funds for more than one State-aid institution of clearly the same kind be appropriated in the same special Appropriation Bill?*

To answer this question we must note that the Constitution, in Section 3, Article III, and Section 15, Article III, forbids more than "one subject" to be provided for in any bill whether appropriating money or not, except only the General Appropriation Bill. Therefore, in bills other than a General Appropriation Bill, it would be unconstitutional to appropriate for more than one subject. This leads us to the inquiry, what constitutes a "subject," and here we find a question which is easier to answer as to any specific case than from a general definition.

It is a clear legal principle that words in a constitution which are not in themselves necessarily technical should be given, as far as possible, that meaning which the consensus of ordinary intelligent citizens would accept. "*Words and Phrases*," Vol. 4 p. 731, takes from *In re Atwell's Estate*, 101 N. W. 946, the rule that the word "subject," when used in a constitutional provision restricting an Act to one subject, must "be given a broad and extended meaning so as to allow the Legislature full scope to include in one Act all matters having a logical or natural connection."

The Court goes on to say:

“to constitute duplicity of subject an Act must embrace two or more dissimilar and discordant subjects that by *no fair intendment* can be considered as having any legitimate connection with or relation to each other.”

Again quoting from *State vs. L. & N. Rwy. Co.*, 48 South 391, the Court states that the law “may state the subject in a very general or indefinite manner,” and that all separate grants to a railroad company within the State may be treated of and provided for as one subject without violating the Constitution. Note the grouping together of grants to various railroads and its similarity, as far as “subject” is concerned, to appropriations in the same Bill for several State-aid institutions of clearly the same class.

Again in “Pope Legal Definitions,” Vol. 2, p. 1532, the author, quoting from *People vs. Sargeant*, 254 Ill. 517, states that “any matter or thing \* \* \* subservient to the general subject or purpose will be germane and may be properly included in the law.”

And again in *People vs. McBride*, 234 Ill. 166, it is said of a constitutional provision that “no Act shall embrace more than one subject,” that any number of provisions may be contained in an Act, however diverse they may be, if not inconsistent with or foreign to the general subject and in furtherance of such subject.”

(See also Vale’s *Pennsylvania Digest*, 3376, and the numerous *Pennsylvania Supreme Court* decisions there cited.)

Thus, although separate hospitals are each of them subjects, and could be treated of in separate bills if desired, it is clear that all hospitals, properly definable as (say) State-aid hospitals, constitute a “subject.” Of the thirty special appropriation bills introduced January 29, 1923, let us take House Bill No. 86 as one typical case. This Bill appropriates “for the several fire companies of the City of Harrisburg.” There are fifteen such companies. Each one could have been made the subject of a special appropriation bill. It is evident that all the fire companies of Harrisburg also form one subject, since the expression “fire companies of Harrisburg” does not “embrace two or more dissimilar and discordant subjects.”

If said House Bill No. 86, on the other hand, had attempted with one “lump sum” to provide for the expenses of “the several fire companies of the City of Harrisburg”, and also for “the several deaf and dumb schools of the State” there would have been a grouping of “two or more dissimilar and discordant subjects that by no fair intendment could be considered as having any legitimate connection with or relation to each other.”



Turning again to the State-aid Hospital Appropriation (House Bill No. 109) we find that all the units affected by this appropriation have a "logical or natural connection"; that "each matter or thing" affected is "subservient to the general subject or purpose"; and that the units affected are "not inconsistent with or foreign to the general subject," but that they are "in furtherance of such subject," namely, that the total appropriation of \$3,600,000 is made to a clearly defined and definable subject, namely, "medical and surgical services rendered to and maintenance of indigent persons in hospitals." In other words, this Bill does not "constitute duplicity of subject," because it "does not embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other."

It is clear that the intelligent and ordinarily well-informed mind would not feel that there was any dissimilarity or discordance between any two hospitals rendering medical and surgical service to indigent persons in accordance with rules established by law. Note that House Bill No. 109 does not appropriate even for hospitals, but for payments toward the cost of medical and surgical service rendered to indigent patients in hospitals, and an appropriation for such service, when identified by law, is in itself *a single* "subject."

My attention is drawn strongly to the practical fact that fears might arise concerning House Bill No. 109, as well as a few others of the thirty special Appropriation Bills, that by inadvertence appropriated funds might be unlawfully paid to sectarian or denominational institutions contrary to Section 18, Article III, of the Constitution, and unless this danger can be clearly obviated by specific provision in the separate law to establish standards and rules or services, each of the few Bills, like No. 109, subject to this danger might (but not necessarily must as far as constitutionality goes) include specific words like the following:

"Provided, That none of the funds hereby appropriated shall be paid to any denominational or sectarian institution, corporation or association contrary to Section 18, Article III, of the Constitution."

This Bill would not be unconstitutional without this proviso. Its inclusion would add security against possible distribution of appropriated funds in violation of the Constitution.

I am of the opinion that each one of the thirty special appropriation bills are within the constitutional requirement that all appropriations not providing for the "*ordinary expenses*" of the Government "shall be made by separate bills, each embracing but one subject."

E. *Does the extent to which "Lump Sum" Appropriations are made Run Counter to the Constitution?*

Principle No. 4, set forth on page 3 of this opinion, is that we must not confuse with the question of constitutionality any other objections which might be raised against a method (or the substance) of appropriations. It is natural for those who do not agree with some new law or some new form of procedure to raise the cry of "unconstitutional." The Courts, however, will turn to the Constitution itself and inquire "is either the substance or the method of procedure in this law or appropriation forbidden by the Constitution?" (See Court decisions cited in Principle No. 1, on page 3 hereof.)

Turning to former appropriations, we find multitudinous examples of "lump sum" appropriation. For example, in one fund provided for in the Game Laws, there is appropriation of a "lump sum" which, without further appropriation, has been used to cover every phase of the administration of the Game Commission. This "lump sum" is being expended on the sole judgment of the Board of Game Commissioners to pay the salaries and expenses of officers and employes, purchase and feed of wild birds, bounties for destruction of harmful animals, and even for the purchase of land for game refuges and the erection of buildings. Again, the Act of May 25, 1921, creates a lump sum "engineer's fund" and appropriates it on the sole discretion of the Engineer's Board for any and all the expenses of said Board.

In fact we find "lump sum" appropriations in practically every appropriation Act to which we turn: Thus in 1921 \$1,000,000 was appropriated for "necessary salaries, wages and expenses to be incurred *as provided by law* for forest protection"; and turning to the Forest Protection Law we find that the expenses authorized (1915, P. L. 797) range through office salaries and expenses, wages and expenses for fire fighting, and the building of fire towers, telephones, fire trails, etc.; or turning to the appropriation of 1921 and former years for the Department of the Attorney General, we find four items, 1st for the Attorney General, 2d for the Deputies, 3d for a private secretary, a certain number of law clerks, stenographers and a messenger, (a true "lump sum" fund in itself), while the 4th item is a "lump sum" appropriation practically as large as the other three items combined and covering at least eleven different classes of expenditure. These examples of what has been done in the past about "lump sum" appropriations could be multiplied indefinitely.

The Appropriation Bills introduced January 29, 1923, which are the subject of this opinion, are not different in kind as far as "lump sum" appropriations are concerned from the Appropriation Acts

already on the statute books. They merely go somewhat further (but certainly no further than the former appropriations for the Game Commission) in the extent to which the "lump sum" idea is carried.

The former practice of the Legislature does not determine the constitutionality of appropriations by "lump sums". That depends on the question as to whether such "lump sum" appropriations are *forbidden by the Constitution*. Turning to the only provisions of the Constitution affecting appropriations (set forth above herein) we cannot find one syllable of prohibition against this "lump sum practice", provided of course that none but "ordinary expenses" are included in general appropriation bills, and provided that all the separate bills, not truly General Appropriation Bills each embraces but one subject.

Therefore I am of the opinion that the objection raised to the "lump sum" appropriations provided for in the said bills introduced January 29, 1923, is purely a legislative one having no constitutional aspect whatever; and that the "lump sum" feature of the thirty-two bills under consideration is constitutional.

The Pennsylvania Legislature has heretofore appropriated "lump sums" according to their judgment from time to time concerning the practical effect of appropriations; and it is clearly within the province of the Legislature to increase or decrease its use of "lump sums" in appropriation Acts according to their judgment as to how the funds of the Commonwealth may be expended best in the interests of the public welfare.

Yours very truly,

GEORGE W. WOODRUFF,

*Attorney General.*

*Nurses—State Board of Examiners for Registration of—Secretary of Board and State Educational Director of Training Schools for Nurses—Appointment of and salaries of—Acts of May 23, 1923, P. L. 351 and June 7, 1923, P. L. 498, Sections 415, 2902.*

The inconsistent provisions of the Act of May 23, 1923, having been expressly repealed by the Act of June 7, 1923, P. L. 498, Section 2902, the Members of the Board must be appointed and the compensation of its Secretary and of the State Educational Director of Training Schools must be fixed as provided for by the last mentioned Act.

August 30, 1923.

Honorable Gifford Pinchot, Governor of Commonwealth of Pennsylvania, Harrisburg, Pennsylvania.

Sir: As requested by you permit me to advise you with respect to the effect to be given Act No. 224, Session of 1923, entitled "An act to amend sections one, two, three, five and seven as amended of an Act approved the first day of May one thousand nine hundred and nine Pamphlet Laws three hundred and twenty-one entitled 'An act to provide penalties for the violation of certain provisions regarding such registration' by providing for a change in membership of the Board for a change in salary of the Secretary, treasurer, the educational director and of the members of the Board."

This Act provides for the appointment by you of a State Board of Examiners for the Registration of Nurses consisting of five persons whose terms are to be respectively, one, two, three, four, and five years. The Act further provides for the election of the Board of a Secretary, whose salary shall be \$3,000. per annum, and for the appointment by the Board of a State Educational Director of Training Schools at a salary of \$3,000. per annum.

The Administrative Code approved June 7, 1923, in Section 415 also provides for the appointment of a State Board of Examiners for the Registration of Nurses. The Board authorized by the Code is to consist of five persons of whom one shall be appointed for six years, two for four years and two for two years. The Code further provides that the Board shall elect a Secretary who shall receive such compensation as the Board with the approval of the Superintendent of Public Instruction shall determine; and that with the approval of the Superintendent of Public Instruction it shall also appoint and fix the compensation of a State Educational Director of Training Schools for Nurses.

Obviously there would be a conflict between the provisions of Act No. 224 and of the Administrative Code, were it not for the fact that the Code in Section 2902 provides, that all other acts or parts of acts inconsistent therewith are repealed including all acts inconsistent therewith enacted at the 1923 Session of the General

Assembly and approved by the Governor prior to the passage of the Code. Act No. 224 was approved by the Governor on May 23, 1923, so that it clearly falls within the provisions of Section 2902 of the Code.

The inconsistent provisions of Act No. 224 having been expressly repealed by the Code the State Board of Examiners for the Registration of Nurses must be appointed under the Code and the compensation of its Secretary and of the State Educational Director of Training Schools for Nurses fixed as therein provided.

Respectfully,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*Judges—Appointment—Member of Legislature—Constitution, art. ii, sect 3, and art. ii, sect. 6—Civil office.*

1. The office of judge of the Court of Common Pleas is a "civil office" within the meaning of article ii, section 6, of the Constitution, which provides that "no senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this Commonwealth."

2. Resignation by a senator or representative during the four years or two years of the term for which he was elected will not qualify him for appointment to a judgeship.

February 29, 1924.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg, Penna.

Sir: The inquiry as to whether or not a representative in the General Assembly, during the time for which he shall have been elected, may be appointed to the office of Judge of the Court of Common Pleas, has been received by this Department.

The Constitution of the State, in Article II, Section 6, 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."

### THE OFFICE OF JUDGE OF THE COURT OF COMMON PLEAS IS A CIVIL OFFICE.

A popular definition of the word "office" is to be found in the Century Dictionary,—“A position of authority under a government; the right and duty conferred on an individual to perform any part of the functions of government and to receive such compensation, if any, as the law may affix, to such service, more specifically called ‘public office.’ It implies authority to exercise some part of the power of the State, a tenure of right therein, some continuous duration and usually emoluments.”

Anderson in his Dictionary of Law, defines an “office” as “A public station or employment, conferred by the appointment of government, and embracing the ideas of tenure, duration, emoluments and duties.”

The ideas embraced in this definition are amply sustained by both Federal and State authorities. *United States vs. Hartwell*, 6 Wallace 383; *Bowers vs. Bowers*, 26 Pa. 74, 77; *Commonwealth vs. Gamble*, 62 Pa. 349.

A civil officer is defined in Bouvier’s Law Dictionary as “Any officer of the United States who holds his appointment under the National Government, whether his duties are executive or judicial in the highest or lowest departments of the Government, with the exception of officers of the Army and Navy.”

In *Ballantyne vs. Bower*, 99 Pacific 869, it was held that the office of Justice of the Peace is a “civil office under the State” within the constitutional provision that “every person holding any civil office under the State shall \* \* \*,” the office being provided for by the Constitution and General Laws and being connected with the State Judicial Department.

In *Olmsted vs. The Mayor of New York*, 42 N. Y. Super. Ct. Rep. 481, it was ruled that an office consists of a right to exercise a public function or employment and to take the fees and emoluments belonging to it. It involves the idea of tenure, duration, fees, the emoluments and powers, as well as that of duty, and it implies an authority to exercise some portion of the sovereign power of the State either in making, administering, or executing the laws.

The Constitution of our State provides that:

“All Judges required to be learned in the law except Judges of the Supreme Court shall be elected by the qualified electors of the respective districts over which

they are to preside and shall hold their offices for the period \* \* \*."

Not only this language, but the character of the duties of a Judge of the Court of Common Pleas indicates it to be a civil office. The incidents of civil office are tenure or fixed, duration, fees and emoluments and power derived directly from statutes. With all of these incidents a Judge of the Court of Common Pleas is invested.

A COMMON PLEAS JUDGE IS A STATE OFFICER, OCCUPIES AN "OFFICE UNDER THIS COMMONWEALTH" AND NOT A LOCAL OR DISTRICT OFFICE.

In speaking of the powers, duties and jurisdiction of the Courts of Common Pleas, the Supreme Court in *Leib vs. The Commonwealth, 9th Watt's, 200*, said:

"The judges of the courts of common pleas exercise a high and extensive portion of the judicial power of the state. In the counties generally throughout the commonwealth, their civil jurisdiction is unlimited in amount and in the nature of the suits. In addition to their original common law jurisdiction, they hear and decide appeals from the decisions of justices of the peace, and sit as courts of the last resort in certioraris to such justices. Many branches of equity jurisdiction are committed to them. By virtue of their offices, as judges of the courts of common pleas, they, by the constitution, compose the courts of quarter sessions and orphans' courts, and with the register of wills, the registers' courts. They exercise large and various jurisdiction in cases of roads, turnpikes, canals, railroads, apprentice, pauper, insolvent and divorce causes, as well as others confided to them by the common law and acts of assembly. They are also justices of oyer and terminer and general jail delivery, under certain restrictions, and have now a limited jurisdiction in writs of quo warranto. \* \* \* They receive their compensation from the treasury of the State. They are amenable to the legislature by impeachment or by address of two-thirds for their removal from office. \* \* \*

If such be the character and grade of an associate judge of the court of common pleas under our constitution and laws, it seems to us his office cannot be considered as intended by the legislature to be embraced within the quo warranto jurisdiction given to that court by the act of 14th of June 1836, over persons exercising a county office. On the contrary, we think the court of common pleas of each county is to be considered as a state court, and the office of an associate

judge of that court a state office. It is true the office is exercised within a county, but that circumstance does not make it a county office."

In *Commonwealth vs. Dumbauld*, 97 Pa. 293, it was held by the court:

"That judges of the Common Pleas are state officers is not denied: *Leib v. Commonwealth*, 9 Watts 200. While their jurisdiction for many purposes is confined to their respective judicial districts, it is equally true that for some purposes it extends over the state. Writ-nesses may be subpoenaed in any portion of the state, and their attendance compelled by attachment in any county of the state by the Court of Common Pleas of such county. In many instances, original process may issue from such courts to other counties throughout the state. The 3d section of the Act of 13th June, 1836, Pamph. L. 572, the Act of 4th March, 1862, Id. 79, and the Act of 24th April, 1857, Id. 318, are cited as illustrations. Many similar acts might be referred to were it necessary. We need not pursue this branch of the case further. It is too plain for argument. We are of opinion that a judge of the Court of Common Pleas is an officer whose jurisdiction extends over the state, within the meaning of the 3d section of the 5th article of the Constitution."

And in *Commonwealth ex rel. Hyneman*, 242 Pa. 244, it was laid down by the court:

"By the third section of the judiciary article of the Constitution this court is given original jurisdiction in cases of 'quo warranto as to all officers of the Commonwealth whose jurisdiction extends over the State,' and a Common Pleas Judge is such an officer."

Judges of the Court of Common Pleas in this State are commissioned by the Governor. They receive their compensation from the Treasury of the State and they are amenable to the Legislature by impeachment, all of which unquestionably makes them State officers or the occupants of "civil office under this Commonwealth."

#### THE TERM FOR WHICH SENATORS AND REPRESENTATIVES ARE ELECTED.

The Constitution of the State, in Article II Section 3, provides:

"Senators shall be elected for the term of four years and Representatives for the term of two years."



During such terms neither Senators or Representatives are eligible for appointment to any civil office, for the plain mandate of the Constitution is that "No Senator or Representative shall, *during the term for which he shall be elected*, be appointed to any civil office under this Commonwealth." The time of such ineligibility is definitely fixed by the constitutional provision. It is the time for which he shall be elected and that time in the case of Senators is four years, and in the case of Representatives two years.

Resignation of a Senator or Representative can make no difference, for neither can by any act of his own nullify the plain wording and intent of the Constitution and change and shorten the time fixed by that instrument in which he shall be ineligible for appointment to civil office.

Being therefore of the opinion (1) that the office of Judge of the Court of Common Pleas is a civil office; (2) that it is an "office under this Commonwealth," you are advised that a Senator or Representative may not, during the time for which he shall be elected, be appointed to such office.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

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*Public officers—Removal—Power to remove—Appointing power—Alderman—Constitutional law.*

1. Whether public officers are appointed to an elective office or not, they "may be removed at the pleasure of the power by which they shall have been appointed."

2. Where the Governor has appointed a person to the office of alderman, and it appears that such person had not resided in the ward for which he was appointed for one year next preceding his appointment, the Governor may correct his mistake and remove the person appointed.

3. The rule which controls the eligibility for election to an office also controls the eligibility for an appointment to the same office.

September 9, 1924.

Honorable Gifford Pinchot, Governor, Harrisburg, Pa.

Sir: I have your request for an opinion from the Department of Justice on the following:

*"Statement and Question.*—A vacancy occurred in the office of Alderman for the Second Ward of the City of Williamsport, Pennsylvania. On June 26, 1924,

you appointed Mr. Philip G. A. deLaBrie as alderman to fill this position. At the time you supposed that he was eligible for appointment. Subsequently it was drawn to your attention that, as required by Section 11 of Article V of the Constitution, he had not 'resided within the \* \* \* Ward \* \* for one year next preceding his election'; but as a matter of fact had resided in said Second Ward of the City of Williamsport for only about three weeks at the beginning of said 'next preceding year'. Can Mr. deLaBrie be removed by you from his position as Alderman of said Second Ward?"

A study of the Constitution convinces me that Mr. deLaBrie can be removed from his office as an alderman and should be removed.

There is no doubt but that an action in quo warranto should, if the facts are correct, result in a judgment ousting Mr. deLaBrie from his office.

I am equally certain that even if a quo warranto action should be practically necessary to complete his removal, you have the right to lay the foundation for such a quo warranto suit by your own action removing Mr. deLaBrie from his office; but in saying this I find with regret that I run counter to a long opinion of Henry O. McCormick, Attorney General, given to Governor Hastings March 26, 1895, in which Attorney General McCormick held that John J. Curley appointed by Governor Pattison to fill a vacancy in the position of Recorder of Deeds of the City of Philadelphia, this appointment by the by being a valid one unlike that of Mr. deLaBrie, could not be disturbed in his office merely by an order of the Governor until his successor was elected and qualified.

I have laid down the rule for the Department of Justice, during the time I hold office as Attorney General that opinions of previous Attorneys General will not be reviewed or disturbed except for a very strong reason. This case of the unwarranted appointment of Mr. deLaBrie as Alderman is, I believe, one which brings upon the Governor and the Attorney General the duty to do everything in their power to cure the mistake in order that something done contrary to the Constitution of the Commonwealth may not continue in force.

Attorney General McCormick did not overlook the portion of Section 4, of Article VI, of the Constitution which reads:

"\* \* \* 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."

In speaking of this constitutional provision he admits that his opinion makes it difficult to give force and meaning to the phrase excepting judges from the power of removal in connection with

the phrase "appointed officers". Attorney General McCormick was able to satisfy himself that reference to the debates of the Constitutional Convention in 1873 showed either that the part of said Section 4 quoted above did not mean what it says, or that the Convention had intended to omit the words which except judges, and failed to do so by inadvertence.

The debates and other records of the Constitutional Convention might and should be considered in construing a part of the Constitution if there is any evident ambiguity. No such ambiguity can be found in the part of said Section 4 quoted above. The word "appointed" and the phrase "of the power by which they shall have been appointed", are clear beyond question. If the constitutional question had meant *appointive* instead of *appointed* they would have surely used the proper expression. In Section 8, of Article IV, the Convention used the words "*elective* office" and in Section 4, of Article VI, they contrast "*appointed* officers" with "officers *elected* by the people". Hence it is clear that the Convention had in mind two different forms of completely subdividing official positions, namely "*elective*" as compared with *appointive* (said Section 8, Article IV), and "*appointed* officers" as compared with "officers *elected* by the people". Therefore, if the words "other than judges of the courts of record" which modifies "appointed officers" had been omitted in said Section 4, it would be plain to me that even judges, if *appointed* by the Governor pursuant to law, might be removed at his pleasure; and the presence of an excepting phrase concerning "*elective officers*" (namely judges) to modify the scope of the words "*appointed* officers", shows in conjunction with the use of the word "*elective*" in Section 8, of Article IV, of the Constitution, that the Convention had clearly in mind the distinction between "*elective officers*" and *appointed* officers, and that it clearly recognized that "*appointed* officers" may include "*elective officers*" who have been appointed by the Governor to fill a vacancy.

In the recent decision of the Supreme Court in the "Soldiers' Bonus Suit" (Armstrong et al. vs. King, Secretary of the Commonwealth) Judge Simpson clearly shows the attitude of the Supreme Court concerning the possibility of ignoring an expression or words contained in the Constitution. He says:

"It is clear that unless we wholly ignore the words 'but no amendment or amendments shall be submitted oftener than once in five years',—a conclusion for which no one does, or reasonably can contend."

Taking this thought of the Supreme Court it is proper to say that no one can reasonably contend that the words "other than judges of the courts of record" should be ignored in considering what is

the meaning of the words "*appointed* officers" in Section 4, Article VI, of the Constitution. "*Appointed* officers" cannot possibly be any except those which "shall have been appointed".

The conclusion is irresistible that if any officers are appointed either to an *elective* office or not, such appointed officers of whom Mr. deLaBrie is one "may be removed at the pleasure of the power by which they shall have been appointed". Hence it is within the power of the Governor to remove Mr. deLaBrie from his office, and under the circumstance that he was appointed contrary to an express prohibition of the Constitution in that he has not resided in the Second Ward of the City of Williamsport for one year "next preceding his appointment", it is the duty of the Governor to correct his inadvertent mistake.

One last question, namely, may the Governor appoint an officer to a vacancy in an elective office unless the appointee would be eligible to an election to that office at the time of the appointment? The asking of this question is its answer. The same rule which controls the eligibility for election to an office also controls the eligibility for an appointment to the same office.

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,  
*Attorney General.*

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*Mines and Mining—Mine Inspectors not "employees" within the meaning of the Administrative Code. (Act of June 7, 1923, P. L. 498, Sections 202, 206, 214, 222, and 440).*

Mine inspectors are not "employees" within the meaning of Section 222 of the Act of June 7, 1923, P. L. 498.

November 12, 1924.

Honorable P. S. Stahlnecker, Secretary of the Executive Board,  
Harrisburg, Pennsylvania.

Sir: We have the request of the Executive Board to be advised whether a Mine Inspector is an "employee" within the meaning of Section 222 of the Administrative Code (Act of June 7, 1923, P. L. 498).

Section 222 of the Administrative Code relates to the work hours and vacations of "each employee of an administrative department,

or of an independent administrative board or commission if employed for continuous service."

By reference to Section 202 of the Administrative Code it appears that the "office" of "Anthracite Mine Inspectors" and "Bituminous Mine Inspectors" are made departmental administrative offices within the Department of Mines. Section 206 (b) provides for the appointment of all departmental administrative officers by the Governor by and with the advice and consent of two-thirds of the members of the Senate. Section 440 of the Code provides, *inter alia*, that the "terms of office" of Mine Inspectors "shall be as may now or hereafter be provided by law."

The appointment of "employees" of the several departments, boards and commissions (except the Auditor General's Department, the Treasury Department, and the Department of Internal Affairs) is provided for by Section 214 of the Administrative Code. "Employees" are appointed and their compensation is fixed by the several department heads or independent administrative boards and commissions, subject to the requirement that the number and compensation of all employees shall be approved by the Governor.

It is clear that there is a very marked distinction between "departmental administrative officers" and "employees" of the several administrative departments, boards and commissions. When, therefore, the Legislature in Section 222 of the Administrative Code made that section apply only to employees of administrative departments or of independent administrative boards and commissions, it must have intended that the section should not apply to "departmental administrative officers."

You are accordingly advised that Mine Inspectors are not "employees" within Section 222 of the Administrative Code.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

*Justice of the peace—Alderman—Vacancy in office—Consideration for infamous crime—Appointment by Governor.*

Where an alderman has been convicted of an infamous crime and sentenced to prison and to disqualification from holding any public office in the future, a vacancy is created in the office which the Governor may fill by appointment.

December 29, 1924.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg, Penna.

Dear Governor Pinchot: In answer to your inquiry concerning the Aldermanship in the First Ward of the City of Allentown, Penna., I have considered the case as follows:

Horace W. Geary, duly elected Alderman for that position, was indicted for misdemeanor in office on the counts of (a) extortion by taking illegal fees; (b) extortion by means of threats; (c) acceptance of bribe. Horace W. Geary was convicted of the above misdemeanor and on November 17, 1924, Honorable Claude T. Reno, Presiding Judge of Lehigh County, imposed a fine of \$500.00 for extortion, and another fine of \$500.00 for acceptance of bribe, together with costs of the prosecution.

Also imposed on account of the extortion an imprisonment of one (1) year in the Lehigh County Jail, *"and furthermore, that you (Horace W. Geary) be and are hereby removed from the office of Alderman of the First Ward of the City of Allentown, in the County of Lehigh and State of Pennsylvania."*

Also imposed on account of bribery a sentence of imprisonment in the Lehigh County Jail for a period of five (5) years from the expiration of the sentence of imprisonment imposed on account of extortion, making a total imprisonment of six (6) years in the Lehigh County Jail.

Also that the five (5) year imprisonment is to be suspended for a period of five (5) years from the expiration of the previous sentence, such suspension being conditioned upon the good behavior of the defendant during said five (5) year period.

And also, Judge Reno added to the sentence disqualification *from holding any public office in this Commonwealth in the future.*

Because of the conviction and the sentences imposed, Horace W. Geary is unable to perform the duties of Alderman for the year of imprisonment which he must undergo, and is also disqualified by the sentence of the court from holding any public office in this Commonwealth during the rest of his life, of course including the position of Alderman from which Judge Reno ousted him by the above sentence. In other words, Geary could not resume his duties as Alderman at the end of his imprisonment because of the last item of sentence set forth above,

You ask whether, under the above circumstances, there is a vacancy in the position of Alderman in the First Ward of the City of Allentown, Pa., such that it would be proper for you to appoint a successor to Horace W. Geary to serve until the next time when Aldermen may be elected.

Section 4 of Article VI of the Constitution provides that—

“All officers \* \* \* shall be removed on conviction of misbehavior in office or of any infamous crime.”

Section 8 Article IV of the Constitution provides that the Governor

“shall have power to fill any vacancy that may happen, during the recess of the Senate, \* \* \* in any other elective office which he is or may be authorized to fill.”

Section 3 of the Act of March 22, 1877, P. L. 12, provides that

“if any vacancy shall take place (in any aldermanship for any reason) \* \* \* such vacancy shall be filled by appointment by the Governor until the first Monday of May succeeding the next ward \* \* \* election.”

Pursuant to the above provisions of the Constitution and the conviction of Horace W. Geary for an infamous crime, namely, extortion and bribery, and his consequent removal from office by sentence of the trial Judge, a vacancy exists in the Aldermanship in the First Ward of the City of Allentown, Penna., and pursuant to the Constitution and the law enacted pursuant thereto, the Governor has power to fill the vacancy thus created.

Yours very truly,

DEPARTMENT OF JUSTICE

GEORGE W. WOODRUFF,  
*Attorney General.*

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OPINIONS TO THE DEPARTMENT OF HEALTH

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## OPINIONS TO THE DEPARTMENT OF HEALTH

*State Health Department—Confidential Records—Subpoena From Court for Their Production—Discretion.*

The State Department of Health is not required to produce medical records of patients treated at state clinics or state sanatoria when subpoenaed so to do by a court of record in the state, when in the opinion of the health authorities the production in open court of confidential records procured solely in their official capacity would be inimical to the public welfare.

January 29, 1923.

Colonel John D. McLean, Deputy Commissioner, Department of Health, Harrisburg, Pa.

Sir: This office is in receipt of your inquiry as to whether or not you are required to produce medical records of patients treated at State clinics or State sanatoria when subpoenaed so to do by a Court of Record in the State of Pennsylvania.

The question is a very broad and important one as the principles applying to the records in your office will apply to other records on file in the various offices of the Commonwealth. Because of the broad application of this ruling we have given extensive study to your question.

The government of the State of Pennsylvania is vested in three distinct departments: the executive, the judicial and the legislative. No one of these may encroach upon the prerogatives of another.

In the case before us we have an apparent conflict between the authority of the Judicial Department and that of the Executive Department. An officer of the Department of Health, which is a branch of the Executive Department of the government, does not want to present certain data, which he considers confidential and which was obtained purely in his official capacity, in a hearing before the Court. The Court desires such data and issues a subpoena directing the officer of the Department of Health to produce such records for the inspection of the Court and for use as evidence in the case before it. We need hardly say that were such records the personal property of a citizen or a corporation it would be necessary to produce them. Where however, they are procured by an official of the Commonwealth in his official capacity, a grave question arises.

In 1815, in the case of *Gray against Pentland, Sergeant & Rawle's Rep. 23*, certain public records were involved. The case was a suit for libel alleged to have been published by Gray by way of a de-

position before a justice of the peace. This deposition was then forwarded to the Governor of the Commonwealth and was apparently the only evidence of the libel. The law would not permit the plaintiff to introduce oral testimony concerning this libel so long as the written document was in existence, and the Governor refused to deliver the document to the Court so that the plaintiff was seriously handicapped in the presentation of his case. The Court held, however, that even though it was apparently very unfair to the plaintiff to reject his oral testimony, it could not be accepted, Justice Yeates commenting thereon as follows:

“But hard as such a case confessedly is, the streams of justice must flow in their accustomed channels. The rules of evidence, founded in good sense, and the experience of mankind, must be adhered to. The law abhors parol evidence of the contents of written instruments, and considers it as highly dangerous. \* \* \* Here it is admitted, that the libellous paper, which is the foundation of one of the counts in the declaration, exists on the files of the chief magistrate, *although it has not been in the power of the defendant in error to produce it on the trial.* \* \* \*”

Justice Brackenridge, in the same case, says:

“As to the Governor, in this case, being compellable to give the deposition or writing transmitted to him, I incline to think it cannot be done. It must be a matter within his discretion, to furnish or to refuse it; and this on ground of public policy. \* \* \*”

Chief Justice Tilghman also expressed his opinion on this point in the same case in the following language:

“\* \* \* It would seem reasonable, therefore, that the Governor, who best knows the circumstances under which the charge has been exhibited to him, and can best judge of the motives of the accuser, should exercise his own judgment with respect to the propriety of producing the writing. It is not to be presumed, that he would protect a wanton and malicious libeller. And even if he should, it is better that a few of the guilty should escape, than a precedent be established, by which many innocent persons may be involved in trouble. \* \* \*”

This precedent, unreversed, seems to substantiate the general principle that information secured by the Chief Executive of the Commonwealth in his official capacity may or may not be divulged by him in the Courts of the Commonwealth as his own judgment may dictate.

This question was again apparently fairly raised in the case of the *Appeal of Hartranft, et al.*, 85 Pa. 433. In that case there was an attempt to attach certain officers of the State government who refused to appear and testify. While there was perhaps a fatal irregularity in the subpoena, yet, for the purpose of deciding the main question at issue, this irregularity was waived. Mr Justice Gordon, in his opinion in this case, sets forth the following principles:

“For the purposes of this case, however, we may admit the regularity of this subpoena and that, upon an ordinary citizen, it would have been binding and obligatory, for we regard the question of the liability of the appellants to attachment, in any event, the prime one of this case. In order to resolve this, we must first understand who the persons are, against whom the court has directed its attachment and for what purpose they have been subpoenaed. They are the Governor of Pennsylvania, the Secretary of the Commonwealth, the Adjutant General, chief officers of the Executive Department of the state government, and two officers of the National Guard; the latter subordinates acting under the orders of the former.\* \* \* It will be observed that these persons are subpoenaed for the purpose of compelling a revelation of such things as have come to their knowledge in their official capacities, and which strictly belong to their several departments as officers of the Commonwealth. This is clearly set out in the answer, by the Attorney-General, to the application for the attachment, and there has been no denial thereof upon the argument before us. In order to simplify matters, we may treat this case just as though the process, first and last, were against the Governor alone; for if he is exempt from attachment because of his privilege, his immunity protects his subordinates and agents. The general principle is, that whenever the law vests any person with the power to do an act, at the same time constituting him a judge of the evidence on which the act may be done, and contemplating the employment of agents through whom the act is to be accomplished, such person is clothed with discretionary powers, and is *quoad hoc a judge*. \* \* \*”

There remains for consideration, perhaps, only the question as to what would happen were we to find the law to be that the Governor or his subordinates must answer to subpoenas issued in the various Courts of the Commonwealth. Suppose a subpoena were issued to the Governor of Pennsylvania to appear in the Courts of Erie County, regardless of the inconvenience to the public business in Harrisburg or of the time it might take from his official duties, and he is bound to obey such subpoena. He would thereupon become liable to obey subpoena issued in any county of the Commonwealth

at any time. If he were so liable and did not appear, an attachment could issue and he would be forcibly brought into Court or detained in prison. We need pursue this course no further. It would be a vain thing, to say that such subpoenas must be obeyed, but that there is no method of enforcing obedience.

The proper interpretation of the law and the Constitution in this case appears to be that the Governor, and, through him, his executive subordinates, shall be the judges of whether or not communications which Courts desire to have presented to them under subpoena are such as should be considered private records and are such as it would be against the public policy of the State to disclose. Having once determined this, he should thereupon produce the records in obedience to the subpoena or refuse to produce them in the exercise of his executive prerogatives.

“\* \* \* In other words if, from such analogy, we once begin to shift the supreme executive power, from him upon whom the constitution has conferred it, to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better at the outstart recognize the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts. \* \* \*”

*Appeal of Hartranft, et al., 85 Pa. 433, at page 445.*

“Again, the Governor, having a proper regard for the dignity and welfare of the people of the Commonwealth, is not likely to submit himself to imprisonment, on the decree of the Court of Quarter Sessions, or to permit his officers and coadjutors to be thus imprisoned. Were we, then, to permit the attempt to enforce this attachment, an unseemly conflict must result between the executive and judicial departments of the government. We need not say that prudence would dictate the avoidance of a catastrophe such as here indicated. \* \* \*”

*Appeal of Hartranft, et al., 85 Pa. 433, at page 446.*

In the case of *Thompson v. The German Valley Railroad Co.*, 22 N. J. Eq. R. 111, the Governor refused to obey a subpoena *duces tecum* on the ground that his duty required him not to appear or

produce the paper required nor to submit his official acts, as Governor, to the scrutiny of any Court. The text-books generally state the law to be that the President of the United States, the Governors of the several States, and their cabinet officers are not bound to produce papers nor to disclose information committed to them in a judicial inquiry when, in their judgment, the disclosure would, on public grounds, be inexpedient.

In the *Appeal of Hartranft, supra*, Justice Gordon further says:

"\* \* \* Thus, the question of the expediency or inexpediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession. The doctrine that the officer must appear and submit the required information or papers to the court, for its judgment as to whether they are, or are not proper matters for revelation, is successfully met and settled in the case of *Beaton v. Skene*, 5 Hurlst. & N. 838, per Pollock, C. B. It was there held, that if the production of a state paper would be injurious to the public interest, the public welfare must be preferred to that of the private suitor. The question then arose, how was this to be determined? It must be determined either by the judge or by the responsible crown officer who has the paper. But the judge could come to no conclusion without ascertaining what the document was or why its publication would be injurious to the public service. Just here, however, occurred this difficulty, that, as judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent. The conclusion reached was, that from necessity, if for no other reason, the question must be left to the judgment of the officer."

In the famous trial of Aaron Burr the President of the United States refused to appear before the Judges and produce a certain letter alleged to have been written by General Wilkinson. The Courts there held that the President, without assigning any reason whatever for withholding the paper, might decide on his own authority whether or not he should do so. Of the weight of the reasons for and against producing it he himself was the judge.

I am of the opinion, therefore, and so advise you, that where officers of your Department, being a branch of the executive authority of the State government, are subpoenaed to appear and bring with them certain confidential records procured solely in their official capacity you shall judge in the first instance as to whether or not the production of such records would be inimical to the public welfare; that having so determined, you shall act accordingly, and that if, in your judgment, such records should not be produced, you

should make respectful presentation to the Court of your opinion in the matter, expressly disavowing any disrespect for the dignity and authority of said Court, but setting forth your conviction that you must determine in the first instance from your knowledge of the records whether or not they are such as should be made public.

Very truly yours,

STERLING G. McNEES,  
*Additional Deputy Attorney General.*

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*Department of Health—Authority to purchase supplies—Act of June 7, 1923, P. L. 498, Sections 507, 1802 and 2103.*

The Department of Health under the Act of 1923, *supra*, may purchase medicines, medical and surgical supplies required by it and materials and supplies for the tuberculosis sanatoria maintained by it. All other materials and supplies required by the department must be purchased through the Department of Property and Supplies.

August 24, 1923.

Dr. Charles H. Miner, Secretary of Health, Harrisburg, Pa.

Sir: Your request for an opinion as to the rights of the Purchasing Division of your Department, and what supplies may be purchased by said Division working in harmony with the Department of Property and Supplies, has been received.

Section 2103 of the Act of June 7, 1923, known as the Administrative Code, sets forth the powers and duties of the Department of Property and Supplies in respect to Standards and Purchases, and in Clause (e) makes it the duty of the said Department.

“To act as the purchasing agency for any department, board, or commission which by law is authorized to purchase materials or supplies and pay for the same out of fees or other moneys collected by it, or out of moneys specifically appropriated to it by the General Assembly;”

Under the powers and duties of the Department of Health and its Departmental, Administrative and Advisory Boards set forth in Section 1802 of the same Act, it is provided in Clause (b) that part of the powers of the said Department are,

“To purchase such medicines, medical and surgical supplies, and materials as may be necessary to carry on the work of the department;”

Any apparent inconsistency between these two provisions is amply covered by Article V of the Act which deals with "Powers and Duties in general," and co-ordination of work. In Section 507 the following provision is found:

"Purchases.—It shall be unlawful for any administrative department, other than the Department of Property and Supplies, or for any independent administrative board or commission, or for any departmental administrative body, board, or commission, or for any advisory board or commission, to purchase any furniture, materials, or supplies, except:

"(a) The Department of Health, which shall have the right to purchase medicines, medical and surgical supplies required by the department, and furniture, materials and supplies for the tuberculosis sanatoria maintained by the department."

This specifies just what the Department of Health has the right to purchase. It may through its Purchasing Division buy medicines, medical and surgical supplies, materials and supplies for the tuberculosis sanatoria maintained by the Department. This enumeration is the limit to which the Department of Health may go, and any other material or supplies required must be purchased by the Department of Property and Supplies acting as Purchasing Agent.

Yours truly,

J. W. BROWN,  
*Deputy Attorney General.*

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*Vaccination Certificates—Major and Minor Surgery—Osteopathic Physicians—Rights Under Act of June 12, 1923.*

Vaccination is not such an operation as to bring it under the head of major or operative surgery, and the proviso in Section 12 of the Act of June 14, 1923, relating to osteopathy, has no application to certificates of vaccination. Osteopathic physicians have the right to sign vaccination certificates and when so signed they must be accepted as valid.

September 11, 1923.

Dr. Charles H. Miner, Secretary of Health, Harrisburg, Pa.

Sir: This Department is in receipt of your letter asking whether or not under the Act of June 14, 1923 an osteopathic physician has a right to sign vaccination certificates.

Section 11 of the Act provides:

"Every license to practice as an osteopathic physician, issued by the State Board of Osteopathic Examiners, shall authorize the holder thereof to practice osteopathy in all its branches, including minor surgery \* \* \*."

Section 11 (b) provides:

"Every license issued by said Board to practice surgery shall authorize the holder thereof to practice major or operative surgery \* \* \*."

A license to practice osteopathy carries with it the right to practice minor surgery, and a license to an osteopathic physician to practice surgery entitled such physician to practice major or operative surgery. Vaccination, however, is not such an operation as to bring it under the head of major or operative surgery.

Section 12 of the Act provides:

"Osteopathic physicians and osteopathic surgeons shall observe and be subject to all State and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and all matters pertaining to public health, the same as physicians of other schools, and all such reports and certificates, when made or issued by osteopathic physicians licensed under the laws of the Commonwealth, shall be accepted by the persons, partnerships, corporations, officers, boards, bureaus or (department) departments to whom the same are made, with the same force and effect as reports or certificates issued by physicians of other schools; and such osteopathic physicians shall be entitled to the same fees and compensation as is provided by law for physicians of any other school; Provided, That no report or certificate made under the provisions of this section, in connection with a case involving operative surgery, shall be valid unless the same is made by an osteopathic surgeon duly licensed to practice operative surgery under the provisions of this act."

As said before, vaccination not involving major or operative surgery, the proviso contained in Section 12 of the Act does not apply to certificates of vaccination.

All osteopathic physicians are subject to all State and municipal regulations relating to the control of contagious diseases, reporting and certifying all births and deaths and all matters pertaining to public health, and all reports and certificates issued by a licensed osteopathic physician must be accepted by the persons, partnerships,



corporations, officers, boards, bureaus or departments to whom the same are made, just as such reports and certificates are received when issued by physicians of other schools.

This includes the right to sign vaccination certificates, and when so signed the certificates must be accepted.

Yours very truly,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

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*Waters—Pollution of streams—Offensive tastes and odors—Power of Sanitary Water Board—Administrative Code of June 7, 1923.*

Under section 1810 of the Administrative Code (Act of June 7, 1923, P. L. 498), the authority to prevent the pollution of public water supplies by substances which give to the water offensive tastes and odors, although they do not directly affect its bacteriological or disease-carrying quality, is vested in the Sanitary Water Board.

April 12, 1924.

Honorable Charles E. Miner, M. D., Secretary of Health, Harrisburg, Pa.

Dear Sir: On February 26th, you requested the opinion of the Attorney General on the question whether or not the Department of Health has authority to prevent the pollution of streams which are sources of public water supply, by substances which give to the water offensive tastes and odors but do not directly affect its bacteriological or disease-carrying quality.

You then had specifically in view the Schuylkill River and the water supply of the City of Philadelphia. A brief examination of the question was made and the views of this Department were informally conveyed to Mr. Stevenson of your Department on the 5th of March, as the basis for a conference which he was about to hold with the authorities of the City of Philadelphia. Further examination of the question was at that time postponed because of the pressure of other urgent matters before this Department.

You have now informed me that you are about to confer with the health authorities of other States in the Ohio Valley and that the same question is likely to come up at that conference. You have, therefore, renewed your request for a formal opinion.

Sections 8 and 9 of the Act of April 27, 1905 P. L. 312, gave to your Department very broad powers "to protect the health of the people of the State and to determine and employ the most efficient

and practicable means for the prevention and suppression of disease. The Commissioner of Health shall cause examination to be made of nuisances or questions affecting the security of life and health in any locality. \* \* \* The Commissioner shall have power and authority to order nuisances detrimental to the public health or the causes of disease and mortality to be abated and removed." The statutes of other States and other statutes of Pennsylvania with respect to cities within the Commonwealth, make similar broad grants of power for the same purpose.

No adjudicated case has been found upon the question whether powers thus broadly defined include the power to prevent offensive tastes and orders in public water supplies which are otherwise wholesome. The answer to your question must be made in the light of general principles as applied to known facts and conditions.

The statute requires you to protect the health of the people of the State and leaves to you the determination of what are the most efficient and practical means for the prevention of disease. It requires you to cause examination to be made of questions affecting the security of health in any locality. It empowers you to order the causes of disease and mortality to be abated and removed. There is nothing in this statute to indicate any intention by the Legislature to exclude from your powers and duties any cause of preventable disease of any kind. The question, therefore, resolves itself into this: Are offensive tastes and odors in otherwise wholesome public water supplies a cause of preventable disease?

This is a question of fact peculiarly within the knowledge of your Department. Concerning it, you say: "Experience covering many years has demonstrated that when offensive tastes and odors are present in a public water supply, even though it be bacteriologically satisfactory, the people will not drink the offensive water and hence their health is menaced through not using the quantity of water for drinking purposes required for the maintenance of a state of health. And furthermore, in lieu of the bacteriologically safe water, the public resort to unknown and oftentimes dangerous waters, such as from springs, wells or bottled waters which are palatable but may not be pure."

It cannot be questioned that an abundance of water must be consumed by every human being for maintaining his health and that any action or neglect which reduced the quantity available to him beyond a certain point would impair his health. The case presented by you is one where the quantity available to him is not absolutely reduced but is made so offensive that many persons will not drink the quantity required for the maintenance of health. I am of the opinion that this is in effect a reduction of the quantity of available water necessary for the maintenance of public health.

The law deals with men as they are. It is true that any man could force himself to drink of the offensive water enough to maintain his health, but if as a matter of fact the great majority of men, or a large number of them, will not do this but will either reduce the quantity they drink below that required for health or will resort to unknown and potentially dangerous sources of supply, the public health will be injuriously affected. Thus pollution of the character now under discussion becomes "a cause of disease and mortality" that your Department has authority to abate and remove within the meaning of the statute, which also empowers you to determine and employ the most efficient and practical means for the prevention of disease.

Adjudicated cases show that such general broad powers for the protection of the public health as are granted to your Department have been very liberally construed by the Courts. For example: health authorities may require the fencing of a city lot to prevent persons other than the owner from depositing filth upon it (*Wistar vs. Addicks*, 9 Phila. 145). They may compel the filling of wet and swampy land (*Kennedy vs. Board of Health*, 2 Pa. 366.)

In the case of *State vs. Lederer*, 52 N. J. Eq. 675, the nuisance complained of was offensive odors from a fat-rendering establishment which grossly polluted the air. In addition to evidence of direct disturbance of health through nausea and the like, it was shown that the odors induced many persons to close their windows at night in warm weather which made their rooms so uncomfortable that their sleep was disturbed. The Court gave consideration to this indirect effect of the odors upon health and ordered that the nuisance be restrained.

In the case of *City of McKeesport against Carnegie Steel Company*, 66 Pittsb. L. J. 695, the defendant caused and permitted refuse fluid to discharge into a tributary of the Monongahela River from which the plaintiff's water supply was taken. The odor of this by-product was foul and the resulting taste of the water offensive and nauseating, rendering it unpalatable and unfit for drinking purposes and domestic use as well as injurious to health. The plaintiff sought to restrain the defendant from polluting the river in this manner. The Court held that the "plaintiff's duty to supply its inhabitants reasonably pure and palatable water cannot be questioned," and decreed that a preliminary injunction be issued to prevent the wrong.

I therefore conclude that an industrial plant may be required to so treat the waste discharged by it to waters of the State used as sources of public water supply as to prevent the pollution of such water supply with offensive tastes and odors.

You have also asked informally whether or not this authority should now be exercised by the Sanitary Water Board.

Section 1810 of the Administrative Code (Act June 7, 1923, P. L. 498) enumerates and defines the powers and duties of the Sanitary Water Board as follows: (a) Transfers to the Board the powers of the Commissioner of Health, the Governor and the Attorney General under the Purity of Waters Act to control stream pollution by sewage (defined as matter containing human or animal excrement); (b) transfers to the Board all other powers of the Department of Health with regard to permits for sewage disposal works and sewer systems; (c) transfers to the Board the powers of the Department of Fisheries, the Commissioner of Fisheries, and the Water Supply Commission with regard to stream pollution; (d) empowers the Board to determine questions of fact as to pollution certified to it by the Public Service Commission; (e) empowers the Board to make rules and regulations for the effective administration and enforcement of the laws against stream pollution; (f) empowers the Board to investigate and report ways and means of eliminating from streams polluting substances, to determine and recommend methods of preventing pollution and to investigate wastes discharged into streams, etc.; (g) empowers the Board to call upon the Department of Health to make inspections, conduct investigations and do other things necessary and proper in the exercise of the powers of the Board.

It is the obvious purpose of section 1810 to concentrate in the hands of the Sanitary Water Board all the powers for the prevention of stream pollution which were formerly divided among the Departments, Commissions, and officials, mentioned in that section. I am of the opinion that the authority to prevent the pollution of public water supplies by offensive tastes and odors is vested by section 1810 of the Administrative Code in the Sanitary Water Board.

Though not covered by your inquiry it may be proper to suggest, in view of your proposed conference on this question with the health authorities of other States in the Ohio Valley, that consideration be given to embodying whatever conclusions are reached by the conference in a compact among the States affected, to be approved by Congress. This procedure has many advantages over what is generally called "uniform legislation." The latter can be repealed at any time by any one of the States at its pleasure, whereas a compact duly entered into and approved by Congress is binding on all the States so that an attempt to repeal it by any one of them alone would be void because prohibited by the clause of the Federal Constitution which forbids the States to make any law impairing the obligation of contracts.

Very sincerely yours,

PHILIP P. WELLS,

*Deputy Attorney General.*

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OPINIONS TO THE DEPARTMENT OF  
HIGHWAYS

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## OPINIONS TO THE DEPARTMENT OF HIGHWAYS

*Bridges—County bridges—Bridge on State highway—Repairs—Lost record—Act of May 31, 1911.*

1. The duty to maintain a bridge forming part of a State highway built under the Act of May 31, 1911, P. L. 468, rests upon the county, and not upon the Commonwealth, where the duty rested upon the county at the time of the passage of the act.

2. Where a bridge has for many years been treated as a county bridge, the county commissioners cannot deny in 1922 that it is a county bridge because of the loss of a court record of the date of 1855.

January 29, 1923.

Honorable P. D. Wright, State Highway Commissioner, Harrisburg, Pa.

Sir: Your communication with file attached in reference to a certain bridge on State Highway Route No. 187, near Murraysville, and asking what proceeding to take in the matter has been received by this Department.

From the record in this case it appears that part of the Pittsburgh and New Alexandria turnpike road in Franklin Township, Westmoreland County, was abandoned prior to the year 1855. It also appears that the bridge in question is part of the road which was formerly the Pittsburgh and New Alexandria turnpike road, and that it was built many years ago and subsequently rebuilt. In August, 1855, the following petition was presented to the Court of Quarter Sessions of Westmoreland County by divers inhabitants of Franklin Township, in said County:

"In the Court of Quarter Sessions of Westmoreland County, Penn'a.

"In Re  
Bridge across the North  
branch of Turtlecreek west  
of Murraysville. } No. 20 August Term 1855.

"The petition of divers inhabitants of the Township of Franklin, setting forth that owing to the abandonment of that part of the Pittsburgh and New Alexandria Turnpike Road being within said township in its present dilapidated condition the bridge in said Township being entirely swept away by the late flood and it being the duty of the supervisor under an act of Assembly dated 19th April, 1844, to take charge of and repair said part as other County roads.

"The Township will be compelled to pay a road tax unprecedented and to the utmost of their ability for ordinary repairs. That the rest of said road is entirely useless for want of a bridge over said North Branch.

"That the erection of said bridge will require more expense than it is reasonable the said Township should bear, Pray the Court to appoint proper persons to view the premises and take such order on the subject as is required and directed by the act of Assembly in such cases made and provided. Filed 22 August 1855. 28 August 1855 Court appointed, Wm. Greer, Obadiah McKown, and George Walters, Wm. Greer to give notice. November 20th, 1855, read. 27th August 1856 report of viewers approved by the Court."

The Act of June 13, 1836, P. L. 551, Section 35, provides as follows:

"When a river, creek or rivulet over which it may be necessary to erect a bridge crosses a public road or highway, and the erecting of such bridge requires more expense than it is reasonable that one or two adjoining townships should bear, the court having jurisdiction as aforesaid, shall, on the representation of the supervisors, or on the petition of any of the inhabitants of the respective townships, order a view, in the manner provided for in the case of roads, and if on the report of viewers, it shall appear to the court, grand jury, and commissioners of the county, that such bridge is necessary, and would be too expensive for such township or townships, it shall be entered on record as a county bridge."

The language of the petition followed strictly the words of the Act and averred affirmatively "that the erection of said bridge will require more expense than it is reasonable the said township should bear." The report of the Viewers, approved by the Court August 27, 1856, has disappeared from the office of the Clerk of the Quarter Sessions and cannot be found, but the records go still further. In July, 1897, the Commissioners of Westmoreland County passed a Resolution, which is recorded in the Minute of July 2, 1897. The Minute is as follows:

"By Reamer and Dinsmore moved that the Murrys-ville bridge on the Pike near the pumping station, at Murrys-ville, be repaired by the Pittsburgh Bridge Company, using as much of the Old material as possible to guarantee a first-class job: the Superstructure not to exceed \$800, and masonry at \$5.00 per cubic yard including cement work to be done under our instructions and supervision."

From the foregoing facts the conclusive resumption is that the bridge on State Highway Route No. 187, near Murrys-ville, was a

county bridge, at least before 1897, and the present county authorities are estopped from saying it ought not to be regarded as such because a record is missing.

In *Commonwealth ex rel. vs. Dickey, et al.* 262 Pa. 121, which was a bridge case with many features like the one under consideration, it was held:

“The present county authorities are estopped from saying that it ought not to be regarded as such merely because a record is missing which it was the duty of their predecessors to preserve. \* \* \* and the present county commissioners, in their effort to impose upon the State the duty of rebuilding the bridge, are not to be permitted to take advantage of the failure of some former board of county commissioners to preserve this record of sixty years ago. If it had been preserved, the presumption is it would show that the county commissioners of 1856 had done everything required of them as public officials by the County Bridge Act of 1836, for omnia praesumuntur rite esse acta.”

If the petition of divers inhabitants of Franklin County, presented in 1855, complied with the Act of 1836, and we think it did, then the bridge became a county bridge, and under the Act of May 5, 1876, P. L. 112, the county commissioners are required to rebuild it if it has been “blown down, destroyed, partially destroyed or swept away by floods, freshets, ice, storm, fire or other casualty.”

By the Acts of April 20, 1905, P. L. 237, April 25, 1907, P. L. 104, and March 15, 1911, P. L. 21, the repair and maintenance of the road, including the bridge, rested at the passage and approval of the Sproul Act of May 31, 1911, P. L. 468, on Westmoreland County. By the repeal of the Act of March 15, 1911, P. L. 21, the duty of maintaining and repairing the bridge involved in this question was reimposed upon the County of Westmoreland and continues to rest upon it under Section 34 of said Act of May 31st, 1911: *Commonwealth ex rel. vs. Grove, et al.*, 261 Pa. 504.

The duty to maintain a bridge forming part of a State highway built under the Act of May 31, 1911, P. L. 468, rests upon the county and not upon the Commonwealth where the duty rested upon the county at the time of the passage of the Act: *Commonwealth ex rel. vs. Bird*, 253 Pa. 364; *Commonwealth ex rel. vs. Grove, et al.*, 261 Pa. 504, and *Commonwealth vs. Dickey, et al.*, 262 Pa. 121.

I am, therefore, of the opinion that the duty rests upon the Commissioners of Westmoreland County to immediately repair the bridge in question and put the same in good order and condition, suitable and safe for public travel. If you will advise them that in the opinion of the Attorney General such is their duty, it is very probable that the Commissioners will arrange to have the



work done. Should they refuse, however, to do the work, the proper course to pursue would be the filing of a petition asking for a writ of peremptory mandamus. Should the County Commissioners not give this matter their immediate attention, we would appreciate your again taking up the subject with this Department.

Very truly yours,

J. W. BROWN,  
*Deputy Attorney General.*

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*In Re: Allegheny and Butler Plank Road Company—Act of May 31, 1911, P. L. 468.*

The rights of the Allegheny and Butler Plank Road Company under the agreement with a street railway company passed to the County of Allegheny, when the said road became a county road as the result of condemnation proceedings, and subsequently to the Commonwealth when it was taken over by the State in 1912 and became a State highway route. The Commonwealth may bring an action in assumpsit against the street railway company, its successors or assigns, to collect any or all of the annual payments which have accrued since 1912 and which remain unpaid.

February 6, 1923.

Honorable Paul D. Wright, State Highway Commissioner, Harrisburg, Pa.

Sir: The communication from your Department in reference to the agreement between the Allegheny & Butler Plank Road Company and the Millvale, Etna & Sharpsburgh Street Railway Company, to use the said plank road, now known as State Highway Routes Nos. 70 and 72, has been received by this Department. From the papers and correspondence in the case, I gather the following facts:

On May 20, 1893, the Allegheny & Butler Plank Road Company entered into an agreement with the Millvale, Etna & Sharpsburg Street Railway Company, which agreement is as follows:

“THIS INDENTURE made this 20th day of May A. D. 1893 between the ALLEGHENY & BUTLER PLANK ROAD COMPANY, of the first part, and THE MILLVALE, ETNA & SHARPSBURG STREET RAILWAY COMPANY, of the second part, WITNESSETH:

THAT WHEREAS, at the annual meeting of the stockholders of said Plank Road Company, in the years 1892

and 1893, the following resolution was passed by the Board of Managers:

RESOLVED, that the Treasurer be authorized to grant the Pittsburgh, Millvale & Etna Passenger Railway Company, represented by George B. Hill, or the Millvale & Lawrenceville Passenger Railway, represented by P. W. Seibert, the right of way over our road from the City line to Bridge Street, Etna, for the purpose of an Electric Passenger Railway Company, the Company to which the privileges is granted to give good and satisfactory security that they will indemnify and make good to this Company any loss of tolls sustained, and will guarantee an annual profit from said part of this Company's road of sixteen hundred and eighty-two (\$1682.00) dollars over and above all expenses; said sum being the average annual profits for the six years ending May 1st, 1891, and will make such advanced payments as will provide for the loss of tolls while the road is being built. This grant to be on condition that the road to which the same is granted shall be commenced in due time and completed this summer, and that the space between the tracks shall be paved or planked so that the same may be traveled on comfortably and a good plank track, and, where deemed advisable, a double track laid outside, and on such other conditions as may be deemed advisable to protect this Company and the road-bed and travel thereon.

AND WHEREAS, the corporate name of the Railway Company represented by George B. Hill is the Millvale, Etna & Sharpsburg Street Railway Company.

NOW, the party of the first part, by James Bredin, Treasurer, duly authorized as aforesaid, having before the delivery hereof received good and satisfactory securities from the party of the second part to indemnify and make good to the party of the first part any loss of tolls which may be sustained by party of the first part by reason of the privileges hereby granted to said party of the second part, (by reason of the privileges hereby granted to said party of the second part) and to guarantee an annual profit to the party of the first part of sixteen hundred and eighty-two (\$1682.00) dollars, over and above all expenses from that part of said first party's road over which the said privileges are granted, and in consideration of two thousand dollars (\$2,000.00) in hand paid by the party of the second part to guard against loss of tolls to party of the first part, while said second party's road is being built, and of the covenants on the party of the second part to be performed and fulfilled, and on the conditions hereinafter stated, and subject thereto, does hereby grant to the party of the second part, its successors, lessees and assigns, the right of way over the road of The Allegheny & Butler Plank Road

Company from the Allegheny City line of Bridge Street, Etna, a distance of about two and three-fourths miles, for the purpose of an electric street passenger railway, with the right to construct, *during the summer of the present year, A. D. 1893*, and when built to thereafter operate such passenger street railway thereon; to lay such tracks and erect such poles and other appliances as may be necessary for the purposes of running cars thereon, SUBJECT, HOWEVER, to the payment by (the) party of (the) second part to (the) said party of the first part, from time to time an annual net profit of sixteen hundred and eighty-two (\$1682.00) dollars from the said two and three-fourths miles over which said right of way and other privileges, are granted, over and above all expenses, including repairs, toll collectors, expenses of toll houses, manager, &c., such payments to be made on ten days' notice from the Treasurer of said Plank Road Company requiring payment of a certain sum at the expiration of such notice. When demanded by party of second part, a statement of receipts and expenses, showing that a deficit has occurred, to be furnished to second party.

AND ON CONDITION that the said party of second part will pave or plank and *keep in good condition and repair* the space between the rails of the track or tracks of said Railway Company, so that said track or tracks may be traveled comfortably by horses and vehicles, and where but a single railway track is laid, will plank the road-bed outside of such track with, at least, one track eight (8) feet in width, of sound white oak three (3) inch plank, so that at all places there will be, at least, two tracks that can be made use of by horses and vehicles, on said Plank Road. (The track outside of the rails, after being laid, to be kept in repair by the Plank Road Company). The work of constructing, repairing or changing the tracks of said Railway Company to be done in such manner that at all times, in all places, one plank track of, at least, eight (8) feet in width, with suitable and convenient turn-outs for passage of vehicles, or one railway track, shall be kept open and in good order and condition for travel, and all damages caused by want of care or skill, or by negligence in the performance of said work, and all damages caused by like carelessness or negligence in the operation of said road affecting said party of the first part, directly or indirectly, shall be paid by party of second part.

The party of the first part to have the right at any time after the last day of September next, if the road of said second party is not then completed, on five (5) days' notice to the party of the second part, to stop the work of constructing said road.

IN WITNESS WHEREOF, the said Allegheny & Butler Plank Road, by James Bredin, Treasurer has

hereto affixed its common seal, and the said party of the second part has hereto affixed its common seal."

Proceedings were started by the authorities of Allegheny County in the Court of Quarter Sessions of said County, at December Sessions 1904, No. 14, to condemn the Allegheny & Butler Plank Road Company, and on July 25, 1905, the proceedings were finally confirmed and the said road condemned. The sum of \$60,000 was paid by Allegheny County as the damages assessed by the Viewers, and upon the payment of this sum the road became a county road, and all the rights and privileges of the Road Company passed to the County. The road continued a county road until the passage of the Act of May 31, 1911, P. L. 468, known as the "Sproul Act". Section 5 of said Act provides, *inter alia*, as follows:

"That all township roads, abandoned and condemned turnpikes, or turnpikes that may hereafter be abandoned or which may hereafter be condemned and paid for by the county in which the same may be located, and which form a part of any such highways, shall be taken over by the State Highway Department before the first day of June, one thousand nine hundred and twelve."

The condemned road formed a part of the highways designated by the Act of 1911, being Routes Nos. 70 and 72. It will be observed that the agreement above recited provides:

"SUBJECT, HOWEVER, to the payment by the party of the second part to the said party of the first part, from time to time an annual net profit of sixteen hundred and eighty-two (\$1682.00) dollars from the said two and three-fourths miles over which said right of way and other privileges, are granted, over and above all expenses, including repairs, toll collectors, expenses of toll houses, manager, &c., \* \* \* \* \*

"AND ON CONDITION that the said party of second part will pave or plank and *keep in good condition and repair* the space between the rails of the track or tracks of said Railway Company, so that said track or tracks may be traveled comfortably by horses and vehicles, and where but a single railway track is laid, will plank the road-bed outside of such track with, at least, one track eight (8) feet in width, of sound white oak three (3) inch plank, so that at all places there will be, at least, two tracks that can be made use of by horses and vehicles, on said Plank Road."

Irrespective of the agreement, under common law principles, the street railway company is required to maintain and repair the portion of the highway occupied by its facilities. *Reading vs. United Traction*

*Co., 215 Pa. 250; Chambersburg Borough vs. Chambersburg, etc., Co., 258 Pa. 57.*

The agreement, however, contains a condition that the railway company should maintain the road where it is occupied by the said Company, and the liability to pave or plank and keep in good condition and repair the space between the rails of the track or tracks of said railway company, is recognized. Why, then, should the Company not recognize its liability to pay the sum of \$1682.00 annually, as specified in the agreement? In *Commonwealth vs. Township of Newton*, not yet reported, the Supreme Court held:

“Section 5 of the Act of May 31, 1911, P. L. 468, applying to highways taken over by the State transfers to the latter the benefit of all rights a township may have in any agreement with the company using such highway, the terms of which require its maintenance.”

Section 5 of the Act of 1911, *supra*, in addition to what has already been quoted, provides:

“That where an agreement or contract exists between any street railway company, or other firm or corporation, and any county, township, or borough, the terms of which require said street railway company, or other firm or corporation, to maintain any highway which is designated under this act as a State Highway, the said agreement shall remain in force, and the State shall succeed to and take over to itself all of the rights of said county, township, or borough existing under said agreement or contract. The said street railway company, or other firm or corporation, shall be bound to carry out all of the requirements, and comply with all the terms and conditions, of said agreement with the State, the same as though the said contract or agreement had been originally made between the State and said street railway company or other firm or corporation.”

Under this the State “succeeded to and took over to itself all of the rights” which the County of Allegheny took from the Allegheny & Butler Plank Road Company when it was condemned. Taking all the rights, includes the right to collect from the railway company the annual profit of \$1682.00 which, under the agreement was to be paid to the Road Company.

I am therefore of the opinion that the rights of the Allegheny & Butler Plank Road Company, under the agreement with the Millvale, Etna & Sharpsburg Street Railway Company, passed to the County of Allegheny when the said road became a county road, and to the State in 1912 when it was taken over by the State, and that the State may bring an action in assumpsit against the Millvale,

Etna & Sharpsburg Street Railway Company, its successors or assigns, to collect any or all of the annual payments which have accrued since 1912, and which remain unpaid.

Very truly yours,

J. W. BROWN,  
*Deputy Attorney General.*

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*The "State Bond Road Fund" established under the Act of April 18, 1919, P. L. 62—Diversion of Appropriations made under the Acts of 1919, P. L. 12 and 1921, P. L. 11.*

The moneys appropriated for State-aid highways under the Acts of March 14, 1919, P. L. 12 and March 10, 1921, P. L. 11, now available to those counties on whose behalf this money from the "State Bond Road Fund" was used, cannot be diverted in any way from the purposes for which it was appropriated under those Acts or from the counties to which it has been appropriated by the Highway Commissioner in pursuance of the directions contained in said Acts. It cannot be used to recompense the "State Bond Road Fund" or be placed in any fund so as to be available for State highway construction or be distributed in any way among all the counties.

March 12, 1923.

Honorable Paul D. Wright, State Highway Commissioner, Harrisburg, Pa.

Sir: This Department has your letter of recent date requesting an opinion as to what disposition you should make of certain money appropriated to your Department for the construction of State-aid highways, under the Acts of Assembly approved the 14th day of March, 1919, and 10th day of March, 1921, where certain counties entitled to participate therein have received the benefit thereof, because of and through the use by your Department of money out of "The State Bond Road Fund" for the payment of the balance due on contracts payable out of the said State-aid highway fund when the money appropriated thereto was not available.

You ask first, can it be made available to the State Highway Department for State highway construction; second, can it be distributed equitably among the several counties of the State for State-aid work on the same basis as the distribution of the State-aid appropriation?

I understand the facts which occasion this inquiry to be briefly as follows:

Contracts were awarded by your Department for the construction of certain roads on the State-aid plan payable out of appropriations for State-aid highways made by the Legislature of 1919 and 1921 (*infra*).

These appropriations had been apportioned by you among the several counties in conformity with the requirements of the Act of 1911 (*infra*) and its amendment of 1921 (*infra*). And the counties within which contracts were so awarded had, prior to the time fixed by law for so doing, duly filed their preference for the amounts involved in this inquiry.

When certain payments under these contracts came due the above appropriations were not available because the receipts in the General Fund in the State Treasury were not sufficient to meet its obligations.

Your Department then issued its requisition upon the Auditor General for payment of same out of "The State Road Bond Fund." Warrants were so drawn and paid.

The amount of money so paid is approximately \$1,500,000, and the question is—what distribution shall be made of this credit?

In reality, due to the emergency, one and a half million dollars due on these contracts and payable out of the State-aid fund has been paid out of the "Bond Road Fund"; and the counties, within which roads were constructed under those contracts will profit in excess of the other counties unless their share of the State-aid highway appropriations of 1919 and 1921, to the amount that they participated in this one and a half million dollars, is diverted from their use and placed (a) in the "Bond Road Fund," (b) in a separate fund for State Highway construction or (c) distributed equitably among all the counties.

The Act of Assembly, approved the 31st day of May, 1911 (P. L. 468) provides in Section 21 (page 521) for the aid and co-operation of the State in the improvement and subsequent maintenance of highways, other than State highways, under certain conditions, the State to pay fifty per cent. of the cost thereof.

Section 27 of said Act is as follows:

"The State aid authorized by the provisions of this act in the construction of State-aid highways shall be ratably apportioned among the several counties of the Commonwealth by the State Highway Commissioner, according to the mileage of township and county roads in respective counties, and the said amounts or apportionments shall remain in the State Treasury until ap-

plied for in accordance with the provisions of this act; Provided, however, That if, in any case, the amounts or apportionments so apportioned shall not be applied for before the first day of March in each year, the same shall thereupon be ratably allotted to such county or counties as have made application requiring the expenditure of sums, in the improvement of State-aid highways, greater than the amount of their apportionment."

This section was amended by Act approved the 10th day of March, 1921, P. L. 23. Said amended section is as follows:

"The State aid authorized by the provisions of this act in the construction of State-aid highways shall be ratably apportioned among the several counties of the Commonwealth by the State Highway Commissioner, according to the mileage of township and county roads in the respective counties: Provided, That if the county commissioners of any county shall fail, by formal action, to take up State-aid applications on file with the State Highway Department to exhaust the State-aid apportionment to the credit of such county, prior to June first of the year next succeeding the appropriation, the unused balances of such appropriations, and any heretofore made for the same purpose, shall revert to the State-aid fund, to be redistributed, on the same basis as the original apportionment, among the several counties of the Commonwealth that have filed with the State Highway Department formal indication of preference for taking up applications requiring the expenditure of such sums greater than the amount of their apportionment: Provided further, That if for any reason the county, township, or borough, either singly or jointly refuses to execute agreements, submitted by the State Highway Department, authorizing the execution of contract or contracts, the amount of State-aid funds represented by said agreements shall be forfeited by the county, and thereafter such sum may be used by the State Highway Department for State Highway construction."

The Appropriation Act approved the 14th day of March 1919, P. L. 12, specifically appropriated to the Highway Department the sum of \$10,862,049.38, for the following purposes, to wit:

\* \* \* \* \*

For the payment of the Commonwealth's share in the expenses of construction of State-aid highways, as provided in the Act of May 31, 1911, the sum of \$3,000,000 or so much thereof as may be necessary.



In the same way the Appropriation Act approved the 10th day of March, 1921, P. L. 11, specifically appropriated \$4,000,000 to the State Highway Department for the payment of the Commonwealth's share in the expenses of construction of State-aid highways, as provided in the Act of May 31, 1921, and supplements and amendments thereto.

The amounts specified in these appropriations for State-aid highways were apportioned among the several counties according to the provisions of the aforesaid Acts of 1911 and 1921.

"The State Bond Road Fund" was established by Act of Assembly approved the 18th day of April 1919, P. L. 62. This fund was established in conformity with the Constitutional Amendment of November 5, 1918 and the disposition and use of the proceeds is as follows:

"The proceeds realized from the sale of bonds under the provisions of this act shall be paid into the State Treasury, and shall be set apart and be kept in a separate fund, which shall be known as "The State Bond Road Fund."

"All moneys in the State Bond Road Fund from time to time, are hereby specifically appropriated to the State Highway Department for the purpose of improving and rebuilding the highways of the Commonwealth.

"The Auditor General shall, upon requisition from time to time of the State Highway Commissioner, draw his warrant upon the State Treasurer for the amounts specified in such requisitions not exceeding, however, the amount in such fund at the time of making such requisitions."

Can the items appropriated for State-aid highways in the aforesaid Acts be diverted in any way from the specific fund to which, or from the specific purpose for which, appropriated?

I. Each item in these Appropriation Acts is so far separate and distinct that the State Highway Department can only use the money appropriated in a specific item for the purpose set forth in said item, and to that extent, at least, each item constitutes a separate appropriation.

*Opinions of the Attorney General, 1915-1916, 122, page 127.*

A specific appropriation of State funds is an Act by which a certain sum of money is set apart in the treasury for a specific purpose in such a manner that the Executive Officers of the Government are authorized to use that money and no more for that object and for no other.

*36 Cyc. of Law and Procedure, 892*

*4 Corpus Juris, 1458*

*Jobe vs. Caldwell & Drake*, 93 Ark. 503, 125 S. W. 425.

*State vs. Holmer*, 123 N. W. 884 (N. D.)

*Epperson vs. Howell*, 28 Idaho 338; 154 Pac. 621.

It was proposed to borrow from a fund of \$1,500,000 acquired from sale of bonds, authorized for a specific purpose, money for general expenses. Held on the submission of the question to the Supreme Court that notwithstanding the certainty that the money could be returned with interest to the special fund before it was needed, it could not be done. The fund is analogous to a trust fund and cannot be legally applied to any other purpose than that for which it was created, except by the consent of the people by whom it was created.

*In re: Statehouse Bonds*, 19 R. I. 393; 33 Atl. 870.

An Act for specific appropriation for the completion and furnishing of a particular department of an insane hospital, and for the construction of certain outhouses, makes appropriations for State purposes, and the moneys so appropriated cannot be diverted from such purposes and applied to the payment of an antecedent indebtedness of the hospital.

*State vs. Porter*, 89 Ind. 260.

Where money had been appropriated out of the general treasury by the Legislature for the erection of a State Normal School, after which a bond issue was authorized for the purpose of purchasing land and erecting buildings for the same State Normal School held that the Legislature had no power to authorize the repayment to the General funds, out of the funds raised from the sale of bonds, the money so appropriated for the erection of the Normal School, unless such authority was specifically granted by the people when they authorized the issue of bonds.

*In re: Statehouse Bonds*, 19 R. I. 393; 33 Atl. 870.

The State Board of Health (Pennsylvania) having an appropriation for use in emergencies expended money out of its general fund in connection with the Austin disaster, an emergency. The general fund became exhausted prior to the end of the appropriation year. The Attorney General advised that the general fund could not be reimbursed from the special fund on account of the money so expended out of the general fund for work that properly belonged within the purpose of the special fund.

*Opinion of the Attorney General*, 41 County Court Reports 97, at page 101.

II. The Legislature having appropriated certain money to the State Highway Department for use in the construction of State-aid highways and having directed how it should be apportioned, leaving no discretion in the Commissioner, and he having, in pursuance of such authority, made that apportionment, it is in the same situation as if the Legislature had in the Act of Assembly appropriated those specific items to the respective counties by name.

The action of the Highway Commissioner in applying the \$1,500,000 out of "The State Bond Road Fund," as above specified, being within his discretion, it was an application of that much of that fund to the construction of certain highways within certain counties and did not affect the distribution of the appropriations of 1919 and 1921 for State-aid highways, nor did it affect the balances standing on your books to the credit of such counties.

The Act of May 11, 1909, (P. L. 519) makes it unlawful to authorize the payment of, or to pay, any money out of the State Treasury "except in accordance with the provisions of an Act of Assembly setting forth the amount to be expended and the purpose of the expenditure;" it also makes it unlawful for any officer of the Commonwealth to authorize the payment of, or for the State Treasurer to pay, any money out of the State Treasury "in excess of the amount thus specifically appropriated."

Therefore, before the Auditor General can issue a warrant and the State Treasurer honor the same, your requisition must set forth the amount to be expended and the purpose of the expenditure and these statements must be in accord with the provisions of the Act of Assembly making the appropriation. So far as the warrant for the expenditure of State-aid highway money, as appropriated by the Acts of 1919 and 1921, is concerned the ministerial act of the Highway Commissioner in making the apportionment between the counties is necessarily considered in determining the provisions of the Act.

If you were to draw your requisition for this State-aid money in question setting forth the purpose of the expenditure as any other than State-aid highway construction, or for any county other than that to which it had been properly apportioned, or for any county in an amount greater than that originally apportioned to it, (unless it has been re-apportioned according to the provisions of the Act) no warrant could issue because it would not be in accordance with the provisions of the Act of Assembly.

And, of course, if the money could not be paid out on such a requisition it could not be so applied after payment on a warrant setting forth proper purposes, amounts and beneficiaries.

Stating the same situation in another way: If this \$1,500,000 were to be returned to the "State Bond Road Fund" then your requisition would state a purpose other than that specified in the Act; if it were to be drawn for State highway construction the same would be true; if it were apportioned among the counties then each county would have to its credit more money than it is entitled to under the provisions of the Acts of 1919 and 1921.

If requisitions, calling for the total amounts originally apportioned to the various counties for State-aid highways, were drawn for that purpose and paid, there would then remain to the credit of the counties various sums aggregating \$1,500,000. You could not then draw your requisitions for these balances because each one would, when added to the amounts already drawn to the credit of that county, call for an amount in excess of the amount specifically appropriated to such county for such purpose. And in the aggregate these requisitions would, when added to the amounts already drawn under said Acts of 1919 and 1921 for State-aid highways, call for \$1,500,000, more than the total amount thus specifically appropriated.

And even if these requisitions were drawn, warrants could not issue or be paid because all the money appropriated for that purpose would be expended and also because they would call for an amount to be expended and set forth a purpose that would not be in accordance with the provisions of the Act.

III. The diversion of the money in question to the "Bond Road Fund" would mean the treatment of that portion of the bond fund used as a loan to the State-aid fund. If money can be used to repay a loan without specific authorization then it can as well be used to create a loan. Interest on the State debt cannot be paid without a specific appropriation by the Legislature. *Ristine v. State*, 20 Ind. 328; *State v. Ristine* 20 Ind. 345.

The placing of it in the "Bond Road Fund" or in a special fund for State highway construction would make it available for State highway use which was not contemplated by the Appropriation Act.

If it could be reapportioned among the counties, then every time the State Highway Commissioner determined to use any money out of the "State Bond Road Fund" for State-aid construction he could compel the county in which it was to be used to release a like portion of its State-aid money. This power in the Commissioner to trade funds has not been authorized by the Legislature either as to the "State Bond Road Fund" or as to the State-aid appropriations.

For these reasons I am of the opinion that the money appropriated for State-aid highways under the Acts of 1919 and 1921 (supra), now available to those counties on whose behalf this money from "The State Bond Road Fund" was used cannot be diverted in any way from the purposes for which it was appropriated under those acts, or from the counties in which it has been apportioned by the Highway Commissioner in pursuance to the directions contained in said Acts; and that, therefore, it cannot (a) be used to recompense the "State Bond Road Fund," or (b) be placed in any fund so as to be available for State highway construction, or (c) be distributed, in any way, among all the counties.

I understand, however, that the former Commissioner did, on the Department books, debit the account of each county in which money so taken from the "Bond Road Fund" was expended with the amount so used. This being the case, a distribution of the \$1,500,000 used by him out of the "State Bond Road Fund" among the counties so debited upon the same ratio as said debits were made will restore those balances.

If this is done you will be in position to make a redistribution of the amounts for which counties have shown no preference according to the provisions of the Act of 1921, which I understand has not been done.

If under all the circumstances this is deemed inequitable and unjust to those counties which did not share in the money so withdrawn from "The Bond Road Fund," the Legislature can grant relief, or in the further use of "The Bond Road Fund" preference can be given to such counties in such proportions as will equalize the matter.

Very truly yours,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

*Motor-vehicles—Title—Title in husband—Assignment of certificate by wife—Desertion—Change of title—Act of May 23, 1923.*

Under the Motor Vehicle Act of May 24, 1923, P. L. 425, the Department of Highways has no power to honor an assignment by a married woman of a certificate of title to a motor-vehicle issued to, and in the name of, her husband, who is alleged by her to have deserted her and ceased to contribute to her support, unless the desertion has been established and the title transferred by proper legal proceedings.

March 25, 1924.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, Department of Highways, Harrisburg, Pa.

Sir: In your letter of the first instant to this Department you inquire whether or not your Department can honor an assignment by a married woman of a certificate of title to a motor vehicle issued to, and in the name of, her husband, who has left her and ceased to contribute to her support; and whether or not you can, on the authority of such assignment, issue a new certificate of title to such assignee.

In the case which you cite an official certificate of title for the motor vehicle in question was issued to the husband by the Secretary of Highways under authority of Section 2 of the Act of Assembly approved the twenty-fourth day of May, 1923, P. L. 425, after he had satisfied himself that the applicant was the lawful owner thereof. No question is raised as to the ownership or right of possession of such motor vehicle at the time of the issuance of said certificate of title.

Upon the change of ownership of a motor vehicle the Act of May 24, 1923, requires the new owner to obtain a new certificate of title thereto from the Department of Highways, and it authorizes the Secretary of Highways to issue such new certificate only upon the presentation to him of certain specified proof of such change of ownership. It may be added that after transfer of the motor vehicle it cannot be operated until license plates have been issued to the new owner, and that such plates can not be issued until a new certificate of title has been issued.

Change of ownership is classified in the Act under two heads; to-wit, (1) sales, and (2) operation of law, and the proof required to be presented to the Secretary of Highways under each is set forth and must be complied with.

(1) Section 3 of the Act is as follows:

“\* \* \* In the event of the sale or transfer of the ownership of a motor vehicle for which an original certificate of title has been issued as aforesaid, the original holder

of such certificate of title shall endorse on the back of the same an assignment thereof \* \* \* and deliver the same to the purchaser or transferee at the time of the delivery to him of such motor vehicle. The purchaser or transferee shall \* \* \* present such certificate of title, assigned as aforesaid, to the commissioner, whereupon a new certificate of title shall be issued to the assignee, \* \* \*."

So far as the issuance of a new certificate of title is concerned in the case of a sale or transfer of the ownership of a motor vehicle, the Act has made the assignment of the certificate of title issued to the original holder the only proof of such change of ownership, and such assignment must be made by the original holder.

This provision is mandatory and, therefore, no such assignment having been produced in the case which you state, you can not issue a new certificate of title for the motor vehicle in question under the authority of Section 3 of the Act.

(2) Section 8 of the Act provides as follows:

"In case of the transfer of ownership or possession of a motor vehicle, by operation of law, as upon inheritance, devise, or bequest, order in bankruptcy, insolvency, replevin, or execution sale, or whenever a motor vehicle is sold at public sale to satisfy storage or repair charges, or repossession is had upon default in performance of the terms of a lease, contract of conditional sale, or other like agreement, it shall thereupon become the duty of the person from whose possession such motor vehicle was taken, and without prejudice to his rights in the premises, immediately to surrender the certificate of title for such motor vehicle to the person to whom possession of such motor vehicle has so passed. The commissioner, upon surrender of prior certificate of title, or, when that is not possible, upon presentation of satisfactory proof to the commissioner of ownership and right of possession to such motor vehicle, and upon payment of the fee of two (2) dollars and presentation of application for certificate of title, shall issue to the applicant to whom possession of such motor vehicle has so passed a certificate of title thereto.\* \* \*"

The authority here given to issue a new certificate is based upon the transfer of title and possession or right of possession by operation of law.

If the right to the issuance of a new certificate of title to the wife in the case which you mention is to be based upon this section of the Act, it must be because (a) the fact of a legal desertion has been established, and (b) desertion ipso facto vests all the personal property of the deserting husband in the wife.

(a) The only evidence you have of desertion is contained in the statement or charge of the wife. This is not sufficient. The husband deserts the wife when he separates himself from her without reasonable cause. Desertion involves the fact of separation and the reason therefor.

Even if desertion can be established, it must be done in the legal way. You have no jurisdiction to determine this question; it must be determined in the proper Court.

(b) The judgment of the proper Court that the husband has deserted his wife without reasonable cause does not vest his property in her. If it vests his motor vehicle it vests all of his property in her. She is entitled to her reasonable and proper support—no more.

There are several acts of Assembly under which the fact of desertion may be determined and under which the property of the deserting husband, sufficient to maintain the wife, may be seized and sold. See Acts of April 13, 1867, P. L. 78, West Penna. Stat. 9061; June 15, 1917, P. L. 614, West 9062; March 13, 1903, P. L. 26, West 9067; July 21, 1913, P. L. 867, West 9070; July 12, 1919, P. L. 939, West 9072.

These Acts provide for proceedings to divest title of the deserting husband to personal property, both in cases in which he can be personally served with process and in cases in which he can not be so served.

I am of the opinion that before you are authorized to issue a new certificate of title to the motor vehicle in question, the fact of the desertion of the husband must be determined and transfer of title to his motor vehicle must be made in some one of the ways outlined in the above cited Acts, proof of which must be submitted to you.

Yours very truly,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*



*Automobiles—Co-owners—Death of one owner—Issue of new certificate.*

Where a certificate of ownership of an automobile has been issued to two persons who are not partners or man and wife, and one of the owners dies, a new certificate should be issued on the surrender of the old one to the survivor and to the person or persons who are shown to the department to be the person or persons entitled, under the intestate laws or under the will of the deceased, to the interest of the deceased in the automobile.

March 27, 1924.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, Department of Highways, Harrisburg, Penna.

Sir: In your recent letter to this Department you inquire what procedure should be followed by you in respect to the issuance of a new certificate of title to a motor vehicle owned jointly by two persons, to whom as co-owners the original certificate of title therefor was issued, in the case of the death of one of such co-owners.

It is to be assumed, unless the contrary is made to appear, that these co-owners are not partners and that the motor vehicle in question is not partnership property.

"A partnership is an association of two or more persons to carry on as co-owners a business for profit." *Section 6, Act of March 26, 1915, P. L. 18; 6 Purdon (13th Ed.) 7054.*

"In determining whether a partnership exists, these rules shall apply:

"\* \* \* \* \*

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived."

*Section 7, Act March 26, 1915, (supra.)*

The motor vehicle in question is therefore subject to the rules applicable to ordinary personal property owned jointly by two or more persons.

The interest of one of several owners of personal property is an undivided interest therein. The ownership of such parties, respectively, to such property is as tenants in common. They have several and distinct titles and estates: *Vivian v. Challenger, 45 Pa. Super. Ct. 1, 5.*

Joint owners of a chattel have each an equal right to the possession of it, and neither when in possession can be ousted by the other. The vendee of a joint owner takes only his vendor's interest and holds in the same way. Neither can object to a sale by the other of his interest, nor are the rights of one joint owner impaired if the other assumes to sell the whole.

If one such owner sells the whole chattel the other owner may elect to ratify the sale or to continue to hold his interest therein. *Browning v. Cover*, 108 Pa. 595 (Sylabus).

From statements contained in your letter I take it that the surviving owner in this case assumes that title to the motor vehicle vests in him by right of survivorship and that he is entitled to have a new certificate of title issued to him upon assignment by him of the original certificate.

Survivorship in joint tenancy was abolished by the Act of March 31, 1812, 5 *Smith Laws* 395; 2 *Purdon* (13th Ed.) 2031. This Act embraces personal property: *Yard's Appeal*, 86 Pa. 125. It does not, however, apply to an estate held jointly by a husband and wife, the right of survivorship attaching to personal property when held by them as co-owners. *Gillan's Executors vs. Dixon*, 65 Pa. 395; *Bramberry's Estate*, 63 P. L. J. 509. This rule is not affected by a divorce: *Alles vs. Lyon*, 216 Pa. 604.

If the parties to whom this original certificate of title was issued were husband and wife then, on the death of one, title to the whole undivided interest in the motor vehicle vested in the survivor. In that case proof should be submitted to your Department of the fact that these co-owners were husband and wife and of the death of one of them. This being done, you should honor the assignment of the original certificate of title when executed by such surviving spouse and issue a new certificate to the assignee so named, under the provisions of Section 3 of the Act of May 24, 1923, P. L. 425.

If the parties to whom this original certificate was issued were not husband and wife and were not partners as above defined, this interest of the deceased co-owner is vested in his devisee, legal representative or heirs, as the case may be, by operation of law, and you are to be governed in the issuance of a new certificate of title by Section 8 of the aforesaid Act of May 24, 1923, which section provides as follows:

"In case of the transfer of ownership or possession of a motor vehicle, by operation of law, as upon inheritance, devise, or bequest, order in bankruptcy, insolvency, replevin, or execution sale \* \* \* it shall thereupon become the duty of the person from whose possession such motor vehicle was taken, \* \* \* immediately to surrender the certificate of title for such motor vehicle to the person to whom possession of such motor

vehicle has so passed. The commissioner, upon surrender of prior certificate of title, when that is not possible upon presentation of satisfactory proof to the commissioner of ownership and right of possession to such motor vehicle, and upon payment of the fee of two (\$2) dollars and presentation of application for certificate of title, shall issue to the applicant to whom possession of such motor vehicle has so passed a certificate of title thereto. \* \* \*

In such case proof should be submitted to you of the death of the co-owner, and whether or not he died testate or intestate. If he died testate, a certified copy of his will should be submitted and the devisee of said motor vehicle, or the executor under the will, or the administrator c. t. a., or d. b. n. c. t. a., or d. b. n., as the case may be, should present the original certificate duly assigned. If he died intestate, his administrator should present said original certificate of title duly assigned, together with a short form certificate of his appointment by the Register of Wills; if administration has not been taken out on the estate, said original certificate of title, duly assigned by all of the heirs in whom title to said motor vehicle has vested, together with proof that such assignors are all of the heirs of said decedent, should be presented.

In the case which you cite the motor vehicle, after the death of one of the co-owners, being owned jointly by the survivor and the successor in title to the deceased co-owner, as above indicated, the new certificate of title must be issued to such owners jointly, there being no provision for the issuance of a certificate of title for a fractional interest in a motor vehicle. Such being the case, the original certificate of title when surrendered to you should be duly assigned by the survivor of the original co-owners and the successor in title of the deceased original co-owner, as above outlined. The assignment should indicate to whom the new certificate is to issue and should be issued by you accordingly.

Yours truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

*Automobiles—Foreign cars—Foreign operators—Licenses—Reciprocity with other states—Acts of June 13, 1919, and June 14, 1923.*

1. The holder of a motor-vehicle operator's license issued by the Commonwealth can, for a limited time, legally operate a motor-vehicle within this Commonwealth which is not restricted herein and is not being operated under Pennsylvania license plates, provided it is duly licensed by a state with which the reciprocity provisions of section 8 of the Act of June 30, 1919, P. L. 678, as amended by the Act of June 14, 1923, P. L. 718, are in force, and provided that the registration plates are conspicuously displayed upon such motor-vehicle, as required by the state by which it is limited.

2. The holder of a valid motor-vehicle operator's license issued by some other state with which the reciprocity provisions of said section 8 are in force, but who is not so licensed by this Commonwealth, can, for a limited time, legally operate a motor-vehicle within this Commonwealth which is duly registered herein and is being operated under Pennsylvania license plates. Such operator should carry with him proof of the authority issued to him by his state to operate a motor-vehicle.

3. The time limit of such authority is to be determined in each individual case by the length of time the state in which such motor-vehicle or operator is licensed shall grant the like privilege to residents of this State.

May 8, 1924.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, Department of Highways, Harrisburg, Penna.

Sir: This Department has your request for an opinion upon the two following questions:

(1) Can the holder of a motor vehicle operator's license issued by this Commonwealth legally operate a motor vehicle within this Commonwealth which is not registered herein or being operated under Pennsylvania license plates or tags, but which is duly registered in another State and is being operated under its license plates and tags?

(2) Can the holder of a motor vehicle operator's license issued by some other State, but who is not so licensed by this Commonwealth, legally operate a motor vehicle, within this Commonwealth, which is registered herein and is being operated under Pennsylvania license plates or tags?

Section 1 of the Act of June 30, 1919, P. L. 678, is as follows:

"Except as is hereinafter provided for nonresidents  
\* \* \* no motor vehicle shall be operated upon any public highway in this Commonwealth until such motor vehicles shall have been registered with the State Highway Department of this Commonwealth."

14, 1923, P. L. 718, 724, is as follows:

\* \* \* .”

Section 4 of the said Act of 1919, as amended by the Act of June

“No motor vehicle shall be operated under any other  
registration plates than those of its own registration,  
\* \* \* except as is provided in this act for nonresidents

Section 8 of said Act of 1919, as last amended by the said Act of 1923, on page 726, provides:

“Nonresidents of this State shall be exempt from the provisions of this act as to the *registration of motor vehicles and the licensing of motor vehicle operators* for the same time and to the same extent as like exemptions are granted residents of this State under the laws of the foreign country, State, Territory, or Federal district of their residence; Provided, That they shall have complied with the provisions of the law of the foreign country, State, Territory, or Federal district of their residence relative to the registration of their motor vehicles, and licensing of motor vehicle operators, and shall conspicuously display the registration plates as required thereby, and have in their possession the registration certificate issued for such motor vehicle.”

Under the first two quoted provisions of the motor vehicle laws of this State there are two conditions, both of which must be complied with before a motor vehicle can be operated herein:

(a) The vehicle must have a Pennsylvania registration and display Pennsylvania license plates; and (b) the operator must hold a Pennsylvania license authorizing him personally to operate a motor vehicle.

However, under the reciprocity provisions of Section 8 (supra) either or both of these conditions shall be suspended for a limited time, in the case of nonresidents, upon the possession of a proper license and license plates for the motor vehicle or of a proper license for the operator, as the case may be, from a foreign State, and the compliance with the other conditions therein specified.

The purpose of requiring such vehicles to be registered and licensed and to carry identification plates is for the purpose of supervision of the vehicle, and especially to provide a means whereby persons who may be injured in property or person by a motor vehicle shall be able to identify the owner liable for any negligence that may have caused such injury.

The purpose of requiring operators to be licensed is primarily to prevent those that are not qualified from operating a motor vehicle upon the highways.

The purpose of the reciprocity clause is to obviate all the trouble and inconvenience and expense which would result to residents of one State, when they wish to travel for a short time in another State, if they are required to procure licenses for the vehicle and for the operator in each State into which they travel. The theory is that the State of residence has a record of the license of the vehicle and operator, which is available to the officials and citizens of other States upon request, which records are easily found upon presentation of the license number; and that the State issuing an operator's license has investigated the qualifications of the operator and issued his license with due care.

Why should a resident of New Jersey who wishes to travel in Pennsylvania be refused permission because his operator is licensed in Pennsylvania when he would be granted such permission if his operator's license was issued by New Jersey? All of the aforesaid purposes are met when his operator has a Pennsylvania license as well as when he has a New Jersey license. Our operators are no less qualified when operating a New Jersey car than when operating a Pennsylvania car. Or why should an Ohio motor vehicle owner visiting in Pittsburgh not be permitted to avail himself of the services of his host, licensed in Pennsylvania and familiar with the City of Pittsburgh, its streets and police regulations.

On the other hand, if we permit a New York operator to drive a New York car in this State, there seems to be no reason why under the reciprocity agreement, he should not be permitted for a short time while in this State to drive a Pennsylvania car. There is no difference in the motor vehicles and his qualifications as an operator are not based upon the source of the license of the vehicle.

I am therefore of the opinion:

(1) That the holder of a motor vehicle operator's license issued by this Commonwealth can, for a limited time, legally operate a motor vehicle, within this Commonwealth, which is not registered herein and is not being operated under Pennsylvania license plates, provided it is duly licensed by a State with which the reciprocity provisions of Section 8 of the Act of June 30, 1919, as amended by the Act of June 14, 1923, *supra*, are in force, and provided that there shall be conspicuously displayed upon such motor vehicle the registration plates as required by the State by which it is licensed.

(2) That the holder of a valid motor vehicle operator's license issued by some other State with which the reciprocity provisions of said Section 8 are in force, but who is not so licensed by this Commonwealth, can, for a limited time, legally operate a motor vehicle, within this Commonwealth, which is duly registered herein and is be-

ing operated under Pennsylvania license plates. Such operator should carry with him proof of the authority issued to him by his State to operate a motor vehicle.

The time limit of such authority under both (1) and (2) is to be determined in each individual case by the length of time the State in which said motor vehicle or operator, as the case may be, is licensed shall grant the like privilege to residents of this State.

Very truly yours,

DEPARTMENT OF JUSTICE,

By JAMES O. CAMPBELL,

*First Deputy Attorney General.*

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*Secretary of Highways—Authority to purchase certain materials and supplies necessary for the work of the Automobile Division of the Department—Where payable. (Acts of May, 31, 1911, P. L. 468; June 7, 1919, P. L. 428; June 30, 1919, P. L. 687; May 17, 1921, P. L. 837; April 6, 1921; P. L. 107; June 7, 1923, P. L. 498; June 14, 1923, P. L. 718; Article XIX, Section 2803, June 14, 1923, No. 44A.)*

The Secretary of Highways is authorized to pay, out of the State Motor License Fund for all such supplies and equipment as are clearly necessary for the effectual carrying on of the work of the Automobile Division of the said Department, such purchases to be made through the Department of Property and Supplies, as purchasing agency.

June 25, 1924.

Honorable Paul D. Wright, Secretary of Highways, Harrisburg, Pa.

Sir: We have your request to be advised whether it is proper for you to request the Department of Property and Supplies as Purchasing Agency to purchase for your Department certain materials and supplies necessary for the work of your Department as per the list furnished us in your letter of June 12, 1924, such materials and supplies to be paid for out of the Motor License Fund.

We shall not here enumerate all the classes of articles contained in your list which, among others, mentions adding machines, title plates, mimeographs, multigraphs, level rods, tripods, metallic tapes, folders, letters trays, files, desks, engineering equipment, typewriters, carbon paper, blue print paper, photographic supplies, maps, envelopes, pens, pencils and printed forms for the Automobile Division.

We understand that all of the classes of articles listed in your letter are necessary for the effectual carrying on of the work of your Department.

By the Act of June 14, 1923, P. L. 718, Section 12 of the Motor Vehicle Act of June 30, 1919, P. L. 687 was amended. This Section of the Act of 1919 as amended appropriates all moneys derived from motor license fees, from fines and penalties collected under the provisions of the Motor Vehicle Act, forfeited bail and other miscellaneous receipts to the State Highway Department for the purpose (1) "of assisting in the maintenance, construction, replacement, reconstruction, improvement, and repair of State Highways," (2) "for payment of salaries, traveling expenses, and *any and all other expenses necessary to effectually carry on the work of the State Highway Department* as described in the Act of Assembly approved the thirty-first day of May one thousand nine hundred and eleven, known as the State Highway Act, and the amendments and supplements thereto," and (3) "to carry out and enforce the provisions of the Act to which this is an amendment, and all amendments and supplements thereto, including the penal provisions thereof."

It is unnecessary to comment upon the meaning of the language employed to describe the first purpose for which the moneys in the Motor License Fund may be expended, namely, "assisting in the maintenance, construction, replacement, reconstruction and repair of State highways." The same is true of the third purpose for which such moneys may be expended, namely, to carry out and enforce the provisions of the Motor Vehicle Act.

With respect to the second purpose for which these moneys may be expended the important question is: What is the work of the State Highway Department as described in the Act approved May 31, 1911, P. L. 468, and the amendments and supplements thereto?

By reference to the Act of May 31, 1911, P. L. 468, it appears that the work of the State Highway Department as in that Act described consists of taking over certain highways as State Highways and maintaining, repairing and constructing them, of preparing and filing for public use maps of all State highways, of relocating highways so as to eliminate dangerous or inconvenient grades, turns or other conditions, advertising for proposals for contracts, letting contracts, erecting signs along the State highways, and so on. The Acts amending and supplementing the Act of 1911 have not in any sense restricted the work of the Highway Department as described in the Act of 1911. On the contrary they have broadened the scope of the Department's work. We shall refer to only a few of these amendatory acts. The Act of June 7, 1919, P. L. 428 authorized the State Highway Commissioner, now the Secretary of Highways, to purchase and acquire lands in the name of the Commonwealth containing



stone suitable for use in constructing or maintaining highways and to quarry and prepare stone for the construction and maintenance of State highways or State-aid highways, and to manufacture any other materials used in the construction or maintenance thereof. It further authorized the Commissioner to erect such buildings and purchase such machinery, utensils, tools and equipment as may be necessary or essential for the proper prosecution of the work of quarrying and preparing stone and manufacturing materials. The Act of April 6, 1921, P. L. 107 authorized the Highway Commissioner to establish the width and lines of State highways and the Act of May 17, 1921, P. L. 837 authorized the Commissioner to relocate parts of State highways under certain circumstances.

While some of the powers to which reference has been made were conferred upon the State Highway Commissioner rather than upon the State Highway Department there can be no doubt but that the work of the State Highway Department includes the exercise of the powers and the performance of the duties conferred and imposed both upon the State Highway Department and upon the State Highway Commissioner.

The Administrative Code of 1923 (Act of June 7th, P. L. 498) did not in any wise restrict the work of the Department nor did it substitute for the former State Highway Department a new and different department or for the State Highway Commissioner a new and different officer to act as head of the Department. The Code did change the name of the Department to "Department of Highways" and the name of the officer at the head of the Department to "Secretary of Highways," but these changes of name had no effect whatever upon the powers and duties either of the Department or of its head. By reference to Article XIX (P. L. 595) of the Code it will be found that many of the powers of the Department as contained in the Act of 1911 its amendments and supplements are reenacted, but the Legislature was very careful to provide in Section 2803 of the Code that the enumeration and definition of powers in the Code "shall not be construed to be in derogation or limitation of the powers and duties heretofore exercised and performed" by any department unless "(a) any power or duty as enumerated and defined is clearly inconsistent with the exercise of the power or the performance of a duty heretofore exercised or performed; or (b) there is a specific statement that a power or a duty heretofore exercised or performed shall not be exercised or performed \* \* \* or that such power or duty shall be exercised in a different manner."

It is true that the Code specifically repealed sections 2 and 4 of the Act of 1911 and that it repealed Sections 1 and 3 of the Act insofar as inconsistent with the Code. However, an examination of these sections clearly shows that their repeal did not lessen the powers of

the Department of Highways in any of the respects now under consideration. Section 2 of the Act of 1911 specifically enumerated a number of employes of the Department, fixed their salaries and designated what duties they should perform. This section was plainly unnecessary in view of the provisions of the Code permitting the head of the Department with the Governor's approval to determine what employes there should be, what salaries they should receive and what duties they should perform. Section 4 provided that the Highway Department should have offices in the Capitol Building, that the State Highway Commissioner should have charge of the records of the Highway Department and should make an annual report to the Governor. All of these provisions being fully covered by the provisions of the Administrative Code it was proper that this section should be repealed absolutely. Section 3 authorized the State Highway Commissioner to purchase machinery, implements, tools and materials of any and every kind, incident to or necessary in the construction, building, rebuilding and maintenance of the State highways. This Section is inconsistent with Section 507 of the Administrative Code only to the extent that it requires the Department of Highways to purchase through the Department of Property and Supplies as Agent all materials, supplies and equipment other than those which are necessary for the construction and repair of highways. It is, therefore, not repealed by the Administrative Code but merely modified to the extent indicated. Section 1 of the Act of 1911 has no bearing whatever upon the question now before us.

Accordingly when the Act of June 14, 1923 appropriated the Motor License Fund to the State Highway Department for payment of salaries, traveling expenses and any and all other expenses necessary to effectually carry on the work of the State Highway Department as described by the Act of May 31, 1911, its amendments and supplements, it appropriated this Fund for the purpose of enabling the Department to purchase materials, supplies and equipment incident to or necessary in the general work of the State Highway Department, provided only that the materials or supplies purchased are "necessary to effectually carry on" such work. In construing the meaning of the word "necessary" as here used it is obvious that what the Legislature intended was that the expenses to be paid out of the Motor Fund should be reasonably necessary,—not absolutely necessary,—for carrying on the work of the State Highway Department. This conclusion is inevitable unless the word "effectually" be ignored. In determining what materials, supplies and equipment are necessary for effectually carrying on the work of your Department your discretion as head of the Department or that of your deputies must be the guide; and only where it could be shown that you had grossly abused your discretionary powers could your judgment be overruled.

Practically every class of article which you have listed is evidently necessary for effectually carrying on the work of your Department and we have no doubt that in the few cases in which the necessity for the articles is not self-evident you would be able to show that the class of article is reasonably necessary for your work.

We understand that you have addressed this inquiry to this Department because of the intimation by the Auditor General's Department that before you can pay for articles of the various classes which you have mentioned out of your Motor Fund it must appear that the Appropriation to the Department of Property and Supplies for materials, furniture and supplies has been exhausted. In our opinion this proposition is not tenable. Under date of January 14, 1924 this Department in an opinion by Deputy Attorney General Brown advised the Department of Property and Supplies that the Legislature having made a specific appropriation to the Treasury Department for the payment of equipment necessary for the collection of emergency Taxes imposed by the 1923 Legislature, the Department of Property and Supplies could not furnish to the Treasury Department equipment needed for this purpose out of the General Appropriation to the Department of Property and Supplies for furniture, materials and supplies, at least until the specific appropriation to the Treasury Department for this purpose had been exhausted. The instant case is very similar. The Legislature having specifically appropriated to your Department the Motor License Fund for the purpose of paying "any and all expenses necessary to effectually carry on" the work of your Department it is your duty to exhaust this appropriation before asking the Department of Property and Supplies to furnish you with materials, supplies, or equipment paid for out of the General Appropriation to that Department.

We believe that this would be so even in the absence of any declaration by the Legislature sustaining this view. Fortunately, however, the Legislature itself has clearly indicated that this should be the proper practice. In Section 709 (f) of the Administrative Code (at Pamphlet Laws, page 543) it is provided that the Executive Board after each biennial appropriation to the Department of Property and Supplies for the purchase of stationary, fuel, printing, paper, supplies, furniture, furnishings, repairs, alterations and improvements shall allocate to the several administrative departments, boards and commissions such portions of such appropriation as will fairly represent the needs of the departments, boards and commissions for the biennium *taking into consideration the right of any such department, board or commission to pay its necessary expenses or purchase furniture, materials or supplies out of fees or other moneys received by or moneys specifically appropriated to it.* In this provision of the Code the Legislature has specifically directed

the Executive Board in estimating the needs of any Department for supplies, printing or other items which would otherwise be properly furnished by the Department of Property and Supplies to take into consideration, and lessen the allocation according to, the right of any Department to pay its expenses out of another Fund. Incidentally, it may be mentioned that the Executive Board allocated to your Department for supplies for two years only seventy thousand dollars (\$70,000) which is considerably less than the amount involved in the requisitions covering the articles now in question.

If there is any doubt about the correctness of our view that it was the intention of the Legislature that requisitions upon the Department of Property and Supplies for materials which your Department has a right to pay for out of the Motor License Fund should be postponed until the appropriation to your own Department available for the purchase of such materials and supplies has been exhausted, it is absolutely clear that the proposition is not tenable that you must refrain from expending any part of your Motor License Fund for materials and supplies until the entire appropriation for materials and supplies made to the Department of Property and Supplies has been exhausted. Such an interpretation of the law would result in the complete paralysis of the State government in view of the fact that your Department will expend for materials and supplies during the current biennium more than the total appropriation to the Department of Property and Supplies for purchasing materials and supplies for the entire State government. If our view that you should postpone requisitions upon the Department of Property and Supplies until your Motor License Fund has been exhausted is erroneous it is erroneous only to the extent that you possibly have a right in your discretion either to pay for materials or supplies out of the motor license fund or to requisition materials and supplies from the Department of Property and Supplies as long as any of the funds of that Department allocated to you are available. We are quite clear that if there is discretion lodged anywhere with respect to the source from which your materials and supplies are to be received that discretion is to be exercised by you and not by the fiscal officers of the State.

We understand that during the last seven (7) months of 1923 and until a very recent date in 1924 the Auditor General's Department approved for payment out of the Motor License Fund requisitions for supplies of the classes listed in your letter, purchased for your Department by the Department of Property and Supplies as Purchasing Agent, but that quite recently similar requisitions have been disapproved. There has been no change in the law as the Legislature has not been in Session, nor has there been any interpretation of the law either by the Courts or by this Department which indicates that

the Auditor General's Department was in error in its original position with regard to these requisitions. It is our opinion that the position originally taken by that Department should be adhered to.

You are accordingly advised that all of the classes of supplies and equipment mentioned in your letter to the extent you consider them clearly necessary for effectually carrying on the work of your Department should be purchased for you by the Department of Property and Supplies as Purchasing Agency and paid for out of the State Motor License Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*Motor Vehicles—Transfer of Title—Lease—Lessor—Lessee—Storage and Repair Charges—Abandonment—Acts of 1863 and 1909—Act of May 24, 1923, P. L. 425.*

Under the Act of May 24, 1923, P. L. 425, relating to registration of motor vehicles, an "owner" is the person having a motor vehicle in his possession, custody or control under a lease or contract of conditional sale, or other like agreement, as well as one who owns it absolutely, and the certificate of title should be in his name. In case of default and repossession by the lessor, the lessee is guilty of a misdemeanor if he does not assign the certificate of title to the lessor and is liable to prosecution. If it is not possible to obtain lessee's certificate, a new certificate will not be issued to the lessor, except upon satisfactory proof of ownership and the right of possession.

When a motor vehicle is sold at public sale on a lien for storage or repair charges, the owner is liable to prosecution under the Act of May 24, 1923, P. L. 425, unless he assigns his certificate of title to the purchaser to enable him to obtain a new certificate. When such an assignment is not possible, before another certificate will be issued by the state, proof will be required by affidavit of the parties having knowledge of the facts, containing the date when the lien accrued and the facts relative to service of the various notices, advertisement and handbills as required by the Acts of December 14, 1863, (P. L. 1864, p. 1127) and of March 11, 1909, P. L. 19, together with copies of the same; also the fact and method of sale together with the date thereof, the person to whom sold and that such person was the highest bidder.

When a motor vehicle is found abandoned on the highway, the finder, in order to obtain a title certificate thereto, should place the same in storage and if unable to locate the owner, should proceed to sell it at public sale in the same manner as for storage or repair charges. In all cases, when a change of title

is sought, the state should notify the former owner by mail addressed to the place given in the original certificate and allow a reasonable time for him to enter a protest.

July 7, 1924

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, Department of Highways, Harrisburg, Pa.

Dear Sir: You have requested an opinion from this Department as to what course you should follow with respect to the issuance of new certificates of title for motor vehicles where there has been a transfer of ownership and possession from the person to whom the original certificate of title was issued to the applicant for the new certificate, in the following manner:

1. By the exercise on the part of the bailor, of the right of repossession of bailed property as provided for in the usual form of bailment contract.

2. By public sale founded on a lien for storage or repair charges;

- (a) Where the sale has been made under an order of Court;
- (b) Where there has been no application to the Court;
- (c) Abandonment.

Section 3 of the Title Registration Act of May 24, 1923, P. L. 425, lays down the general rule that is to be followed upon the sale or transfer of ownership of a motor vehicle for which an original certificate of title shall have been issued and it must be followed unless the Act itself creates an exception.

This section requires the delivery by the transferor to the transferee of a title certificate for the motor vehicle in question, duly assigned.

Section 4 makes it a misdemeanor for anyone "to sell, convey or transfer, pass title to, deliver or purchase, buy, procure or otherwise acquire title \* \* \* \* of any motor vehicle, unless at the time of sale and delivery thereof there shall pass between the parties such certificate of title, with an assignment thereof, in the form prescribed by the Commissioner."

This provides a method of enforcing the delivery of the certificate of title, duly assigned. It visits the responsibility of the delivery of the same equally on transferor and transferee. It also emphasizes the importance attached by the Legislature to the transfer of such certificate duly assigned.

1. Transfer by repossession in pursuance of the term of a bailment lease or contract of conditional sale—

Section 8 of the Title Registration Act of May 24, 1923, P. L. 425 provides:

"In case of the transfer of ownership or possession of a motor vehicle, by operation of law \* \* \* whenever \* \* \* repossession is had upon default in performance of the terms of a lease, contract of conditional sale, or other like agreement, it shall thereupon become the duty of the person from whose possession such motor vehicle was taken, and without prejudice to his rights in the premises, immediately to surrender the certificate of title for such motor vehicle to the person to whom possession of such motor vehicle has so passed. The Commissioner, upon surrender of prior certificate of title, or, when that is not possible, upon presentation of satisfactory proof to the Commissioner of ownership and right of possession to such motor vehicle and upon payment of the fee of \$2.00 and presentation of application for certificate of title, shall issue to the applicant to whom possession of such motor vehicle has so passed a certificate of title thereto. Any person failing to comply with the provisions of this section shall be deemed guilty of a misdemeanor and may be prosecuted by the Commissioner. \* \*"

In case of an application for a new certificate based upon a transfer because of repossession as above provided which is accompanied by the original certificate of title duly assigned, you should issue the new certificate without further proof.

If the application is not accompanied by the original certificate, you should request that it be presented duly assigned, and the attention of the parties should be called to the aforesaid provisions of the Act including the penal provisions.

It is to be noted that the bailee in all cases similar to the one stated should have a certificate of title for the motor vehicle in question, because Section 2 of the Act requires the owner to take out a certificate of title, and Section 1 defines the term "owner" as including the person having a motor vehicle in his possession, custody or control under a lease or contract of conditional sale, or other like agreement.

In case such certificate is not forwarded to you or, if so, is unassigned, satisfactory proof must be presented to the Commissioner of ownership and right of possession to such motor vehicle.

Affidavits should be presented accounting for the absence of the original certificate and setting forth the relevant facts concerning the bailment contract or conditional sale, together with the facts as to default and repossession. These affidavits should be accompanied by authenticated copies of any writing under which the right of repossession is claimed and has been exercised. The basic facts in this affidavit may be verified from your records and should conform

therewith, for you should have a record in your files correct at all times, of all motor vehicles against which there are any liens or encumbrances, including leases or similar contracts under which the same are held.

Section 2 and 3 of the Act provide that the application for an original certificate or a subsequent certificate of title must contain statements relative to the liens or encumbrances, if any, against the motor vehicle in question. If it is an original application it must contain the statement as to whether possession is held under a lease, contract of conditional sale, or other like agreement. Each certificate of title issued upon any application containing a statement that there are liens or encumbrances against the motor vehicle in question, or that the same is held under a lease, must contain a statement of such liens or encumbrances; also that upon request of the owner when the original certificate of title is returned with evidence that all liens, encumbrances and legal claims have been satisfied, a corrected certificate of title shall be issued.

2. Transfer by public sale founded on a lien for storage or repair charges—

At common law the bailee of chattels had a lien on the same for storage and repair charges (*Trickett Laws of Liens, Volume 2, Secs. 730-733-734, 27 H. C. L. page 1007: Mathias vs. Sellers, 86 Pa. 486-491.*)

Enforcement of this lien was limited to the retention of the chattels (*Trickett, Volume 2, Sec. 751; Volume 3, Sec. 419; Rodgers vs. Grothe, 58 Pa. 414*).

It is now provided for by the two following statutes, the provisions of which must be strictly followed:

The Act of Dec. 14, 1863 (*P. L. 1864, p. 1127; West Sect. 18623, et seq. Purdon Vol. 1, p. 617 and Vol. 2 p. 2265*), provides that in all cases in which commission merchants, factors and all common carriers, or other persons, shall have a lien under existing laws, upon any goods, wares, merchandise or other property for, or on account of \* \* \* storage or labor bestowed on such \* \* \* if the owner \* \* \* shall fail or neglect or refuse to pay the amount of the charges upon any such property, etc., within 60 days after demand thereof, made personally upon such owner or consignee, then in such case it shall and may be lawful for any such commission merchant, factor, common carrier or other person having such lien as aforesaid after the expiration of said period of 60 days, to expose such goods, etc., to sale at public auction and sell the same or so much thereof as shall be sufficient to discharge said lien, together with costs of sale and advertising: Provided notice of such sale, together



with name of person or persons to whom such goods shall have been consigned shall have been first published for three successive weeks in a newspaper published in the county and by six written or printed handbills put up in the most conspicuous places in the vicinity of the depot where the goods may be.

Section 2 provides for an order of the Court, upon application thereto, when the residences of the owner and consignee are unknown \* \* \* or for any other cause that shall render it impracticable to give the notice as provided for in the first section, authorizing the sale of such goods upon such terms as to notice as the nature of the case may admit of, and to such judge shall seem meet.

This Act embraces a horse left with a veterinary surgeon (*Rodgers vs. Grothe*, 58 Pa. 414); a mill owner as bailee (*Grouch vs. Buerman*, 6 Dist. Rep. 357); tobacco delivered to bailee for the purpose of being manufactured into cigars (*Mathias vs. Sellers*, 86 Pa. 486); household goods stored in a storage warehouse (*Brown vs. Werts & Co.*, 28 Dist. Rep. 828).

The *Warehouse Receipts Act of March 11, 1909, P. L. 19*, provides that a warehouseman shall have a lien on goods deposited with him for all lawful charges for storage and preservation of the same; also for all lawful claims for money advanced, interest, insurance, transportation, weighing, coopering and other charges and expenses in relation to such goods; also for notice and advertisements of sale and for the sale of the same where default has been made in satisfying the warehouseman's lien. (Section 27). A warehouseman is defined as one lawfully engaged in the business of storing goods for profit. (Section 58). Section 28 specifies the goods against which such lien may be enforced.

Section 33 provides as follows:

"A warehouseman's lien for a claim which has become due may be satisfied as follows:

"The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person, or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain:—

"a. An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice, and the date or dates when it became due;

"b. A brief description of the goods against which the lien exists;

"c. A demand that the amount of the claim, as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice, if it is personally delivered, or from the time when the notice should reach its destination according to the due course of post, if the notice is sent by mail; and

"d. A statement that unless the claim is paid within the time specified, the goods will be advertised for sale and sold by auction at a specified time and place.

"In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted, at least ten days before such sale, in not less than six conspicuous places therein."

The *Title Registration Act of 1923*, *supra*, recognizes the law as to the lien for storage and repair charges and the enforcement of the same by sale as above outlined.

Section 8 of said last mentioned Act provides as follows:

"In the case of transfer of ownership or possession of a motor vehicle by operation of law \* \* \* whenever a motor vehicle is sold at public sale to satisfy storage or repair charges \* \* \* it shall thereupon become the duty of the person from whose possession such motor vehicle was taken, and without prejudice to his rights in the premises, immediately to surrender the certificate of title for such motor vehicle to the person to whom possession of such motor vehicle has so passed. The commission upon surrender of prior certificate of title, or, when that is not possible, upon presentation of satisfactory proof to the commissioner of ownership and right of possession to such motor vehicle, and upon payment of the fee of two (\$2) dollars and presentation of application for certificate of title, shall issue to the applicant to whom possession of such motor ve-

hicle has so passed a certificate of title thereto. Any person failing to comply with the provisions of this section shall be deemed guilty of a misdemeanor and may be prosecuted by the Commissioner."

In the case of application for issuance of a new certificate of title for a motor vehicle, following transfer of title and possession based upon a sale on account of storage or repair charges, accompanied by the original certificate of title, duly assigned, you should without further proof issue the new certificate.

If the old certificate does not accompany the application you should request that it be presented duly assigned and the attention of the parties should be called to the aforesaid provisions of the Act including the penal provisions. If it is not forthcoming, or if it is not duly assigned, you should require proof of the facts and proceedings necessary to the validity of a sale for storage or repair charges.

This proof should be made by affidavit of the parties having knowledge of the facts, containing the date when the lien accrued and the facts relative to service of the various notices, advertisement and handbills as required by the Acts together with copies of the same; also the fact and method of sale together with the date thereof, the person to whom sold and that such person was the highest bidder.

It is to be noted that there are some differences in the requirements of the Act of 1863 and the Act of 1909 as to the proceedings upon which these sales are based.

Each Act provides for personal notice to the owner and for a certain length of time to elapse between the service of that notice and the advertisement, the former 60 days, and the latter 10 days. Each requires an advertisement of sale in a newspaper, the former once a week for three weeks, the latter once a week for two weeks. The former requires six handbills, the latter none. The latter requires fifteen days to elapse between date of first publication of notice of sale and date of sale, the former has no such provisions.

Although it was held in the case of *Brown vs. Werts & Co.*, 28 *Dist. Rep.* 828, that the Act of December 14, 1863 was not repealed by the Act of March 11, 1909, the question of the conflict of these provisions for notices was not involved there. In that case it had been impossible to give personal notice to the owner and, the Act of 1909 failing to provide for such a contingency, the parties had involved the provisions of the second section of the Act of 1863, presenting their application to the court and obtaining an order of sale therefrom.

I thoroughly agree with the conclusion expressed in the case of *Brown vs. Wertz* so far as the facts of that case are concerned. But it is obvious that these two sets of contradictory provisions cannot

stand concerning the same subject matter and so those of the Warehouse receipts Act must control.

It should be noted that the Warehouse Receipts Act applies to chattles sold for storage charges, and other charges incident to the storage of the same, and that the Act of 1863 applies to those sold for repair and other charges, as well as storage.

In view of this contradictory situation you should require proof of demand for payment and notice of sale as follows:

(a) In case of sale of chattels for storage charges—at least ten days written personal notice to the owner; or, by registered letter; advertisement in one newspaper published within the county once a week for two consecutive weeks; date of sale, which must not be less than 15 days after the first publication of notice of sale.

(b) In case of sale of chattels for repair charges—at least 60 days demand for payment served personally on the owner; advertisement in one newspaper published within the county once a week for three consecutive weeks and by six handbills posted in the vicinity of the place where the chattles are.

(c) In case personal service on owner of chattles (or by registered letter under (a),) can not be had in either (a) or (b)—an order of the proper Court.

### 3. Abandonment—

In the case of a motor vehicle abandoned in the public highway the finder should place the same in storage, and if unable to locate the owner, proceed with its disposal as outlined under 2 above. In the case which you cite title to the property was acquired July 5, 1923. A certificate of title never having been issued for this motor vehicle, the question discussed above are not applicable, and if you are satisfied that the title was acquired as indicated you are justified in issuing a certificate of title therefor.

In the case of application for a new certificate of title under conditions detailed in either (1) or (2) above, unaccompanied by the original certificate duly assigned, you should give reasonable notice to the owner named in the original certificate for the motor vehicle in question of the receipt of such application in order that protest may be made if desired, such notice to be by mail to the address given in said original certificate.

Yours very truly,

JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

*Bridges—Reconstruction after fire—Bridge connecting counties—Bridge connecting State highway routes—Expense of reconstruction—Cost paid by State—Statutes—Construction—Acts of June 14, 1923, and July 11, 1923.*

1. A county bridge connecting two counties, crossing a river so as to connect two State highway routes, and destroyed by fire prior to July 11, 1923, falls within the class of bridges identified by the first paragraph of section 1 of the Act of July 11, 1923, P. L. 1070.

2. The provisions of the first paragraph of the act that such bridge shall be rebuilt at the expense of the Commonwealth is not nullified by the provision of the second paragraph of section 1 of the act, which provides that the bridge "shall be rebuilt by the State Highway Department, in accordance with provisions of existing laws providing for the rebuilding by the Commonwealth of country bridges destroyed by fire or windstorm."

3. The provisions of the Act of June 14, 1923, P. L. 761, relating to the rebuilding of bridges destroyed by windstorms, are to be read into the Act of July 11, 1923, except in so far as they are inconsistent with the clear provision of paragraph 1 of section 1 of the Act of July 11, 1923, directing that the expense of rebuilding shall be at the expense of the Commonwealth.

4. No clear provision in one act is to be nullified by other provisions in the same act or in earlier acts, unless there is no reasonable method of reconciling any apparent conflicts.

5. The appropriation provided by section 2 of the Act of July 11, 1923, for the rebuilding of bridges authorized by section 1 of the act, makes the amount appropriated available from the general fund before any of the motor fund is used.

August 18, 1924.

The Honorable Paul D. Wright, Secretary of Highways, Harrisburg, Penna.

Sir: I have before me your request for an opinion as to whether you have the authority to reconstruct the bridge across the Susquehanna River at Northumberland, which was destroyed by fire on June 3, 1923, by entering into a contract for the rebuilding of said bridge at a total cost of four hundred five thousand dollars (\$405,000).

The laws which bear particularly upon your power to rebuild this bridge are the Acts of July 11, 1923, P. L. 1070, and June 14, 1923, P. L. 761.

The bridge which was burned June 3, 1923, falls clearly within the class of bridges identified by the first paragraph of section 1 of the Act of July 11, 1923, namely, (a) it was a county bridge; (b) Across a river located on a state highway route; (c) Connecting two state highway routes; (d) Connecting two or more counties; and (e) having been destroyed by fire prior to July 11, 1923.

Said first paragraph of Section 1 of the Act of July 11, 1923, gives you the power to rebuild this bridge "*at the expense of the Commonwealth,*" provided only that the second paragraph of said Section 1 does not modify that power.

Said second paragraph of the law provides that the bridge "shall be rebuilt by the State Highway Department in accordance with provisions of existing laws providing for the rebuilding by the Commonwealth of county bridges destroyed by fire or wind storm." No existing law provides for the rebuilding of bridges destroyed by fire, but the Act of June 14, 1923, provides at length for the rebuilding of bridges destroyed by wind storms; therefore the provisions of said Act of June 14, 1923, are to be read into the Act of July 11, 1923, except in so far as such provisions are inconsistent with the clear provisions of paragraph one of Section 1 of the Act of July 11, 1923.

All the consistent provisions of the Act of July 11, 1923, with regard to viewers, and action before and by the Court of Common Pleas of Dauphin County, have been carried out. The other provisions which bear upon the question at issue are:

1. Section 9 limits the expenses of the State in the case of bridges destroyed by wind storm "to the sum required to construct a bridge of the dimensions and character of the old bridge destroyed."

2. The first paragraph of Section 19 specifically authorizes that "payments of the amount due by the State may be made from the funds available for the construction of State highways," when the bridge "is on the route of a State highway."

It is a well established principle in the construction of a law that no clear provision in one act shall be nullified by other provisions in the same act or in earlier acts, unless there is no reasonable method of reconciling any apparent conflicts. Paragraph one of the Act of July 11, 1923, clearly states that the rebuilding of bridges, like the one in question shall be "at the expense of the Commonwealth." If, therefore, the provision of paragraph two, which says that the bridge shall be rebuilt in accordance with provisions of existing laws, causes said Section 9 to fall into direct conflict with the clear provision for building "at the expense of the Commonwealth" by restricting the amount which the State may pay and leaving the balance to be paid by the counties, the clear provision of the later act would be nullified in the present instance.

It should be noted that Section 19 makes the amount due from the State for rebuilding bridges "on the route of State Highways" destroyed by wind storm less in some instances than the necessary cost of rebuilding such bridges, because Section 9 of the same law determines "the amount due by the State" in the case of destruction by wind storm.

When, however, at a later date the Act of July 11, 1923, was passed, the legislature saw fit to change the rule as to "the amount due by the State" from the cost of a bridge of the same dimensions

and character, so that if a bridge upon the State highway between two counties is destroyed by fire it may be rebuilt by the State Highway Department wholly "at the expense of the Commonwealth," with no limitation based on the previous dimensions and character of the bridge .

Therefore the rule for determining "the amount due by the State" contained in Section 9 of the Act of June 14, 1923, has been replaced by the first paragraph of Section 1 of the Act of July 11, 1923, so that in applying Section 19 of the former Act "the amount due by the State" is determinable not by "the sum required to construct a bridge of the dimensions and character of the old bridge destroyed," but by the cost for building a new bridge according to the order of the Dauphin County Court for such rebuilding made in confirmation of the report of the viewers.

The five viewers were duly appointed. They proceeded according to the law to recommend "The kind of bridge needed and the probable cost thereof." The Court ordered as follows:

"And now this 17th day of December, 1923, no exceptions having been filed to the above report of viewers, same is confirmed and it is ordered and decreed that the said bridge shall be rebuilt as recommended in the report of the viewers."

Thus we have of record a court order for the rebuilding of this bridge and the power of the Department of Highways becomes by virtue of said order a duty to proceed pursuant to the other provisions of the Act of June 14, 1923.

The Department has prepared the plans and specifications,—advertised for bids,—and should now let the contract for rebuilding to the lowest and best bidder.

"Upon the acceptance of any bid, the Department on behalf of the Commonwealth, shall enter into a contract for rebuilding of said bridge with such bidder, under the advice and direction of the Attorney General."

One difficulty raised is that Section 2 of the Act of July 11, 1923, appropriates \$350,000 for the building of bridges authorized by Section 1 of the same Act. There is contention that the appropriation of \$350,000 takes the place of the authority in Section 19 of the Act of June 14, 1923, to utilize the motor fund for any part of the cost of building the Northumberland bridge. Section 19 is part of the "provisions of existing laws providing for the rebuilding of bridges" destroyed by wind storm, and therefore is a provision applicable for rebuilding the Northumberland bridge. If no appropriation had been made in the Act of July 11, 1923, it is my opinion that Section 19 of the Act of June 14, 1923, would have given the Department

of Highways the power to use funds available for the construction of State highways (namely, the motor fund) for the entire cost of rebuilding this bridge. The appropriation of \$350,000 from the general fund, in my opinion, does not operate to defeat the purpose of the Act for the rebuilding of bridges of this description, but merely makes \$350,000 from the general fund available before any of the motor fund is used.

### CONCLUSION

It is my opinion that you have the power and, probably because of the order of the court, the necessary duty to proceed to rebuild the bridge; and for that purpose you have the power to enter into a contract with what you consider the lowest and best bidder for the rebuilding of the bridge at a cost of (say) \$405,000.00, to be paid, to the extent of \$350,000.00, from the funds appropriated by Section 2 of the Act of July 11, 1923, P. L. 1070, and the balance of \$55,000.00 from the motor fund, under the authority of Section 19 of the Act of June 14, 1923, P. L. 761.

You should not overlook the further restriction of the Act of June 14, 1923, Section 18, that although partial payments on the contract may be made from time to time as the work progresses, you are forbidden by Section 17 of the Act of June 14, 1923, to approve for payment more than eighty per cent. of the estimated value of the work done.

This requirement should be followed closely, because the Dauphin County Court has the power and duty, under Sections 15 and 16 of said Act, to cause the bridge to be inspected and (for reason) upon the report of the inspectors to cause a deduction to be made from the amount stipulated in the contract to be paid to the contractor.

It should also be observed (See Sections 17 and 18) that the fees and expenses for viewers and inspectors, the proper charge for the preparation of the plans and specifications, as well as advertising and all other legal costs and expenses, are to be paid by the counties in which the bridge is located, pursuant to orders of the Dauphin County Court.

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,  
*Attorney General.*



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**OPINIONS TO THE DEPARTMENT OF  
INTERNAL AFFAIRS**

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## OPINIONS TO THE DEPARTMENT OF INTERNAL AFFAIRS

*Presque Isle Peninsula—Act of 1921, P. L. 1180—Management and Control of.*

The Pennsylvania Interstate Park and Harbor Commission of Erie, having been vested with the management and control of Presque Isle Peninsula by the Act of May 27, 1921, P. L. 1180 and the Act of Congress having confirmed such management and control, there is no necessity for any further action on the part of the State Legislature of Pennsylvania to effectively transfer to the commission full management and control of the peninsula.

March 6, 1923.

Honorable James F. Woodward, Secretary of Internal Affairs,  
Harrisburg, Pa.

Sir: Your letter of January 30, 1923, concerning the property of the Pennsylvania State Park and Harbor Commission of Erie, is before me for reply, in which you request an opinion upon the following two points:

“First: The United States government having passed an Act of Congress reconveying such interest as it might have had in the peninsula of Presque Isle, is any other action on the part, either of the United States government or the state of Pennsylvania, necessary to fully complete the transfer of the title of the United States to the state of Pennsylvania?”

“Second: By Act of 27th of May, 1921, (P. L. 1180) the state of Pennsylvania conveyed Presque Isle Peninsula to the Pennsylvania State Park and Harbor Commission of Erie for the purpose of erecting a state park. Does not the reconveyance of the title of the United States government to the state of Pennsylvania vest automatically such title as it had in the park to the Pennsylvania State Park and Harbor Commission of Erie without the necessity of any further legislative Act?”

In answer to the first part of your first question, you are advised no further action is necessary on the part of the United States Government to reconvey such interest as it might have had in the Peninsula of Presque Isle, the Act of Congress itself specifically stating that “the United States *hereby grants quit-claims, and reconveys* to the Commonwealth of Pennsylvania.” From the correspondence, however, which is herewith returned, it appears in the letter of December 16, 1922, from Major P. S. Reinecke, that he may not have in mind in asking about “necessary matters pertaining to the

transfer of this jurisdiction" anything other than the formal delivery of possession to the State Government or the Park Commission. If there is any formality in connection with the transfer of jurisdiction or physical control from the United States Government to the State Government, then such formality should be complied with to complete the records of each jurisdiction.

In answer to the second part of your first question, you are advised no further action is necessary on the part of the State of Pennsylvania to complete the transfer of title, except as above suggested, covering mere possession.

In answer to your second question, you are advised the Act of Congress of November 28, 1922, would not automatically transfer to the Pennsylvania State Park and Harbor Commission any right or title acquired by the State of Pennsylvania thereunder. However, from an examination of the Act of May 27, 1921, it will be observed the title to the Presque Isle Peninsula was not conveyed to the Pennsylvania State Park and Harbor Commission. It was "dedicated to the use of the public":

"to the end that said Presque Isle Peninsula be preserved, maintained, improved, enlarged, and forever held as a public park \* \* \* under the control and management of the Pennsylvania State Park and Harbor Commission."

The conveyance by the State of Pennsylvania to the United States of America, under the Act of May 11, 1871, P. L. 731, transferred merely the *supervision* and *control* of said Peninsula for "the purposes of national defense and for the protection of the Harbor of Erie." While the Act of Congress carries a suggestion that they were conveying the fee, nevertheless as they had not acquired or held the fee, the Act is nothing more than a quit claim deed or release as to supervision and control.

The management and control of Presque Isle Peninsula having been given to the Pennsylvania State Park and Harbor Commission of Erie by said Act of May 27, 1921, P. L. 1180, and the Act of Congress further confirming only such management and control, in my opinion there is no necessity for any further action on the part of the Legislature of Pennsylvania to effectively transfer to said Commission full management and control of said Peninsula.

Yours very truly,

JOHN N. ENGLISH,

*Deputy Attorney General.*

*Real estate—Conveyance of land to Commonwealth in trust for the purpose of a State park. Acts of April 4, 1919, P. L. 44; May 11, 1921, P. L. 520; June 7, 1923, P. L. 498.*

The deed of the Lehigh Valley Coal Company to the Commonwealth of Pennsylvania covering land to be used as a State park never having been accepted by the Commonwealth, the Secretary of Internal Affairs, who is the custodian of all deeds relating to real estate owned by the Commonwealth, should return the deed in question to the grantor.

November 16, 1923

Honorable James F. Woodward, Secretary of Internal Affairs, Harrisburg, Pennsylvania.

Sir: We acknowledge receipt of your letter of September sixth requesting an opinion on the question whether you can lawfully return to the Lehigh Valley Coal Company its unrecorded deed of August 16, 1921 conveying to the Commonwealth in trust for the purpose of a State Park to be known as the Wyoming State Memorial Park 17.44 acres of land.

By the Act of May 11, 1921, P. L. 520, the Legislature created the "Wyoming Valley Memorial Park Commission" providing for the appointment of this Commission by the Governor and giving it authority among other things "to make arrangements with the Trustees of the Wyoming Valley Memorial Park for the transfer of said Park to the Commonwealth and to accept title thereto in the name of the Commonwealth" The same Act provided that a certain tract of land 115 acres in area known as the "Wyoming Valley Memorial Park" and located in the Boroughs of Exeter and West Pittston, Luzerne County, should, subject to the consent of the present owners thereof, be taken over by the Commonwealth as a state Park to be known as the "Wyoming Valley State Memorial Park."

The Governor did not appoint a Commission as provided by the Act of 1921, and by the Act of June 7, 1923 (Act No. 274) the Wyoming Valley Memorial Park Commission was abolished, and the Act of 1921 was specifically repealed.

In view of the fact that the Wyoming Valley Memorial Park Commission was never organized, it was never in a position to accept deeds for the land comprising the Wyoming Valley Memorial Park or any part thereof as provided by the Act of 1921. No other Agency of the Commonwealth was ever authorized by law to accept the said Park as a State Park. Accordingly the deed of the Lehigh Valley Coal Company conveying to the Commonwealth 17.44 acres of land in trust for the purpose of a State Park to be known as the Wyoming Valley State Memorial Park cannot now be accepted as there is no Agency of the State Government having the power to accept it.

The deed in question, never having been accepted, was providently forwarded to you as the custodian of all deeds relating to real estate owned by the Commonwealth under the Act of April 4, 1919, P. L. 44, and it is, therefore, entirely proper that you should strike the deed from your records and return it to Lehigh Valley Coal Company from whence it came.

Very truly yours,

DEPARTMENT OF JUSTICE

By WM. A. SCHNADER,  
*Special Deputy Attorney General.*

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**OPINIONS TO THE DEPARTMENT OF  
LABOR AND INDUSTRY**

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## OPINIONS TO THE DEPARTMENT OF LABOR AND INDUSTRY

*Workmen's Compensation—Agreement With State—Department—Injury—Statute of Limitation—One Year—Hospital Expenses—Act of 1915.*

An agreement for the payment of compensation under the Workmen's Compensation Act to a State employe injured during the course of his employment can be legally executed by a department of the State Government, compensation to be paid out of the fund appropriated by the legislature.

Where a claimant under the Workmen's Compensation Act enters into an agreement with an insurance carrier within one year from the date of the accident and payments are made thereon, the limitation of one year as set forth in Section 315 of the Act of 1915 is tolled if the compensation board declares the agreement invalid and sets aside the agreement and final receipt. The statute then runs from the date of the last payment, not the date of the accident.

A hospital under the Workmen's Compensation Act is entitled to receive payment for medical, surgical and hospital treatment of a claimant. The fact that the claimant is an employe of the State and the hospital receive State aid would be immaterial.

February 19, 1923.

Hon. John H. Walker, Acting Commissioner of Labor & Industry,  
Harrisburg, Pa.

Sir: This Department is in receipt of your inquiry of February 2, 1923, in which you ask for an opinion concerning matters in connection with the administration of the division of workmen's compensation, the specific requests being as follows:

First—Can an agreement for the payment of compensation to a State employe injured during the course of his employment be legally executed by a department of the State Government and compensation be paid out of the fund appropriated by the Legislature for the purpose when more than one year has elapsed from the date of the accident?

Second—Can a hospital receiving State aid be paid for services rendered an injured State employe out of the fund appropriated by the Legislature for the payment of medical, surgical and hospital expenses and compensation to injured State employes under the provisions of the Workmen's Compensation law?

Third—In a case where disability of an injured State employe did not begin until more than a year after the accident occurred and an operation became necessary due to the accident, can the cost of medical, surgical and hospital expenses be paid out of the fund appropriated by the Legislature for the purpose?

The first and third questions can very properly be treated as one subject, as they naturally involve the construction of the same Acts of Assembly.

Section 315 of the Act of June 2, 1915, P. L. 736 Provides:

"In cases of personal injury all claims for compensation shall be forever barred, unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this article; or unless, within one year after the accident, one of the parties shall have filed a petition as provided in article four hereof. In cases of death all claims for compensation shall be forever barred, unless, within one year after the death, the parties shall have agreed upon the compensation under this article; or unless, within one year after the death, one of the parties shall have filed a petition as provided in article four hereof. Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of one year from the time of the making of the last payment."

This provision of the law is absolute and there are no exceptions, and the case is not altered if the employer be the Commonwealth or any particular department of the State Government and the employe a State Government employe, and where an employe has failed to either enter into a compensation agreement or to file a compensation petition within one year after the accident, his claim is forever barred. However, in case an employe after suffering an accident, no matter how trivial in its nature, in any case, has been paid compensation, said limitations as provided in Section 315 shall not take effect until the expiration of one year from the time of the making of the last payment, but where no compensation has been paid and no compensation agreement made nor claim petition filed within one year after the accident, no proceedings for compensation may thereafter be had.

"Where a compensation agreement was executed on May 3, 1916 which omits a dependent child and a claim in its behalf was not made until more than a year after the accident, the Statute of Limitations bars any right such child may have had." *Opinion by Mr. Mackey, February 7, 1918. Dolan vs. Phila. & Reading Coal and Iron Co. 4th Department Reports, 300.*

"The Statute of Limitations has run against a claim petition which was not filed within a period of twelve months after the accident and no agreement was made to the effect that the Statute should not run." *Opinion of Mr. Mackey. Lopez vs. Pittsburgh Plate Glass Co., Workmen's Compensation Board Decisions, Vol. 5, page 356.*



But where payments have been made, etc., the Statute is tolled. Claimant was injured while at work while in the course of his employment and for more than a year afterward was paid his regular wages instead of compensation, at the end of which time he filed a claim petition. Held: That the claimant is entitled to compensation because of the payments. *Opinion by Mr. Jarrett, June 21, 1920, Chase vs. Emery Manufacturing Company, Compensation Board Decisions, Vol. 5, page 329.*

Where a claimant enters into a compensation agreement with an insurance carrier within one year from the date of the accident and payments are made thereon, the Statute, as set forth in Section 315 of the Workmen's Compensation Act of 1915, is tolled if the Compensation Board declares the agreement invalid and sets aside the agreement and final receipt. In such case the Statute ceases to run against the claimant from the date of the compensation agreement. *Blystone vs. Salzberger Coal Mining Co. Opinion by Judge Langham of the Court of Common Pleas of Indiana County. 6th Department Reports, 2172.*

An employer can not invoke in his own behalf the Statute of Limitations when he fails in his obligation under an agreement executed by him. When a compensation agreement was entered into the running of the Statute of Limitations was tolled. *Dowling vs. A. & J. Hurwitz. Opinion by Judge Strauss of the Court of Common Pleas of Luzerne County. 6th Department Reports, 1087.*

Second—When a State employe is injured in course of employment, he is required to seek compensation in precisely the same manner as if he were an employe of a private employer, and where the Commonwealth is his employer, the proper person upon whom to make service of any notice or papers required under the Act is the Head of the Department, Bureau or Commission under whom the injured employe was working. Compensation agreement should be signed or claim petition filed, and any award or amounts payable under agreement, are not payable out of the Department's contingent fund, but are payable out of the appropriation made by the Legislature for such purposes, and if no such funds be available, it is then necessary to await an appropriation by the Legislature.

There are no provisions in our law requiring a hospital receiving State aid to furnish without charge statutory, medical, hospital, surgical and burial expenses to injured State employes, and it is therefore my opinion, and I advise that such institutions are entitled to be reimbursed for such services out of the appropriations made by the General Assembly for such purposes.

Yours very truly,

ROBERT L. WALLACE,  
*Deputy Attorney General.*

*Employment agencies—License—Exemption—Commissary—Act of June 7, 1915.*

1. An employment agency seeking to establish the right to exemption from the necessity of taking out a license as required by the Act of June 7, 1915, P. L. 888, can only establish such right by showing strict compliance with all the terms upon which the right to exemption is predicated in the act.

2. Where an employer owns a commissary and grants the privilege of operating it to another, who, in turn, secures employees thereby for the owner, a license need not be obtained if the concession is operated as a *bona fide* department or bureau of the employer, and employees are obtained exclusively for him, no charges or fees whatsoever being imposed, either directly or indirectly, upon those seeking employment. If, however, the commissary charges are greater where employment is secured, or if it is a condition of employment that the commissary must be patronized, such conditions take the operation of the business out of the scope of the exemption and a license would be required.

June 25, 1923.

Honorable Royal Meeker, Commissioner of Labor and Industry,  
Harrisburg, Penna.

Sir: Your communication of May 29, 1923, addressed to the Attorney General has been referred to me for an opinion, the request being as follows: "In accordance with Act 307, Pennsylvania Statutes, 1915, as recently amended, must a man, firm or corporation which owns and operates a commissary—and in return for the commissary privileges granted it, secures employes for the employer from whom it has received the commissary privilege, charging no fee whatever on account of the profit it makes from lodging and boarding the employes—take out a private employment agency license?"

Employment agencies are regulated through the Commissioner of Labor and Industry by the Act approved June 7, 1915, and by the second section thereof an employment agent is defined as follows:

"The term 'employment agent,' as used in this act, shall mean every person, co-partnership, association or corporation engaged in the business of assisting employers to secure employes, and persons to secure employment, or of collecting and furnishing information regarding employers seeking employes, and persons seeking employment: Provided, That no provision of any section of this act shall be construed as applying to agents procuring employment for school teachers exclusively; nor to registries of any incorporated association of nurses; nor to departments or bureaus maintained by persons, firms, or corporations or associations, for the purpose of obtaining help for themselves, where no fee is charged the applicant for employment."

It will be noticed that there are three exceptions to the general definition of employment agent, to none of which does the Act apply.

First—Agents procuring employment for school teachers exclusively.

Second—To registries of any incorporated association of nurses.

Third—To departments or bureaus maintained by persons, firms, or corporations or associations, for the purpose of obtaining help for themselves, where no fee is charged the applicant for employment.

Whether or not the third exception above enumerated controls the subject of your inquiry is the matter we have for determination. As a general proposition it would seem that under the provisions of the Act a party is an "employment agent" who keeps a commissary or boarding house and further, in connection therewith, engages in the business of providing employes for the employer who granted the commissary privilege, even though he receives no fee from the employes, as we would naturally assume that he receives some consideration or fee from his employer, the corporation, granting the commissary privilege. But the statement of your inquiry is that no fee whatsoever is charged or received either from the employes who have secured employment or from the employer other than the profit the agent makes from lodging and boarding the employes under his commissary privilege from the employer. In order to determine whether or not such an agent is excepted from the provisions of the Act a strict examination of the statute is necessary, as all such exceptions must be construed strictly.

In *Folmer's Appeal*, 87 Pa. State 133, it is held that a proviso engrafted upon a preceding enactment taking special cases out of the general enactment is always to be strictly construed. It takes no case out of the enacting clause which is not fairly within the terms of the proviso. In order to bring this case within the third exception, the following facts must necessarily appear:

First—That the agency maintaining the commissary and procuring employes for the employer is a department or bureau maintained by the employer for the purpose of obtaining help for itself.

Second—Where no fee is charged the applicant (or the employe) either directly or indirectly for such employment.

In Section 11 we find this provision:

"Every employment agent shall file with the commissioner, for his approval, a schedule of fees proposed to be charged for any services rendered to employers seeking employes, and persons seeking employment. The schedule of fees may be changed only with the approval of the commissioner."

And just following the above language we find this significant provision:

“No registration or other fees in lieu thereof shall be charged or received by such employment agent.”

It is plainly the intent of the law to prevent deception or evasion in complying with the spirit as well as the letter of the definitive provision of this Act as quoted above from the second section thereof. It is natural to assume that where persons are conducting an employment agency, employes are procured and employment furnished that some remuneration is expected and most likely received for such services. If, however, the employment agent is a bona fide department or bureau of the employer and his business of obtaining employes is providing exclusively for his employer, and if no fees or charges whatsoever are imposed, either directly or indirectly upon those seeking employment, then unquestionably such agency would come under the exception above and no license would be required. If, however, on the other hand, fees or extra charges are imposed upon the employes in the nature of additional charges or expenses of lodging or boarding, or if any requirements that said employes shall be lodged or boarded at the commissary, then it would be such an evasion of the law as would not come within the exception referred to and the agency would be required to procure a license.

I, therefore, have the honor to advise that if proof is obtainable that the agency or agencies in question are either charging fees to the employes or are adding anything whatsoever to the regular reasonable or customary expense of lodging and boarding such employes, or are imposing any conditions of employment requiring those employed to be lodged and boarded at any such commissary, that such would be a violation of the law and such agency or agencies must first procure a license from your Department.

Very truly yours,

ROBERT L. WALLACE,

*Deputy Attorney General.*

*Workmen's Compensation—Departmental Administrative Boards and Commissions required to insure their own employees. Act of June 7, 1923, P. L. 498.*

The provision of the General Appropriation Act of 1923 (Act No. 44-A) permits payment of workmen's compensation to employees or dependents of deceased employees of all agencies of the executive branch of the State Government listed in Section 201 and 202 of the Administrative Code, except the departmental administrative boards and commissions listed in Sections 1311 and 2019 of the Code of 1923. The latter are bound to insure their own employees and to pay for the same from their ordinary receipts or out of the funds appropriated for their maintenance.

January 28, 1924.

Dr. Royal Meeker, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: Your request of yesterday addressed to this Department was duly received. You desire to be advised whether under the appropriation to your Department as contained in the General appropriation Act of 1923 (Act No. 44-A, approved June 30, 1923, Appropriation Acts page 35) you are required to pay workmen's compensation and medical, hospital, surgical and burial expenses to injured employes and dependents of deceased employes of the various boards and commissions of the executive branch of the State government.

That part of the appropriation to your Department which is pertinent in the consideration of this question is as follows:

"\* \* \* 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-three, and ending May thirty-first, one thousand nine hundred and twenty-five, 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 expenses incurred by the Bureau of Workmen's Compensation in the investigation and adjustment of claims of such employes and dependents \* \* \*."

In passing you will note that the part of the Appropriation Act which has been quoted speaks only of the payment of compensation to injured employes and dependents of deceased employes of the various *Departments* of the State government.

The Administrative Code of 1923 (P. L. 498) unquestionably establishes all of the administrative agencies listed in Sections 201 and 202 of the Code as parts of the executive branch of the government; and employes of all of these agencies are undoubtedly State employes. The agencies listed in the sections mentioned are, however, divided into four classes, namely, departments, independent administrative boards and commissions, departmental administrative boards and commissions and advisory boards and commissions; and all departmental administrative boards and commissions and advisory boards and commissions are, at least for fiscal purposes, connected with and made parts of departments. It does not, however, follow that because an employe of a departmental administrative board is a State employe he is necessarily an employe of the Department with which the departmental administrative board or commission is connected.

Further inquiry into the provisions of the Administrative Code discloses that departmental administrative boards and commissions are treated in two entirely distinct ways insofar as their employes are concerned. In the case of a large number of departmental administrative boards and commissions the Code in Section 214 provides that:

“The heads of the respective administrative departments shall appoint and fix the compensation of such clerks, stenographers, and other assistants as may be required for the proper conduct of the work of any departmental administrative bodies, boards, commissions or officers \* \* \* established in their respective departments.”

It will be found that the only exceptions to this provision are contained in Sections 1311 and 2019 of the Code. The first of these sections relates to Boards of Trustees managing the State Oral School for the Deaf, the Home for Training in Speech of Deaf Children Before They Are of School Age and the Pennsylvania Soldiers' Orphan School. The other section deals with the Boards of Trustees managing twenty-nine State penal or reformatory institutions and State Hospitals. Each of the Boards of Trustees listed in Sections 1311 and 2019 is authorized to elect a Superintendent or Warden for the Institution and upon his nomination to appoint such officers and employes as may be necessary, whose compensation shall be fixed by the several Boards of Trustees in conformity with the standards established by the Executive Board.

There can be no doubt but that employes selected by the heads of the several Departments for the assistance of departmental administrative boards or commissions within such department are employes

of the departments whose heads select them. These Department heads not only select the employes but fix their compensation and the employes are carried on the payrolls of the departments.

It is equally clear that employes of the departmental administrative boards and commissions listed in Sections 1311 and 2019 are not employes of the departments with which the respective boards and commissions are connected. All of these boards receive separate appropriations for their maintenance and the Departments with which they are connected have no control of nor voice in the selection of such employes. The Department payrolls do not carry these employes as members of the Departments.

You are accordingly advised that the provisions of the General Appropriation Act of 1923 which has been quoted in the beginning of this Opinion permits your Department to pay workmen's compensation to employes or dependents of deceased employes of all of the agencies of the executive branch of the State government listed in Sections 201 and 202 of the Administrative Code except the departmental administrative boards and commissions listed in Sections 1311 and 2019 of the Code. This opinion is in conformity with the opinion of Deputy Attorney General Keller rendered to the Chairmen of the State Workmen's Insurance Board on December 9, 1915 and the letter of Deputy Attorney General Hargest to the Auditor General dated March 17, 1920. The views which have been expressed by us indicate that so far at least as the employes of the boards and commissions listed in Sections 1311 and 2019 of the Administrative Code are concerned, the Code has not modified the opinion rendered by Deputy Attorney General Keller that these boards and commissions "are bound to insure their own employes and to pay for the same from their ordinary receipts or out of the funds appropriated for their maintenance." (See Official Opinions of the Attorney General 1915-16, pp. 194-196).

Very truly yours,

DEPARTMENT OF JUSTICE,

By: WM. A. SCHNADER,

*Special Deputy Attorney General.*

*State Workmen's Compensation—Authority of Insurance Board to purchase equipment and supplies—Right to dispose of unserviceable property—Right to have automobiles used by its employes to be licensed as State cars, etc.—Act of June 7, 1923, P. L. 498, Sections 202, 507, 508, 1711, 2103.*

State Workmen's Insurance Board,—all materials or supplies required by, must be purchased for it by the Department of Property and Supplies as agent, and all leases for offices required by the Board must be negotiated and executed by said Department. Automobiles purchased for the Board or its employees are not the property of the Commonwealth and should not be licensed as State cars, but should be titled and licensed as the property of the fund to which they belong. Unserviceable property belonging to the Board may be disposed of by the Board and the proceeds thereof turned back into the Insurance Fund.

February 4, 1924.

Dr. Royal Meeker, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the State Workmen's Insurance Board has the right to buy furniture, equipment and supplies independently of the Department of Property and Supplies; whether the Board must deliver to the Department of Property and Supplies its unservicable property to be sold; and whether automobiles used by employes of the Board are State cars and should be licensed as such and painted as other State cars are painted.

Under Section 202 of the Administrative Code the State Workmen's Insurance Board is placed in and made a part of the Department of Labor and Industry. It is designated as a "departmental administrative board." Section 1711 of the Code provides that "subject to any inconsistent provisions in this act contained the State Workmen's Insurance Board shall continue to exercise the powers by law vested in and imposed upon the said Board."

By reference to the Act creating the State Workmen's Insurance Board it will be found that the Board was created for the purpose of administering the State Workmen's Insurance Fund. In an opinion of this Department rendered by Deputy Attorney General Hargest to the State Treasurer on December 9, 1915 it was held that "No part of the fund belongs to the State." (Opinions of the Attorney General 1915-16, page 189). There is nothing in the Administrative Code which in any way modifies the status of the Fund.

Subsequently, on October 23, 1918, Deputy Attorney General Collins rendered an opinion holding that the office furniture and other equipment paid for out of moneys in the State Workmen's Insurance Fund is not property of the State but belongs to the owners of the Fund. This also is unchanged by the Administrative Code.



Another opinion of this Department rendered January 30, 1919, by Deputy Attorney General Collins, held that because the property purchased by the State Workmen's Insurance Board did not belong to the Commonwealth but to the owners of the State Workmen's Insurance Fund it was not necessary that such property be purchased through the Board of Commissioners of Public Grounds and Buildings and that for the same reason it was not necessary that offices occupied by the State Workmen's Insurance Board and its employes should be leased by the Board of Commissioners of Public Grounds and Buildings.

While the opinion to which reference has last been made was fully warranted by the law as it existed when the opinion was rendered the provisions of the Administrative Code have entirely changed the law upon which Deputy Attorney General Collins' opinion was based. Section 507 of the Administrative Code provides that:

"It shall be unlawful for any \* \* \* departmental administrative board or commission \* \* \* to purchase any furniture, materials or supplies, except

\* \* \*

"(c) Any \* \* \* boards or commissions which by law are authorized to purchase materials or supplies and pay for the same out of fees or other moneys collected by them \* \* \* Provided, That every such \* \* \* board or commission shall make its purchases through the Department of Property and Supplies as its purchasing agency";

This language clearly embraces the State Workmen's Insurance Board, and requires all purchasing for it to be done by the Department of Property and Supplies as agent the bills for articles purchased to be paid as authorized by pre-existing laws. The status or ownership of property so purchased by that Department is, however, exactly the same as was the ownership of similar property formerly purchased directly by the State Workmen's Insurance Board. It belongs not to the State but to the owners of the Fund.

For the same reason that all materials or supplies required by the State Workmen's Insurance Board must be purchased for it by the Department of Property and Supplies as agent, all leases for offices required by this Board must be negotiated and executed by that Department as provided in Section 2103 (d) of the Code.

Section 508 of the Code which applies to the disposition of un-serviceable property provides that personal property "of this Commonwealth" which is no longer of service shall be turned over to the Department of Property and Supplies to be sold as provided by Section 2103 (i) of the Code. Plainly, as property paid for out of

the State Workmen's Insurance Fund is not property "of this Commonwealth," sections 508 and 2103 (i) are not applicable; and the State Workmen's Insurance Board may dispose of such property and turn the proceeds thereof back into the Fund.

For the reasons already given, automobiles purchased for the State Workmen's Insurance Board or its employes are not the property of the Commonwealth and should not be licensed as State cars. However, because of the fact that they are used in a branch of the State service it is entirely appropriate that they should be painted as other cars are painted; but they should be titled and licensed as the property of the Fund, to which they belong.

Very truly yours,

DEPARTMENT OF JUSTICE,

By WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*Factory acts—Establishments—Tenements—Working conditions in tenements and dwelling-houses—Woman's Law—Child Labor Law—Acts of May 2, 1905, July 25, 1913, and May 13, 1915.*

1. Tenement-houses and dwelling-houses, where work is done by members of the families occupying such places, and where no persons outside of such families are therein employed, are "establishments within the meaning of the Factory Act of May 2, 1905, P. L. 352, the Women's Labor Act of July 25, 1913, P. L. 1024, and the Child Labor Act of May 13, 1915.

*Statutes—Repeal—Acts of May 5, 1897, and May 2, 1905.*

2. The Act of May 5, 1897, P. L. 42, is not repealed by the Act of May 2, 1905, P. L. 352.

March 20, 1924.

Dr. Royal Meeker, Secretary of Labor and Industry, Harrisburg, Pa.

Sir: Your letter asking to be advised whether the term "establishment" as defined in certain Acts of Assembly, includes a tenement house or dwelling house where work is done by members of the families occupying such tenement or dwelling, and where no persons outside of such families are employed, has been received by this Department.

The Act of May 2, 1915, P. L. 352, known as the Factory Act, the Act of July 25, 1913, P. L. 1024, known as the Woman's Law, and the Act of May 13, 1915, P. L. 386, known as the Child Labor Law, all define an "establishment" as any place where labor is employed

for any compensation, to whomever payable. Farming and domestic service in private houses are exempted from the provisions of the several Acts, and in the Act of 1905 coal mining is excepted.

Work done in a tenement house or dwelling house is subject to the provisions of the Act of May 5, 1897, P. L. 42, as amended by the Acts of April 28, 1889, P. L. 70 and May 11, 1901, P. L. 178. Attorney General Carson, in an opinion dated May 8, 1903, answered the question you have asked and I can do no better than to quote from that opinion.

"The Act of 1897, in specific terms and without limitation, forbids the use of any room or apartment in any tenement or dwelling house for the manufacture of the articles therein specified, and prohibits further the hiring or employment of any person to work in any room or apartment or in any part or parts of buildings used for the purpose aforesaid, without first obtaining a written permit from the Factory Inspector, or one of his deputies, which permit must state the maximum number of persons allowed to be employed therein; and further, that the building, or part of building, to be used for such work or business is thoroughly clean, sanitary and fit for occupancy for such work or business.

"The question, therefore, whether such room or apartment in any tenement or dwelling house is or is not used by the immediate members of a family does not arise, and I am of opinion, that before such room or apartment in any tenement or dwelling house can be used for the purpose of manufacturing the article designated, and before there can be any hiring or employment of any person to work in such room or apartment, there must be first obtained a written permit from you, as Factory Inspector, or from one of your deputies, specifically stating the matters already designated as necessary to be shown as to the number of persons allowed to be employed therein, and as to the sanitary condition and fitness of such apartment for occupancy for such work or business. In other words, under the Act of 1897, permits must be granted to applicants, whether connected with the immediate family or not. The duty on the part of all persons engaged in such manufacture to obtain from you such permit, before either manufacturing themselves or hiring others to manufacture for them, must be complied with entirely irrespective of the question as to whether there are or are not immediate members of the family living in such room or apartment. I instruct you, therefore, that, under the Act of May 5, 1897, it is your duty, if requested, to issue permits for the uses designated in the Act, entirely irrespective of the question as to whether the applicants are or are not immediate

members of the family living in the apartment sought to be used. I add further, that there can be no use of any apartment for manufacturing purposes without a permit, and that inspection must precede the granting of a permit.

\* \* \*

“Under this law, I am of opinion that the apartments in any tenement or dwelling house, used or proposed to be used for the manufacture of the articles designated in the Act of 5th of May, 1897, are manufacturing establishments within the meaning of the Act of May 29, 1901.”

The Act of May 2, 1905, P. L. 352, takes up the subject of home work and it specifically defines what the term “establishment” shall mean and it brings tenement houses and dwelling houses where work is done by members of the families occupying such houses within its definition.

You are, therefore, advised that tenement houses and dwelling houses where work is done by members of the families occupying such places, are included in the term “establishment” as defined in the Acts referred to.

It has never been held by any of our Courts that the Act of May 2, 1905 repeals the Act of May 5, 1897, and I am of opinion, after a careful reading of both acts, that the Act of 1897 is not repealed but is supplemented by the Act of 1905.

Yours very truly,

DEPARTMENT OF JUSTICE,

By J. W. BROWN,  
*Deputy Attorney General.*

*Department of Labor and Industry—Rules and Regulations—Statutory Requirements—Authority of Board—Hearings—Recommendations—Administrative Code of 1923.*

The Industrial Board created by the Administrative Code of 1923 is an advisory body only and not an administrative body as created by the Act of June 2, 1913, P. L. 396. It is fundamentally different. It does not have the right to suspend the application of any law regulating labor in a specific case where a peculiar hardship would result from the literal application of the law. If, after hearing, it believes that a statutory provision is inequitable and unduly burdensome either to employee or employer it can make its recommendation to the Legislature, or recommend that a rule or regulation of the Department of Labor and Industry be modified, but this is the extent of the Board's authority.

June 23, 1924.

Dr. Royal Meeker, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: We have your letter of June 3rd requesting an interpretation of Section 1714 paragraph (b) of the Administrative Code and inquiring whether either the Industrial Board of your Department has the right under the law to suspend the application of any law regulating labor in a specific case where a peculiar hardship would result from the literal application of the law.

Section 1714 paragraph (b) of the Administrative Code is as follows:

"The Industrial Board created by this Act shall have the power and its duty shall be:

"(b) To hold hearings with reference to the application, by the department, of the laws affecting labor, upon appeal either of employes or employers or of the public, and after such hearings to make recommendations to the departments";

This section supersedes in part Section 15 of the Act of June 2, 1913, P. L. 396, which authorized the former Industrial Board to hold similar hearings upon the reasonableness of rules and regulations adopted and promulgated by the Board. After holding such hearings the Board had the power under the Act of 1913 to modify its rules and regulations in accordance with its determination of the matter or the matters which the hearing developed.

Between the former Industrial Board which was abolished by Section 2 of the Administrative Code and the new Industrial Board created by Section 203 of the Administrative Code there is a fundamental difference. The old Board was an administrative agency.

The new Board is an advisory body only. It was a part of the work of the old Board to make and promulgate rules and regula-

tions for the Department of Labor and Industry. That function under the Administrative Code belongs to the Department of Labor and Industry itself, but before the Department can make effective its rules and regulations they must be approved by the new Industrial Board.

It is quite clear that after the present Industrial Board has held a hearing as authorized by Section 1714 (b) of the Code and made its recommendation to the Department of Labor and Industry its work has been completed. It cannot enforce its recommendation either with or without the consent of the Department of Labor and Industry. If the recommendation is accepted by the Department of Labor and Industry the Department must act to put the same into effect. It follows as a necessary consequence that the present Industrial Board cannot under any circumstances suspend the application of any law affecting labor.

We are also of the opinion that your Department does not have the power to suspend the application of a law affecting labor. You have the power to make rules and regulations for carrying into effect the laws regulating the labor of persons and the construction, ventilation, and equipment of places where labor is performed or where public assemblies are held. (See Section 1705 of the Administrative Code). These rules and regulations must, however, be general rules and regulations applicable without reference to any specific case. It may be that the laws regulating labor if literally and uniformly applied will work hardships in certain particular cases, but the exemption of any person or persons from their application is beyond the power of the administrative agencies authorized to enforce the laws. We are of the opinion that the old Industrial Board did not have the power under any circumstances to suspend the application of any law in any particular case and that your Department does not have this power.

Section 1714 (b) of the Code, it is true, permits the present Industrial Board to hold hearings with reference to the application by your Department of the laws affecting labor upon appeal either of employes or employers or of the public. This power must, however, be limited to a consideration of the rules and regulations promulgated by your Department with the approval of the Industrial Board or to instances in which the discretionary powers of your Department have been exercised in a way objectionable to the appellant. Where a case clearly comes within the definite provisions of a statute or within the clear purview of a rule or regulation of your Department it would not be proper for your Department either with or without the recommendation of the Industrial Board to relieve any person of the duty of obeying the statute or the rule or regulation

as the case may be. If, after hearing, the Industrial Board believes that a statutory provision is inequitable and unduly burdensome either to employe or employer it can make its recommendation to the Legislature. If a rule or regulation of your Department is found to be burdensome or inequitable the Industrial Board can recommend to you that the rule or regulation be modified. If it be found that your Department in the exercise of discretionary power has reached a decision which is unduly burdensome or unfair the Board can recommend that you reverse your decision in the matter. This is, however, clearly the extent of the Board's authority.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*Labor and Industry, Department of—Construction of the Act of June 14, 1923, P. L. 802, with special reference to "baby carriages and strollers."*

"Pillows," "comfortables," or "cushions," whether or not manufactured for use in automobiles, horse carriages, and the like, are subject to the Act, although such vehicles cannot themselves be regarded as "upholstered furniture," as defined in the law. "Baby carriages and strollers" should be regarded by the Department of Labor and Industry as "upholstered furniture," within the meaning of the law, to the extent that they are filled with the materials enumerated in the fifth paragraph of the Act.

July 29, 1924.

Dr. Royal Meeker, Secretary of Labor and Industry, Harrisburg, Penna.

Sir: I have your inquiry of July 25 as to whether the Bedding and Upholstery Act of June 14, 1923 (P. L. 802)—applies to "baby carriages and strollers" which are upholstered and contain upholstered cushions.

Perhaps we should enlarge the question and divide it as follows:

1. Does the fact that "pillows," "comfortables" or "cushions" are used elsewhere than on an article of furniture connected directly with a house, relieve them from the requirements of the "Bedding and Upholstery Act" as to the material, construction and sterilization required?

2. Considering the case when upholstering is a fixed part of a baby carriage or stroller, is such carriage or stroller "upholstered furniture" as defined in, and governed by, the act?

As to the first question: It seems very clear to me that the "pillows," "comfortables" and "cushions" used in and about a baby carriage, automobile, or any other contrivance, whether an article of furniture or not, must conform to the requirements of the Bedding and Upholstery Act. You will note that "pillows," "comfortables," and "feather beds," as defined in the act, are not connected up with "articles of furniture." "Cushions" as defined in the act are connected up with "other articles of furniture" used for "reclining, resting or sleeping purposes."

Nevertheless since "cushions," as defined in the act, cannot be identified ahead of time, nor at any time, as those that will be used solely in connection with baby carriages, automobiles, and the like, it is evident that if anybody desires to manufacture such cushions they must make and tag them in accordance with the law, so that even if used at times, or principally, with baby carriages and the like they will be all right when used, as they can be interchangeably, "on a hammock, chair, couch, divan, sofa, lounge or other article of furniture for reclining, resting or sleeping purposes."

In the case of upholstering made part of "any article of furniture," we meet more difficulty. The definition of "upholstered furniture" which confines the meaning to "articles of furniture" does not in itself cause me to believe that "articles of furniture" might not include baby carriages, automobiles and the like, since the public often speaks of the trimmings and finishings of such articles as though it were a matter of furniture in the broad sense of the term.

However, all parts of the law must be read together, and in considering the definition of "cushion" strict construction requires us to connect up the expression "article of furniture," as found in the fourth paragraph of this Act, with articles like "hammocks, chairs, couches, divans, sofas and lounges"; because strict construction requires us to consider the expression "or other articles of furniture" as meaning articles of the same class as those with which the phrase is connected by the conjunction "or," and if the phrase "other article of furniture" is used in one paragraph as being articles of the class of hammocks, chairs, couches, divans, sofas and lounges, proper interpretation of the law must lead us to give it that same meaning when it occurs in the next following paragraph where "upholstered furniture" is defined. In other words, the definition of cushion seems clearly to give the expression "article of furniture," as used in the act, the meaning of household furniture.

This would exclude from the act such articles as automobiles, horse carriages, and the like which cannot be looked upon as articles actually used in or directly about a house.



A baby carriage, however, is more closely connected up with the house itself. The question as to whether the fixed upholstering on a baby carriage makes it "upholstered furniture" or not, is such a close one that an opinion is of little value except in protecting the official of the State asking for the opinion.

It is my opinion that even the fixed upholstering about a baby carriage must cause it to be regarded as "upholstered furniture," and therefore subject to the terms and conditions of the act.

### CONCLUSION

To resume: I have no doubt (a) that any loose articles of the nature of "pillows," "comfortables" and "cushions," whether or not originally manufactured for use in automobiles, horse carriages and the like, are nevertheless subject to the law; (b) that the automobiles, horse carriages and the like, cannot themselves be regarded as "upholstered furniture" as defined in the law; but that baby carriages and strollers can and should be held by your Department to be "upholstered furniture" within the meaning of the law, to the extent that they are stuffed or filled with the materials set forth in the fifth paragraph of the act.

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General.*

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*Labor and Industry, Secretary of—Authority to modify a rule of the former Industrial Board, so as to make it apply to female workers in restaurants. (Acts of July 25, 1913, P. L. 1024; June 1, 1915, P. L. 709; July 5, 1917, P. L. 686; and June 7, 1923, P. L. 498, Sections 2, 8, 203, 1701, and 1714).*

The Secretary of Labor and Industry cannot modify a rule of the old Industrial Board, which was abolished by the Administrative Code; and the modification of the rule applying to female workers in restaurants, promulgated April 18, 1924, is unlawful and void.

November 13, 1924.

Honorable Richard H. Lansburgh, Secretary of Labor and Industry,  
Harrisburg, Pennsylvania.

Sir: We have your request to be advised with regard to the validity of the action of the Secretary of Labor and Industry in presenting to the Industrial Board for approval and thereafter on July 8, 1924

promulgating a modification of the Department's Rule W-1 so as to make it apply to female workers in restaurants.

Rule W-1 was, we understand, promulgated by the former Industrial Board in 1916 under authority of Section 3 (a) of the Act of July 25, 1913, P. L. 1024 as amended by the Act of June 1, 1915, P. L. 709.

Section 3 (a) of the Act of July 23, 1913 as amended prohibits any female from being employed or permitted to work in or in connection with any establishment, inter alia, for more than six days in any one week, with the proviso that "the one day of holiday in seven may be subdivided into two days of twelve hours each for women employes in hotels, boarding houses and in charitable, educational and religious institutions, at the discretion of the Industrial Board of the Department of Labor and Industry."

Rule W-1 specified in what cases and to what extent the one holiday in seven might be subdivided.

On July 5, 1917 (P. L. 686), a supplement to the Act of July 25, 1913, P. L. 1024 became a law. It authorized the Industrial Board to modify the provisions of the Act of July 25, 1913 "whenever, in the opinion of a majority of the members of the said board after due hearing upon petition filed, such modification may be justified and warranted, and will not result in or tend to injury of the public health and welfare or of the health and welfare of the females sought to be affected by such modification." However, the Act of 1917 specifically provided that "any modification made by said board pursuant to said application and in accordance with the provisions of this Act, shall apply only to the particular establishment or department thereof, referred to in said petition."

On June 7, 1923 the Administrative Code (P. L. 498) was approved. By Section 2 thereof the old Industrial Board was abolished, and Section 1701 (P. L. 583) provided that "the Department of Labor and Industry shall, subject to any inconsistent provisions in this act contained, continue to exercise the powers and perform the duties by law vested in and imposed upon the said department, the several bureaus and divisions thereof, and the Industrial Board." In Section 203 of the Code (P. L. 508) a new Industrial Board was established in the Department of Labor and Industry, and in Section 1714 (P. L. 586) its powers were defined. These powers are (1) to hold meetings to consider such matters as are brought before it or the Secretary of Labor and Industry shall request; (2) to hold hearings upon appeal with reference to the application by the Department of the laws affecting labor, and to make recommendations to the Department; (3) to approve or disapprove rules and regulations established by the Department and to make suggestions for the formulation of rules and regulations; and (4) to study the work of the

Department of Labor and Industry. The present Board can exercise only these powers which are expressly conferred by the Administrative Code.

Section 8 of the Code (P. L. 504) continued in effect rules and regulations promulgated by agencies abolished by the Code, until modified by the agencies to which their respective powers have been transferred.

This lengthy recital of statutory provisions is necessary to a clear understanding of the statements about to be made:

1. If at the present time, the powers conferred by the Act of July 5, 1917, P. L. 686, may be exercised at all (a question which it is not necessary for us to decide) they must be exercised by the Department of Labor and Industry, and not by the present Industrial Board;

2. The modification of Rule W-1 to include in its scope restaurants as well as hotels and institutions, would have been unlawful had it been attempted by the Industrial Board prior to the passage of the Administrative Code, whether the Board had attempted such action under the proviso to Section 3 (a) of the Act of July 25, 1913 as amended, or under the Act of July 5, 1917, P. L. 686. The proviso to Section 3 (a) of the Act of 1913 was made applicable only to certain specified classes of establishments. Restaurants were not specified. The Act of 1917 was applicable only to action upon petition modifying the law as to the particular establishment or department mentioned therein. It did not authorize general modifications;

3. If the old Industrial Board could not lawfully have modified Rule W-1 to include restaurants in its scope, certainly the Department of Labor and Industry could not lawfully make such a modification after the old Industrial Board was abolished.

Accordingly you are advised that the modification of Rule W-1 promulgated July 8, 1924 is unlawful and void.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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OPINIONS TO THE DEPARTMENT OF MINES

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## OPINIONS TO THE DEPARTMENT OF MINES

*Mines and Mining—Rule 40 of Article XII, of the Act of June 2, 1921, P. L. 176 interpreted.*

It is the duty of an operator to keep a headman and footman at their proper places during the entire time any persons are under ground and is not permitted to withdraw them after miners are hoisted if any persons are still in the mine.

March 26, 1923.

Honorable Joseph J. Walsh, Chief, Department of Mines, Harrisburg, Pa.

Sir: This Department has received your communication of the 15th instant, asking to be advised as to what interpretation shall be put upon Rule 40 of Article 12 of the Act of June 2, 1891, P. L. 176. The Rule referred to is as follows:

“Rule 40. At every shaft or slope in which provision is made in this Act for lowering and hoisting persons, a headman and footman shall be designated by the superintendent or foreman to be at their proper places from the time that persons begin to descend, until all the persons who may be at the bottom of said shaft or slope when quitting work shall be hoisted. Such headman and footman shall personally attend to the signals and see that the provisions of this act, in respect to lowering and hoisting persons in shafts or slopes, shall be complied with.”

When statutory duties are imposed we must look to the statute to ascertain what the duties are. Such duties are presumed to be different in kind and degree from those imposed by the common law, else there would be no necessity for the legislation. These duties do not arise by implication but are imposed by express legislative authority. When the Legislature takes a step in advance of the common law and imposes additional burdens upon an employer in order to meet the necessities of modern industrial growth, the new duties thus imposed, when clearly set forth, should be carried out as fully and completely as possible. The Rule above quoted sets forth in so clear and manifest a manner the duties imposed as to leave no doubt as to the legislative intent.

It provides—“a headman and a footman shall be designated by the superintendent or foreman to be at their proper places from the time that persons begin to descend, until *all* the persons who may be at the bottom of said shaft or slope when quitting work shall be

hoisted." This Rule does not apply to the hoisting of contract miners only, but to all persons who may be at the bottom of said shaft or slope. This includes workmen employed by the company to do repair work, for these workmen are entitled to the protection afforded by the Rule under consideration just as fully and completely as any others who work in the shaft.

Rule 21 of the same Article of the Act is not in conflict with the views herein expressed, but, on the contrary, supplements Rule 40 by providing safety for persons ascending or descending a shaft in the absence of a headman or footman.

I am, therefore, of the opinion that it is the duty of an operator to keep a headman and footman at their proper places during the entire time any persons are underground and is not permitted to withdraw them after miners are hoisted if any persons are still in the mine.

Very truly yours,

J. W. BROWN,  
*Deputy Attorney General.*

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*Mines and Mining—Bituminous Mine Inspectors—Payment of Salary for two weeks ending May 31, 1923 from Appropriation made by General Assembly for biennium beginning June 1, 1923.*

No part of the money appropriated for a biennium can be used for the payment of salaries liability for which was incurred during the preceding biennium. The salaries under consideration must be provided for by a deficiency appropriation if there are not sufficient funds in the appropriation for the current biennium.

May 16, 1923.

Honorable Joseph J. Walsh, Chief of Department of Mines, Harrisburg, Pa.

Sir: This Department has received your request for an opinion as to whether or not any part of the appropriation for the two years beginning June 1, 1923, can be applied to the payment of salaries of the bituminous inspectors for the two weeks May 15-May 31.

It is, of course, impossible to answer this question finally at present, as the Appropriation Bill for 1923 has not yet been passed. If it should be passed in the form in which it now is, or in the form in which it has been passed in other years, I am of the opinion that no part of the money so appropriated for the next biennium could

be used for salaries for inspectors, liability for which was incurred during the present biennium. Whatever salaries are due until the end of the present biennium must be met from funds appropriated for their payment during this biennium. If there are not sufficient funds in the appropriation for this biennium the result will be a deficiency, which it seems to me can only be met by the deficiency appropriation.

Very truly yours,

STERLING G. McNEES,  
*Special Deputy Attorney General.*

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*Republic Iron and Steel Company—Branding of Mine Cars—Act of June 1, 1883, P. L. 52.*

If the operators at the bituminous mines of the Republic Iron and Steel Company use cars which are not of uniform capacity and cars which are not branded, it is a violation of Section 2 of the Act above referred to.

June 6, 1923.

Honorable Joseph J. Walsh, Chief of Department of Mines, Harrisburg, Pa.

Sir: This Department is in receipt of your letter of May 31st in reference to branding of mine cars in the bituminous coal mines by the Republic Iron and Steel Company. The Act of June 1, 1883, P. L. 52, in Section 2 provides as follows:

“That at every bituminous coal mine in this Commonwealth, where coal is mined by measurement, all cars, filled by miners or their laborers, shall be uniform in capacity at each mine; no unbranded car or cars shall enter the mine for a longer period than three months, without being branded by the mine inspector of the district, wherein the mine is situated; and any owner or owners, or their agents, violating the provisions of this section, shall be subject to a fine of not less than one dollar per car for each and every day as long as the car is not in conformity with this act, and the mine inspector of the district, where the mine is located, on receiving notice from the check-measurer or any five miners working in the mine, that a car or cars are not properly branded, or not uniform in capacity according to law, are used in the mine where he or they are employed then inside of three days from the date of receiving said notice, it shall be his duty to enforce the

provisions of this section, under penalty of ten dollars for each and every day he permits such car or cars to enter the mine: Provided, That nothing contained in this section shall be construed or applied to those mines who do not use more than ten cars."

If the operators at the Republic Mine use cars which are not of uniform capacity and cars which are not branded, it is a violation of the section of the Act above quoted, as its provisions cover the facts as related in your letter.

The third section of the Act of 1883, was declared unconstitutional in *Commonwealth vs. Hartsell*, 17 C. C. 91. This was only a lower court decision and it has never been passed upon by the Supreme Court. The decision, however, does not affect Section 2 of the Act which is still in force and the law of the land. Only one section of the Act was passed upon in the case above mentioned, and this Department cannot say that any other part of the Act is not constitutional as it has no authority to pass upon the constitutionality of Acts of Assembly. The Attorney General's Department is not armed with judicial authority and is bound to assume that an Act of the Legislature duly passed and approved by the Governor is constitutional. If any one doubts the constitutionality of the Act of June 1, 1893, the best way to secure a speedy determination of the question is by insisting upon its strict enforcement.

I am of the opinion that the second section of the Act of 1883 is applicable to the case of the Republic Iron and Steel Company and should be enforced.

Yours truly,

J. W. BROWN,  
*Deputy Attorney General.*

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*Resignation—List of Eligibles—Status—Re-examination—Act of June 7, 1911, P. L. 756.*

A bituminous coal inspector who resigns from his office is not entitled to have his name on the eligible list of inspectors on file in the State Department of Mines. Before he can be reappointed as a bituminous coal inspector he must fully qualify and be re-examined in the manner prescribed by Act of June 7, 1911, P. L. 756.

April 21, 1924.

Honorable Joseph J. Walsh, Secretary of Mines, Harrisburg, Pa.

Sir: This Department is in receipt of your recent letter in which you inquire whether a certain former bituminous coal inspector of Pennsylvania, who resigned as such inspector on May 15, 1918, after



having served six years and ten months and whose name you advise is not now on the eligible list of inspectors on file in your Department, is eligible for appointment as a bituminous coal inspector.

This question calls for a construction of the Act of June 7, 1911, P. L. 756, so far as it applies to the appointment of inspectors.

Section 3 of Article XIX of this Act provides for certain qualifications of candidates for inspectors to be certified in their application to the Examining Board, with the proviso, however, "That any inspector appointed under the provisions of the Act of May fifteen, one thousand eight hundred and ninety-three, or under the provisions of this act, shall be eligible for reappointment, even if beyond fifty years of age, if in good physical condition."

Section 4 provides, among other matters, that the Examining Board shall certify to the Governor and also to the Department of Mines the names and percentages of all persons making a certain average who are properly qualified to fill the office of inspector. The Governor under the provisions of section 5 thereof commissions the inspectors for each district from these names so certified by the Examining Board.

Section 6 provides:

"When a vacancy occurs in said office of inspector, the Governor shall commission for the unexpired term, from the names on file in the Department of Mines, a person who has received an average of at least ninety per centum. When the number of candidates who have received an average of at least ninety per centum shall be exhausted, the Governor shall cause the aforesaid Examining Board to meet for a special examination.  
\* \* \*"

The provisions above referred to clearly indicate that one who is an inspector under this Act has a right to have his name remain on the eligible list on file in your Department and be eligible for reappointment by the Governor, if in good physical condition. The Governor, in case of any vacancy in the office of inspector, commissions for the unexpired term from the names on file in your Department, which is the eligible list just referred to. When this list is exhausted a special examination is called, as provided for in said Section 6.

The former inspector whose eligibility is now in question resigned May 15, 1918. His name was removed from the eligible list in your Department. This action on the part of your Department was entirely proper.

"A resignation implies an expression by the incumbent in some form, express or implied, of the intention to surrender, renounce or relinquish the office."

*Bowyer.*

“A resignation in terms immediate and unconditional means an entire severance of the officer’s connection with the Army.”

*Turnley vs. U. S., 24 Ct. Cl. (U. S.) 317, 329.*

By his resignation the former inspector deliberately severed himself from his office and renounced all rights thereto. His resignation not only removed him from his office as inspector, but it also operated to cause a forfeiture of all rights accruing under said office.

You are therefore advised that a bituminous coal inspector who resigns from his office is not entitled to have his name on the eligible list of inspectors on file in the Department of Mines. Before he can be reappointed as a bituminous coal inspector he must fully qualify and be reexamined in the manner prescribed in the Act.

Yours very truly,

DEPARTMENT OF JUSTICE,

By PHILIP S. MOYER

*Deputy Attorney General.*

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**OPINIONS TO THE DEPARTMENT OF  
PENNSYLVANIA STATE POLICE**

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## OPINIONS TO DEPARTMENT OF PENNSYLVANIA STATE POLICE

*Justices of the Peace—Misconduct in office—Failure to Perform Duties—Punishment—Indictment—Removal from Office..*

In Pennsylvania a Justice of the Peace is a constitutional officer. He is a judge and possesses judicial discretion. He presides over a Court not of record and of limited jurisdiction. When he wilfully refuses to perform his duties, he is guilty of misconduct in office and can be indicted and punished and removed from office or both as provided by the Constitution.

January 5, 1923.

Major Lynn G. Adams, Superintendent, Department of State Police,  
Harrisburg, Pa.

Sir: The question submitted by your Department has been assigned to me, and I beg to advise you thereupon as follows:

*Question:* The procedure against a Justice of the Peace for refusing to act on matters brought before him by members of the State Police.

In this State a Justice of the Peace is a Constitutional officer. His office is created by the Constitution. He is an elected officer. He is a judge. He possesses judicial discretion. He presides over a Court of limited jurisdiction that is not a court of record.

These several facts it is well to have in mind in making the foregoing inquiry, and particularly the latter fact, for examining the earlier works and authorities by English writers and courts, we must not be unmindful that the court was originally a court of record.

Of course it may well be said of any office that its value to a Commonwealth depends upon how well the duties of the office are executed. But this fact is emphatically true of the office of a justice of the peace, for he is peculiarly a peace officer, particularly when he stands four square and executes the duties of his office without fear or favor. His is the handy court, scattered among the people, a subordinate and limited part of the government, it is true, but of great aid in attaining tranquility and peace when the duties are wisely, honestly and fearlessly performed. The words of Lord Coke are as applicable to the office of a Justice of the Peace today as they were in his place and time.

"It is such form of subordinate government for the  
tranquility and quiet of the realm as no (other) part

of the Christian world hath the like, *if the same be duly executed.*"

Officers are either elected or appointed.

In this State all officers hold office on condition that "they behave themselves well while in office." Failing in this they may be punished in office, or removed from office, or both.

Punishment in office may follow when they commit what amounts to a misdemeanor or a crime, either under a statute, or, in the absence of a statute, under the common law.

*Com. v. Evans, 13 S. & R. 425 (1825)*

*Wilson v. Com'th, 10 S. & R. 373, (1823)*

But removal from office is provided for in the Constitution. Now a Justice of the Peace under all our constitutions has been a constitutional officer. The Legislature did not create the office, and it cannot therefore either abolish it or turn out the official. He can only be removed from office in the way pointed out in the Constitution.

*Bowman's Case, 225 Pa. 364, (1909)*

Section 4 of Article VI of the Constitution provides:

"All officers (that is, both appointed and elected) shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime."

Said Section further provides that—

"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."

While—

"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."

The nip of the inquiry will be found to be in deciding what offenses may be indictable, and what amount to "reasonable cause" for removal from office.

The question as propounded in a very general one. It is incapable of answer more definite than general observation.

While a Justice of the Peace presides over a court of limited jurisdiction, nevertheless he is a judge, and, as such, has what is called in law "judicial discretion," in regard to the performance of judicial duties. Just what judicial discretion means I do not know. I was impressed very early in my experience as an attorney by a definition given in Bouvier's Law Dictionary—"The law of tyrants." While that is undoubtedly a severe definition, judicial discretion is very wide, almost unlimited, and can be attacked only when abused.

Was the matter which he refused to act upon within his judicial duties and discretionary, or was it ministerial and imperative upon him?

I have little hesitation in saying, that, in my opinion, a Justice of the Peace who is duly commissioned and enters upon the duties of his office, and then lies down upon his duties and refuses wilfully to perform duties wholesale because they are submitted by a particular class of officials, as, for instance, State Police, would be guilty of misconduct in office for which he could be indicted and punished, or removed from office, or both.

As to the possibilities of indictment and punishment in a given case when the exact facts and circumstances are not all detailed, or, when they are, for that matter, the inquirer must consult the statutes, and, in so far as they have failed to define the offense, then common law. When the statute prescribes a certain punishment for a definite offense, that is the only punishment, as such, the law inflicts.

But in addition to being convicted and punished as prescribed by the statute, or the common law, he may possibly be removed from office because of the very fact that he has been convicted. It will be observed that the latter part of Section 4 of Article VI of the Constitution quoted provides for removal by the Governor for "reasonable cause," on address of two-thirds of the Senate after "due notice and full hearing."

Wherever the word "reasonable" is used in connection with a standard of duty or a test for action, the standard is flexible. Reasonable cause, like reasonable care, depends upon facts and circumstances. As to what may or may not amount to it, each case is largely by a law unto itself.

The first paragraph of the Section of the Constitution quoted provides that:

"All officers \* \* \* \* *shall be removed on conviction of misbehavior in office or of any infamous crime.*"

It would seem from this clause that a record of conviction on a charge of misbehavior in office or of infamous crime, would, of itself, be "reasonable cause" such as should prompt address upon part of

two-thirds of the Senate to the Governor, and "reasonable cause" for removal by the Governor, upon full hearing, without anything more. But the Governor would not be confined in the hearing as to what might constitute "reasonable cause" to such record of conviction. Whatever would satisfy him of "reasonable cause" for removal, would meet the requirement of the Constitution, under the provision, of which, as we have already observed, removal from office can alone be effected.

Very truly yours,

PAUL J. SHERWOOD,

*Deputy Attorney General.*

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OPINIONS TO THE DEPARTMENT OF  
PROPERTY AND SUPPLIES

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## OPINIONS TO THE DEPARTMENT OF PROPERTY AND SUPPLIES

*State Institutions—Right under Act of June 7, 1923, to exchange their products in excess of their own needs for others and to turn in unserviceable property in part payment for new articles—Acts of March 26, 1895, P. L. 22; May 1, 1911, P. L. 107; June 16, 1919, P. L. 482, Sections 34 to 36 inclusive; June 7, 1923, P. L. 498, Sections 508, 2102.*

The Act of 1923, *supra*, makes no change with regard to the disposition of surplus products or the disposition of unserviceable property except in the agency which is to administer the law.

October 11, 1923.

Honorable Berkey H. Boyd, Secretary of Property and Supplies,  
Harrisburg, Pennsylvania.

Sir: We have your request for an opinion interpreting Sections 508 and 2103 (i) of the Administrative Code.

We understand that there are a number of State Institutions which raise cattle, hogs and vegetables in excess of their own needs for the particular kind of meat or vegetables produced, and are able to exchange their own products for other kinds of meat or vegetables. Also that certain Departments have old automobiles, typewriters or other machines which can be exchanged in part payment for new automobiles, typewriters or other machines thus reducing the cash outlay necessary to purchase new automobiles, typewriters or other machines as the case may be.

You desire to know whether such exchanges are permissible.

Section 508 of the Administrative Code provides:

“Whenever any furnishings or other personal property of this Commonwealth *shall be no longer of service* to the Commonwealth, it shall be the duty of the department, board, or commission, in whose possession such property shall be or come, to put such property into the custody of the Department of Property and Supplies: Provided, however, That in the case of any perishable property which is not in the City of Harrisburg, the department, board, or commission having possession of the same may sell it in such manner and upon such terms as the head of the department or the board or commission may determine.”

Section 2102 of the Administrative Code provides that:

"The Department of Property and Supplies shall have the power and its duty shall be:

\* \* \*

(i) To receive, from the several departments, boards, commissions and State Institutions, personal property of this Commonwealth which is no longer of service to the Commonwealth, to issue a receipt therefor, make a complete record thereof, and, as soon as convenient, sell the same either at public auction or private sale in the city of Harrisburg, or elsewhere, as may be deemed advisable: Provided, That except in the case of perishable property, such sales shall be advertised, in not exceeding five newspapers of the Commonwealth, once a week for three weeks, such advertisements to state the time, place, and condition of any such sale."

These provisions of the Code are not new law. They reenact in substantially the same phraseology (with the exception that the Department of Property and Supplies is substituted for the Board of Commissioners of Public Grounds and Buildings) the provisions of Sections 34 to 36 inclusive of the Act of June 16, 1919, P. L. 462. These Sections of the Act of 1919 reenacted similar provisions of the Act of May 1, 1911, P. L. 107, which had reenacted similar provisions contained in the Act of March 26, 1895, P. L. 22.

The provisions in the Code with regard to the disposition of un-serviceable property have been on the statute books for twenty-eight years. During this period they have not been construed by the Courts. They have, however, been uniformly interpreted, so we are informed, by successive Boards of Commissioners of Public Grounds and Buildings down to the date the Code took effect as inapplicable to cases of the kind mentioned in your request. The Board interpreted the law to mean that property is to be deemed un-serviceable only if it cannot be used to advantage in acquiring other property of a similar nature required in the conduct and administration of the Commonwealth's affairs.

This interpretation finds sanction in the definition of the word "un-serviceable" as given in the Century and other dictionaries. That which is un-serviceable or not of service is defined as "not fit for service; not bringing advantage, use, profit or convenience; useless."

Obviously if a State Institution has a quantity of pork products on hand which it can use but prefers not to use, and is able to exchange the same for the equivalent in value of beef products, the pork products cannot be said to be unfit for service or not capable of being of advantage, use, profit, or convenience. They

are not useless, but on the contrary are distinctly useful in enabling the Institution to acquire without the expenditure of money other property more desirable for the purposes of the Institution.

The same may be said of the exchange of a used automobile in part payment for a new one. The used automobile may still be fit for service but it may be desirable from the standpoint of efficiency of operation or for other reasons to acquire a new automobile. If the old one can be used to reduce the amount of cash required for the purchase of a new car it cannot be said to be either without advantage, use, profit, or convenience, or useless.

It is true that the contemporaneous interpretation of a statute and long usage by administrative officers thereunder is not conclusive; but it is equally true that great weight should be given to the contemporaneous construction and long usage thus adopted and prevailing.

As previously stated there has since 1895, been no substantial change in the law on this subject. The Administrative Code of 1923 makes no change except in the agency which is to administer the law. We can see no reason for reversing the interpretation which the Board of Commissioners of Public Grounds and Buildings have for many years placed upon the meaning of these provisions and you are, therefore, advised that you may continue to be guided by the interpretation heretofore placed upon these statutory provisions by that body.

Very truly yours,

DEPARTMENT OF JUSTICE,

By WM. A. SCHNADER,

*Special Deputy Attorney General,*

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*Public officers—Bonds of State employes—Department of State Treasurer—Act of May 28, 1915, P. L. 626.*

1. Employes in the Department of the State Treasurer must give bonds to the Commonwealth, whether or not they give a bond to the State Treasurer.
2. The State Treasurer has no right to require bonds from employes in his department.

January 4, 1924.

Honorable Berkey H. Boyd, Secretary of Property and Supplies,  
Harrisburg, Penna.

Sir: I have your communication informing me that the State Treasurer insists that employes of his Department give bonds to the State Treasurer instead of to the Commonwealth of Pennsylvania and asking what you shall do in the matter.

The Act of May 28, 1915, P. L. 626, provides:

"Section 1. Be it enacted &c., That from and after the passage of this act, every such State official and employe, and every State official and employe who may hereafter be appointed, who shall receive and disburse public moneys, shall be required to give a good and sufficient corporate bond to the Commonwealth of Pennsylvania, conditional that he will well and truly account for and pay out, according to law, all moneys received by him in the performance of his official duties; and the amount, when not otherwise provided by law, and character, of each bond and the sufficiency of the surety, shall in all cases be approved by the Attorney General."

This Act specifically directs that State officials and employes who shall receive and disburse public moneys shall give good and sufficient corporate bonds to the Commonwealth. In 1916, Attorney General Brown construed the Act of 1915, *supra*, and he held that the sole purpose of the Act was to protect the Commonwealth in the disbursement of its funds.

This Act was followed by the Act of June 16, 1919, P. L. 482, and Section 44 of the Act provides:

"It shall be the duty of the board to procure from a corporation or corporations, authorized by law to act as sureties in the Commonwealth of Pennsylvania, good and sufficient bonds, which shall be approved by the Attorney General, to meet the requirements of law in the case of all State officers and employes required by statute to give bonds to the Commonwealth, for the faithful performance of their official duties. The cost of said bonds shall be paid for by the board out of a specific appropriation to be made to said board in the general appropriation bill for that purpose, upon warrants drawn by the Auditor General upon the State Treasurer."

The Act of 1919 was repealed but practically re-enacted by the Administrative Code, and it is provided in the Code, Section 2102: "The Department of Property and Supplies shall have the power, and its duty shall be" \* \* \*

"To procure, from a corporation or corporations authorized by law to act as sureties in the Commonwealth of Pennsylvania, good and sufficient bonds, which shall be approved by the Attorney General and paid for by the Commonwealth, to meet the requirements of law in the case of all State officers and employes required by statute to give bonds to the Commonwealth for the faithful performance of their official duties." Section 2103 (h).

In every Act of Assembly in reference to giving bonds by State employes it is expressly provided that the bond shall be given to the Commonwealth of Pennsylvania. In no Act can any authority be found for the State Treasurer to take bonds from his employes directly to himself as Treasurer. If such bonds are desired it is a matter between the Treasurer and his employes and the Commonwealth has nothing to do with it. .

The bonds directed by law to be given by State officers and employes are paid for out of a specific appropriation in the General Appropriation Bill for that purpose.

The General Appropriation Bill of 1923 contains the following provision for the payment of the cost of bonds:

“For the payment of the cost of procuring bonds required to be given by employes of the Treasury Department and of officers and employes of other departments, boards and commissions required to be given to the Commonwealth, two years, the sum of .....

This appropriation expressly provides for employes of the Treasury Department who are required to give bond, but it provides, as do all the Acts of Assembly, for bonds to be given to the Commonwealth.

All the Acts requiring bonds from State employes provide that such bonds shall be given to the Commonwealth of Pennsylvania. The appropriation to pay the cost of such bonds is for bonds to be given to the Commonwealth of Pennsylvania. Nowhere is it provided that the State Treasurer shall take from his employes bonds made directly to himself as Treasurer.

You are therefore advised that there is no authority in law for the State Treasurer to require bonds from employes made to him as Treasurer and you have no right to procure such bonds or to pay for them out of the appropriation made to pay for bonds required to be given to the Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

By J. W. BROWN,  
*Deputy Attorney General.*

*Appropriations—Office Equipment to facilitate the collection of emergency taxes; how payable—Acts of June 7, 1923, P. L. 498, Section 2103; June 15, 1923, P. L. 834; June 28, 1923, P. L. 876; June 30, 1923, P. L. 44-a.*

The Legislature, having made a specific appropriation to the Treasury Department for the payment of office equipment to facilitate the collection of emergency taxes, such equipment must be paid for from the appropriation made to said Department for that purpose.

January 14, 1924.

Honorable Berkey H. Boyd, Secretary of Property and Supplies,  
Harrisburg, Pa.

Sir: Your letter of December 13, 1923, in reference to a requisition from the Treasury Department for filing equipment to be used in connection with a system of accounts in the collection of emergency State taxes, has been received by this Department.

The General Assembly of 1923, passed an Act which was approved June 15, imposing a State tax and an additional emergency State tax on liquid fuels. Another Act was passed by the same Assembly, which was approved June 28, imposing an emergency profits tax for State purposes on the net income of certain corporations etc.

As I understand your letter it is in the collection and keeping accounts of these taxes that the filing equipment is asked for by the Treasury Department.

The Administrative Code provides "that the Department of Property and Supplies shall have the power and its duty shall be":

"Section 2103. (c) To purchase in like manner all furniture, materials or supplies required by the legislative and other departments of the State Government except as otherwise provided in this Act."

If there were nothing further to be found in the law the provision of the Code requiring the purchase of all furniture, materials and supplies by the Department of Property and Supplies would authorize that Department to furnish the filing equipment asked for.

But the Legislature recognized the fact that there would be expenses incidental to the collection of the emergency State taxes, not only in the office of the Auditor General, but in the Treasury Department as well, and it provided for such expenses.

In the General Appropriation Act of 1923, under the appropriation to Auditor General's Department is the following:

"For the payment of the salaries of experts, clerks and stenographers; and office equipment, and incidental

expenses to facilitate the collection of emergency taxes  
the sum of \* \* \*."

In the same General Appropriation Act under appropriation to Treasury Department is the following:

"For the payment of the salaries of experts, clerks and stenographers, and office equipment, and incidental expenses to facilitate the collection of emergency taxes the sum of \$50,000."

Here is a specific appropriation to the Treasury Department for office equipment to facilitate the collection of emergency taxes, and any such equipment or other incidental expenses must be paid from such appropriation.

The filing equipment asked for is office equipment and comes within the scope of the appropriation.

The Legislature having made a specific appropriation to the Treasury Department for the payment of equipment asked for in the requisition you have from the Treasury Department, you have no right to pay for it out of any appropriation made to the Department of Property and Supplies and it must be paid for from the appropriation made to the Treasury Department for that purpose.

Yours truly,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

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*Robert Morris Monument Commission—Appropriation made by Act of June 14, 1911, P. L. 937—Availability for payment of balances due the sculptor and for the expenses of the Commission and the dedication of the monument—Act of July 7, 1923, P. L. 498, Section 2102.*

The Robert Morris Monument Commission was abolished on June 15, 1923, when the Administrative Code became effective. The Department of Property and Supplies having been specifically authorized to complete the construction and erection of the monument, the unexpended balance of the appropriation made in 1911 for the construction and erection of the monument should be paid out of the State Treasury, upon the requisition of the Secretary of Property and Supplies.

June 23, 1924.

Honorable Berkey H. Boyd, Secretary of Property and Supplies,  
Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether the unexpended balance of the appropriation made by the Act of June 14, 1911, P. L. 937 for the purpose of building a Monument to Robert Morris, is

available for the payment of the balance due the sculptor and whether the unexpended balance of the appropriation made by the same Act for the expenses of the Robert Morris Monument Commission and the dedication of the Monument is available at this time.

The Act of 1911 empowered the Governor to appoint a Commission to be known as the Robert Morris Monument Commission which was authorized to select a suitable site in Philadelphia for the erection of a Monument to Robert Morris, to select and decide upon the design of the Monument and the materials out of which it should be constructed and to make contracts for its construction and erection.

The sum of twenty thousand dollars (\$20,000) or so much thereof as might be necessary was appropriated "for the purpose of building a Monument, in the City of Philadelphia, to Robert Morris, in commemoration of his services to the United States during the Revolutionary War."

The sum of one thousand dollars (\$1,000) or so much thereof as might be necessary was also appropriated "for the expense of the said construction and the dedication of the said Monument."

Acting under the authority given by the Act of 1911 the Robert Morris Monument Commission entered into a contract with R. E. Brooks of Washington, D. C., for the construction of the said Monument, but before Mr. Brooks completed his work he died and a new contract was executed between the Commission and Mr. Paul W. Bartlett, under the terms of which Mr. Bartlett undertook to complete Mr. Brooks' work. We understand that the Monument has been completed and that you have been requested to take such action as is necessary to procure payment of the balance remaining unpaid.

It should be stated parenthetically that the Robert Morris Monument Commission entered into a contract with the Robert Morris Memorial Committee of the Pennsylvania Bankers Association and the Robert Morris Memorial Committee of the Fairmount Park Art Association under the terms of which the two Committees mentioned agreed to pay one-third of the total cost of the Monument, leaving but two-thirds to be paid for out of the appropriation contained in the Act of 1911.

On June 15, 1923 the Robert Morris Monument Commission was abolished by operation of the Administrative Code which became effective on that date. The question before us is whether the abolition of the Robert Morris Monument Commission rendered unavailable the unexpended balances of either or both of the appropriations contained in the Act of 1911.

We are today advising you in another opinion that notwithstanding the abolition of the General George Gordon Meade Statue Commission the moneys appropriated for the construction and erection



at Washington, D. C., of a statue of General George Gordon Meade are available for the payment of the sculptors and architect. For the same reasons which dictated our conclusion in the case of the Meade Statue appropriation we advise you that the unexpended balance of the appropriation of twenty thousand dollars (\$20,000) for the construction and erection of the Robert Morris Monument is now available. We shall not repeat those reasons except to emphasize the fact that aside from all other considerations this conclusion is inevitable under Article I, Section 10 of the Constitution of the United States, which prohibits any state from enacting legislation impairing the obligation of contracts. We do, however, wish to point out that in one respect the present case is less complicated than that of the Meade Statue appropriations. The latter appropriations as contained in the Acts of 1917 and 1921 were to the George Gordon Meade Statue Commission. The appropriation for the Robert Morris Monument was not to the Commission but "for the purpose of building a monument," without naming the Commission. Accordingly, the abolition of the Robert Morris Monument Commission could have no possible bearing on the availability of the appropriation.

With reference to the appropriation of one thousand dollars (\$1,000) "for the expense of the said Commission and the dedication of the said Monument" we advise you that no part of the said appropriation can be expended to pay the expenses of the Advisory Commission known as the "Robert Morris Monument Commission" created by the Administrative Code to supplant in part the original Robert Morris Monument Commission which was abolished. With reference to the expenditure of money for the dedication of the Monument there is no existing department, board or Commission which has authority to make arrangements for the dedication of this Monument. Your Department is authorized by Section 2102 (g) of the Administrative Code "to erect and supervise the erection of \* \* \* the Robert Morris Monument on the steps of the Custom House at Philadelphia, Pennsylvania." Nothing is said, however, with regard to the dedication of this Monument and while, therefore, it would be entirely proper for your Department to cooperate with the Robert Morris Memorial Committees of the Pennsylvania Bankers Association and the Fairmount Park Art Association in making the necessary arrangements to have the Monument dedicated you have not been empowered by law to expend any funds in connection with such dedication. For this reason you could not expend any part of the appropriation of one thousand dollars (\$1,000) in connection with the dedication of the Monument.

In view of the fact that your Department has been specifically authorized by law to complete the construction and erection of the

Robert Morris Monument the unexpended balance of the appropriation of twenty thousand dollars (\$20,000) for the construction and erection of the Monument should be paid out of the State Treasury upon warrant of the Auditor General drawn upon your requisition as head of the Department of Property and Supplies.

Very truly yours,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*General George Gordon Meade Memorial Statue Commission—Lapse of appropriations made thereto by virtue of the enactment of the Administrative Code of 1923. (Acts of March 30, 1811, P. L. 145; June 14, 1911, P. L. 935; May 21, 1913, P. L. 155; June 18, 1915; Appropriation Acts, page 249; July 25, 1917, P. L. 1211; May 27, 1921, Appropriation Acts, page 276; June 7, 1923, P. L. 498, Sections 2, 3, 9, 203, 2102, and 2109; and Article I, Section 10, of the Federal Constitution.)*

Contracts for the erection of an heroic group and for the construction of a pedestal and base for the same having been executed on the faith of the appropriations made to the Meade Memorial Statue Commission, these appropriations did not lapse when the Administrative Code of June 7, 1923, became effective. The Commission was abolished by the Code. If the Auditor General and the State Treasurer are satisfied that the unpaid claims of the contractors presented in accordance with the Act of March 30, 1811, are just and valid, the Auditor General may draw his warrants on the State Treasurer, if there is an "appropriation by law" for the payment of the claims. The Legislature not having the power to disturb the appropriations after they became charged with the Commonwealth's liability to the contractors, there is an "appropriation by law" to pay these claims. The Auditor General, however, must be assured that the contractors have performed their contract obligations. When they so assured, the claims may be paid out of the unexpended balance of the appropriations above referred to.

June 23, 1924.

Honorable Berkey H. Boyd, Secretary of Property and Supplies,  
Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether the contractors now working upon the Meade Memorial Statue, which is being erected by this Commonwealth in the Botanical Gardens at Washington, D. C., can be paid out of unexpended funds appropriated to the Meade Memorial Commission prior to its abolition on June 15, 1923.

The relevant facts are as follows:

The Act of June 14, 1911, P. L. 935, authorized the appointment of a Commission for the purpose of procuring a suitable statue of General George Gordon Meade and causing the same to be erected on a suitable site in the City of Washington, D. C. The Act contained an appropriation of twenty thousand dollars (\$20,000) "for the making, erection and dedication of said statue" and the expenses of the Commission.

Additional appropriations for the construction and erection of the Statue were made by the Acts of May 21, 1913, P. L. 155, June 18, 1915, Appropriation Acts P. L. 249, July 25, 1917, P. L. 1211 and May 27, 1921, Appropriation Acts P. L. 275. Prior to June 15, 1923 all of the appropriations made by the Acts of 1911, 1913 and 1915 had been expended, but there was on June 15, 1923 an unexpended balance of upwards of one hundred thousand dollars (\$100,000) out of the appropriations of 1917 and 1921. The Act of 1917 appropriated seventy thousand dollars (\$70,000) to the Meade Memorial Commission for the purpose, *inter alia*, "of constructing the necessary foundation and pedestal, and in securing appropriate tablets and designs therefor, and for the erection and completion of said statue or memorial." The Act of 1921 appropriated fifty thousand dollars (\$50,000) for these purposes and for the additional purpose of dedicating the statue.

On June 7, 1919 a contract was executed by and between Charles Grafly of the City of Philadelphia and the Meade Memorial Commission under the terms of which Mr. Grafly for a consideration of eighty-five thousand dollars (\$85,000) agreed to make a heroic group consisting of eight figures cut in stone with a top of gilded bronze as per sketch adopted by the Meade Memorial Commission and approved by the National Commission of Fine Arts, the central figure of the group to be a portrait statue of General George Gordon Meade.

On the date of the execution of this contract there were unexpended balances of appropriations previously made to the Meade Memorial Commission sufficient to pay the consideration named in the contract in full. Mr. Grafly commenced work under his contract, and has been paid in part therefor. The work is not yet completed but there are now certain payments due Mr. Grafly. Other payments will become due in the future.

On August 29, 1921 a contract was executed by and between Piccirilli Brothers of New York and the Meade Memorial Commission. This contract covered the construction of the pedestal and base for the statue. The consideration to be paid by the Commonwealth under this contract is eighty-five thousand six hundred and fifty-two dollars

(\$85,652). Work was commenced under this contract and payments on account made. Other payments are now due and others will become due as the work proceeds.

The payments to be made under the Grafly contract are conditioned upon approval of the work by the Meade Memorial Commission or its representative; and payments under the contract of Piccirilli Brothers upon certificate of the sculptor and architects. In this latter contract Mr. Grafly is named as the sculptor and Messrs. Simon and Simon as architects.

On June 7, 1923 the Legislature enacted The Administrative Code (P. L. 498) which became effective June 15, 1923. This Act abolished the Meade Memorial Commission (Section 2), provided that the Department of Property and Supplies should "supervise the erection of the General George Gordon Meade Statue at Washington, D. C.," (Section 2102) (g) created an advisory commission to be known as the General George Gordon Meade Statue Commission (Section 203), and authorized the new commission to make recommendations and render advice to, and approve or disapprove the plans of the Department of Property and Supplies with regard to the erection, maintenance and care of the Meade Statue (Section 2109).

Section 9 of the Code provides that:

"All existing contracts and obligations of the \* \* \* commissions \* \* \* \* abolished by this act shall remain in full force and effect, and shall be performed by the departments, boards or commissions to which the rights, powers, duties and obligations of such governmental \* \* \* commissions \* \* \* are transferred";

and Section 3 of the Code provides that:

"All rights, powers and duties, which have heretofore been vested in, exercised by, or imposed upon any \* \* \* commission \* \* \* abolished by this act, \* \* \* and which are by this act transferred, either in whole or in part, to a department, board or commission created by this act, shall be vested in, exercised by, and imposed upon the department, board or commission to which the same are transferred by this act, and not otherwise; and every act done in the exercise of such rights or powers and the performance of such duties shall have the same legal effect as if done by the former \* \* \* commission \* \* \*."

The question presented is whether under the facts recited, the appropriations to the Meade Memorial Commission lapsed by reason of the enactment of the Administrative Code, abolishing as it did, the Meade Memorial Commission.

Certainly to the extent to which contracts were entered into upon the faith of these appropriations they did not lapse as a result of the passage of the Code. Indeed, legislative action could not effectually have lapsed them, even if the Legislature had expressed a clear intention to do so. Article I, Section 10, of the Federal Constitution, prohibiting the passage of any State law impairing the obligation of contracts, would bar such legislative action. The legislature could not specifically have repealed these appropriations; and what it could not do specifically, it could not do by implication.

However, the intention of the Legislature that there should be no impairment of the obligation of contracts as a result of the structural reorganization of the executive branch of the government was clearly expressed in Section 9 of the Code, above quoted. When the Legislature provided that all existing contracts and obligations of commissions abolished by the act should remain in full force and effect it clearly recognized that to the extent to which funds had been appropriated to pay the obligations of such contracts, the appropriations should continue to be available.

Only one question remains to be considered. How, it may be asked, can warrants be drawn for payments out of these appropriations, without requisitions from the Meade Memorial Commission, to which the appropriations were made? The answer is plain. Neither the Constitution nor any general law enacted prior to the passage of the Administrative Code, nor the appropriation Acts in question require the Auditor General to decline to draw a warrant unless he has received a requisition; and the Act of March 30, 1811, P. L. 145, provides a method by which any person having a claim against the Commonwealth may present it directly to the Auditor General. If the Auditor General is satisfied that the claimant is entitled to be paid, and the State Treasurer concurs, the Auditor General is directed to draw his warrant upon the State Treasurer if there is an appropriation by law for the payment of the claim.

As the Legislature did not have the power to disturb these appropriations after they became charged with the Commonwealth's liability to the contractors, there is an "appropriation by law" to pay the claims of these contractors. The Auditor General is, of course, in duty bound to assure himself that the contractors have performed their contract obligations. In the case of Piccirilli Brothers, the certificate of the sculptor and of the architects must be furnished to him. In the case of Mr. Gaffy, the approval of the Department of Property and Supplies (which under Section 3 of the Code is substituted for the approval of the Meade Memorial Commission) is a pre-requisite to payment. Assuming that the necessary certificates, in the one case, and the necessary approval, in the other, can be

furnished to the Auditor General, there is no reason why these claims should not be paid promptly out of the appropriations to which reference has been made.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*Department of Property and Supplies—Authority of the Secretary to pay the rent on a certain building formerly owned and afterwards sold by the Commonwealth, without the delivery of possession to the purchaser—Payable from what fund. (Act of June 16, 1911, P. L. 1027; Act of June 7, 1923, P. L. 498.)*

The Commonwealth, which acquired certain land by virtue of condemnation proceedings, and afterwards sold the same, but did not deliver possession to the purchaser for several years, having the use and enjoyment of the said property during the interval, with the purchaser's consent or sufferance, should pay reasonable rent therefor, payable out of the appropriation to the Department of Property and Supplies.

July 8, 1924.

Honorable Samuel B. Rambo, Deputy Secretary, Property and Supplies, Harrisburg, Pa.

Sir: This Department has your request for an opinion as to whether or not you are authorized to pay Mr. Samuel Fishman of Harrisburg for the rental for the use of a building situated at the southeast Corner of Fourth and North Streets upon property owned by the State, and, if so, out of what fund the same can be paid.

The facts are that this building was acquired by the State by virtue of condemnation proceedings of the land upon which it is located some years ago; that on July 28, 1917, it was, pursuant to the authority of the Act of June 16, 1911, P. L. 1027, sold to Lewis Silbert for the sum of \$880.34; that on the day of the sale \$220.08, one-fourth of the purchase price was paid on account that under the terms of the sale the said building was to be removed from the land of the State, at which time the balance of the purchase money was to be paid; that possession thereof has up to the present time not been given to the purchaser or his successor in title for the reason that it has been continuously occupied by the Bureau of Animal Industry of the

Department of Agriculture; that the said purchaser transferred all of his interest in said building to Samuel Fishman, the claimant, for rent.

We are not informed as to the date of the transfer from Silbert to Fishman, nor as to whether or not such transfer carried with it all claim of Silbert to rent of the same.

The Administrative Code in Article XXI, Section 2102 (b), authorizes the Department of Property and Supplies to contract in writing for and rent proper and adequate offices, rooms or accommodations outside of the Capitol buildings for any department, board or commission which can not be properly and adequately accommodated with offices and rooms in the Capitol buildings. This is a reenactment of the authority vested in the Board of Commissioners of Public Grounds and Buildings by Section 41 of the Act of June 16, 1919, P. L. 482, West's Penna. Stat., Sec. 17556.

Where land is occupied by one with the owner's consent or sufferance there is an implied promise to pay a reasonable rent. (*Bardsley's Appeal*, 10 A. T. L. 39; *Hemwood vs. Cheeseman*, 3 S. & R. 500; *Grqve vs. Barclay*, 106 Pa. 155; *National Oil Refining Co. vs. Bush*, 88 Pa. 335; *Seitzinger vs. Alspach*, 42 L. I. 68.)

Although it was the intention at the time of this sale that the buildings should be delivered to the purchaser within a reasonable time, they were never so delivered and the Board of Commissioners of Public Grounds and Buildings having at that time authority to rent this building, I am of the opinion that the above rule as to an implied promise to pay a reasonable rent where land is occupied by consent would apply, and that you are authorized to pay a reasonable rent for the same to the party or parties entitled thereto.

What that rent shall be is a matter for your determination, and the fact that the purchaser has not paid all of the consideration should be taken into account in arriving at such sum.

I am further of the opinion that this rental may be paid out of the appropriation made to the Department of Property and Supplies for the payment of the rent of offices and rooms outside of the Capitol building when necessary for the accommodation of any department, board or commission of the State Government. (See Appropriation Act 44-A, p. 52 of Appropriation Acts of 1923.)

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

*State institutions—Industrial Home for Women at Muncy. Property and Supplies, Department of; authority of Department to print annual report of the Board of Trustees of said institution. (Act of June 7, 1923, P. L. 498, Sections 202, 504, and 2104.)*

The annual report of the State Industrial Home for Women at Muncy is part of the Biennial Report of the Secretary of Welfare. The Governor, the Secretary of Welfare, and the Secretary of Property and Supplies must determine whether or not it shall be printed and, if printed, in what form and quantity. The cost of printing may be paid out of that part of the appropriation to the Department of Property and Supplies for printing which has been allocated to the Department of Welfare.

December 2, 1924.

Honorable Berkey H. Boyd, Secretary of Property and Supplies,  
Harrisburg, Pennsylvania.

Sir: We have the request submitted to us by your Department through Mr. Frank E. Woods, Director of Publications, to be advised whether the annual report of the Board of Trustees of the Industrial Home for Women at Muncy can be printed by your Department upon request of said Board of Trustees, the cost of printing to be paid out of the appropriation for printing to your Department.

The Board of Trustees of the Industrial Home for Women at Muncy is a departmental administrative board within the Department of Welfare. See Section 202 of the Administrative Code (Act of June 7, 1923, P. L. 498 at 508).

Section 504 of the same Act (P. L. 534) provides that each departmental administrative board shall not later than September first of each even-numbered year report in writing to the head of the Department of which such Board is a part; and that all such reports shall be attached as exhibits to the report made by the head of the Department to the Governor.

It is clear from this Section of the Code that reports of all boards of trustees shall be made biennially not annually and that they should be submitted to the head of the Department with which such boards are connected and by the appropriate department head submitted to the Governor. If, therefore, the report in question has come to you directly from the Board of Trustees you should transmit it to the Secretary of Welfare notifying the Board of Trustees of your action.

The printing of Department reports is covered by Section 2104 of the Code (P. L. 617). By reference to that section you will see that your Department has the power and the duty to edit for publication all department reports and, with the approval of the



Governor, after consultation with the Department involved determine the need, size, character, quantity and method of distributing department reports.

As the report of the Board of Trustees of the State Industrial Home for Women is a part of the biennial report of the Secretary of Welfare to the Governor the question whether it is to be printed and if so in what form and in what quantity must be determined by your Department, the Governor and the Secretary of Welfare. Should it be determined to print the report in whole or in part the cost of printing can be paid out of that part of the appropriation to your Department for printing which has been allocated to the Department of Welfare.

Very truly yours,

DEPARTMENT OF JUSTICE,

By WM. A. SCHNADER,

*Special Deputy Attorney General.*

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**OPINIONS TO THE DEPARTMENT OF  
PUBLIC GROUNDS AND BUILDINGS**

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## OPINIONS TO THE DEPARTMENT OF PUBLIC GROUNDS AND BUILDINGS

*State Fire Insurance Fund, created by Act of May 14, 1915, P. L. 524—Cost of rebuilding and replacing buildings of the State Hospital for the Insane at Norristown, destroyed by cyclone.*

The loss or damage in question having been caused by a casualty and the State being the owner of the property destroyed, the cost of rebuilding, restoration or replacement is a proper charge against the State Fire Insurance Fund.

April 25, 1923.

Honorable Berkey H. Boyd, Superintendent, Public Grounds and Buildings, Harrisburg, Pa.

Sir: On April 5, 1923, a tornado or cyclone damaged the Hospital and other buildings of the State Hospital for the Insane at Norristown, Pennsylvania. The damage and destruction is thus described by the Steward of the Institution:

"Many of the buildings have portions of the roofs blown off, the flag pole was blown down, the rest pavilion for consumptive patients was entirely demolished, a wing of our piggery was completely destroyed and the barn on the Moyer property was blown off its foundation and entirely collapsed, the silo at the dairy barn is entirely ruined, as well as innumerable number of window panes broken everywhere."

You now ask to be advised as to whether or not the cost of rebuilding and replacing the above property would be a proper charge against the State Fire Insurance Fund.

This is a State Institution and all the property, including the buildings, is owned by the State.

The Act of May 14, 1915, P. L. 524, created a fund for the purpose of replacing, restoring and rebuilding, structures, equipment and other property of the Commonwealth, damaged or destroyed by fire or other casualty and regulates the placing of insurance thereon.

Section three of said act provides:

"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 five of the act provides for the rebuilding, restoring or replacement of any structure, building, equipment or other property owned by the Commonwealth, which has been damaged or destroyed by fire or other casualty, as follows:

“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.”

The loss or damage suffered at Norristown was caused by such a casualty as is contemplated by the Act of 1915.

Section seven of the Act makes it unlawful for any Department of the State government or any board of overseers, trustees, managers 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 December 31, 1920.

The purpose of the Act is to have the State carry its own insurance. No provision was made for insuring new buildings erected since the passage of the Act, as the fund created by the Act

was amply sufficient to protect all such buildings. It seems to have been the intention of the Legislature that the fund was to provide for insurance upon all new buildings and to reduce greatly the insurance upon all old buildings until December 31, 1920, when the fund would be able to carry all insurance upon all the buildings of the Commonwealth.

The loss or damage in question having been caused by a casualty, you are advised that the cost of rebuilding, restoration or replacement of any structures, buildings or other property is a proper charge against the State Fire Insurance Fund.

Very truly yours,

J. W. BROWN,  
*Deputy Attorney General.*

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*Public Grounds and Buildings, Board of Commissioners of—Authority to make a lease for a term beyond the appropriation period or to cancel one so made—Act of June 16, 1919, P. L. 482, Sections 41 and 43.*

The Board of Commissioners of Public Grounds and Buildings has authority to make a lease for a term longer than two years, but has not the right to cancel contracts already made.

June 6, 1923.

Honorable Berkey H. Boyd, Superintendent of Public Grounds and Buildings, Harrisburg, Pa.

Sir: Your inquiry as to whether or not your Department can legally make a lease for a term beyond the appropriation period, namely two years, and if a lease has been so made can it be canceled, has been received by this Department.

The authority of the Board of Commissioners of Public Grounds and Buildings to contract in writing for the rent of offices, rooms and accommodations, for any Department, Board, Bureau, Division, or Commission of the State is found in the Act of June 16, 1919, P. L. 482. Section 41 of that Act provides:

“Whenever any department, board, bureau, division, or commission of the State Government cannot be properly and adequately accommodated with offices and rooms in the Capitol buildings, the board shall have the power and authority to contract in writing for and rent

proper and adequate offices or rooms outside of the Capitol buildings for such department, board, bureau, division, or commission."

Section 43 of the same Act provides:

"All amounts paid for the rent of any offices, rooms, or accommodations, as provided in this act, shall be paid out of an appropriation for that purpose in the general appropriation bill made to the board."

The Act authorizing the making of the contract does not limit the power of the Board of Commissioners as to time, but simply provides that it shall have power and authority to contract in writing for and rent proper and adequate offices or rooms.

This is evidence of a legislative intent that the Board should exercise its discretion in the making of such contracts, and if to the best interests of the Commonwealth could make contracts for a period longer than two years.

In many cases alterations and changes are made by the lessor to meet the needs and requirements of the Department, Board, Bureau, Division or Commission, which is to occupy the offices or rooms and if the contract to rent could be for two years only, many lessors would refuse to do this work. In that event the State would be compelled to make the alterations and changes at its own expense and if at the end of two years for any reason the contract could not be renewed, all the expense paid by the State and the labor performed by it would be lost and most likely in a new place the same expense and labor would again be necessary.

No lessor would care to make expensive alterations and changes in a building for the use of State Departments if the contract with the State could not exceed a period of two years with all the uncertainty of a renewal of the contract.

The intention of the Legislature is further evidenced by the language used in Section 43 of the Act. It provides for the payment of the rent of offices, rooms, or accommodations, and instead of saying such rents shall be paid out of "the" appropriation, it provides that the rent shall be paid out of "an" appropriation in the General Appropriation Bill made to the Board. This shows that the Legislature intended and expected further appropriations in the General Appropriation Bills to pay the rent of offices or rooms contracted for.

The presumption is always in favor of the correctness of an act performed by public officers and every reasonable intendment will be made in support of such presumption. So it is always to be presumed that in any official act the officers performing such act have not exceeded their authority. If, as above said, it was the legisla-

tive intent that the Board should exercise its discretion in making such contracts, it may make them for such period of time as in its discretion is for the best interests of the State.

Hence it follows that in the absence of fraud or collusion, the acts of the Board acting in behalf of the Commonwealth within the limits of its authority and in the performance of its duties, are the acts of the State and cannot be repudiated by it.

You are, therefore, advised that the Board of Commissioners of Public Grounds and Buildings has the authority to make a contract to rent rooms or offices for a term longer than two years and has not the right to cancel contracts already made.

Very truly yours,

J. W. BROWN,

*Deputy Attorney General.*

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**OPINIONS TO THE DEPARTMENT OF  
PUBLIC INSTRUCTION**

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## OPINIONS TO THE DEPARTMENT OF PUBLIC INSTRUCTION

*Public Instruction, Department of—Status of employees of the Department and the various agencies administered by it defined—Acts of June 7, 1923, P. L. 498, Sections 2, 214 and 406 to 422, inclusive, 435, 1305, 1311.*

All employees necessary for the administration of the State Library and Museum, are employees of said Department. Where the Secretaries for the various Boards and Commissions are selected outside of their membership, as authorized by the Administrative Code, such Secretaries are not employees of the Department, but of the respective Boards or Commissions which they serve. The Secretaries or Treasurers of the Pennsylvania State Oral School for the Deaf, or of the Home for Training in Speech for Deaf Children, or the Pennsylvania Soldiers' Orphan School, are not employees of the Department, but of the Boards which selected them. The superintendents and other employees of these Boards of Trustees, employed under the provisions of Section 1311 of the Code, are not employees of the Department, but of the Board. The State Educational Director of Training Schools for Nurses is not an employee of the Department. All of the employees referred to are employees of the Commonwealth.

February 5, 1924.

Dr. J. George Becht, Superintendent of Public Instruction, Harrisburg, Pa.

Sir: This Department has received your request to be advised whether in administering the affairs of the Department of Public Instruction and the various agencies placed under the Department by the Administrative Code there is any distinction between employees "of the Department of Public Instruction" and employees "of other agencies administered by the Department of Public Instruction."

The Administrative Code placed in the Department of Public Instruction for purposes of fiscal control nineteen already existing boards and commissions, all of which are denominated "departmental administrative boards and commissions" by Section 202 of the Code. These nineteen boards and commissions are the Council of Education, the Pennsylvania State Board of Censors, Public School Employees' Retirement Board, the Pennsylvania Historical Commission and fourteen professional examining boards. Two of these fourteen boards, namely, the Dental Council of Pennsylvania and the Board of Dental Examiners of the Commonwealth of Pennsylvania are combined into one Board known as the "State Dental Council and Examining Board."

The Code also created and placed in the Department of Public Instruction new Boards of Trustees to manage respectively the Pennsylvania State Oral School for the Deaf, the Home for Training in

Speech of Deaf Children Before They Are of School Age and the Pennsylvania Soldiers' Orphan School. These Boards of Trustees are also designated as "departmental administrative boards."

Finally the Code abolished the State Library and Museum as a separate agency of the State Government. (See Section 2) and in Section 1305 transferred to the Department of Public Instruction the functions previously performed by the agency formerly known as the State Library and Museum.

The employment of persons to do the work of Departments and departmental administrative boards and commissions is regulated by Section 214 of the Code under which the Superintendent of Public Instruction is authorized to appoint and fix the compensation of such assistants and employes as may be required for the proper conduct of the work of the Department of Public Instruction and it is provided that "except as otherwise provided in this Act the heads of the respective administrative departments (of which the Superintendent of Public Instruction is one) shall appoint and fix the compensation of such clerks, stenographers and other assistants as may be required for the proper conduct of the work of any departmental administrative bodies, boards, commissions or officers \* \* \* in their respective departments."

Sections 406 to 422 of the Code, inclusive, provide for the organization of all of the departmental administrative boards and commissions within the Department of Public Instruction except the Boards of Trustees of the Pennsylvania State Oral School for the Deaf, of the Home for Training in Speech of Deaf Children Before They Are of School Age and of the Pennsylvania Soldiers' Orphan School, the organization of which boards is provided for in Section 435.

An examination of Sections 406 to 422 inclusive discloses the fact that a number of the boards within the Department of Public Instruction are authorized to select secretaries who need not be members of the board and fix their compensation, and that the State Board of Examiners for the Registration of Nurses is authorized to appoint and fix the compensation of a State Educational Director of Training Schools for Nurses. These are, however, the only exceptions to Section 214 which will be found in sections 406 to 422 inclusive.

Section 435 of the Code permits the Boards of Trustees of the three educational Institutions which have been specifically mentioned to select a Secretary and Treasurer who need not be members of the Board and Section 1311 of the Code permits the Boards of Trustees of these Institutions to elect a Superintendent and to appoint such officers and employes as may be necessary for the management of the Institutions under their respective control,

Nowhere in the Code will there be found any provision authorizing the employment of persons for service in the State Library and Museum otherwise than as provided in Section 214 of the Code.

The provisions to which reference has been made clearly indicate:

1. That all employes necessary for the administration of the State Library and Museum, which under the Code is an integral part of the Department of Public Instruction, are employes of the Department, having exactly the same status as the employes engaged in the administration of the Public School System which is the primary duty of the Department;

2. That in cases in which secretaries for the various boards and commissions are selected outside of their membership as authorized in Sections 406 to 422 inclusive such secretaries are not employes of the Department of Public Instruction but employes of the respective boards or commissions which they serve;

3. That similarly secretaries or treasurers of the Pennsylvania State Oral School for the Deaf, of the Home for Training in Speech of Deaf Children Before They Are of School Age and of the Pennsylvania Soldier's Orphan School are not employes of the Department of Public Instruction but of the Boards which selected them;

4. That the Superintendents and other employes of these Boards of Trustees employed under the provisions of Section 1311 of the Code are not employes of the Department of Public Instruction but of the respective boards having jurisdiction over the respective Institutions which they serve; and

5. That the State Educational Director of Training Schools for Nurses is not an employe of the Department but of the Board of Examiners for the Registration of Nurses.

All of the employes to whom reference has been made are employes of the Commonwealth; but that fact does not carry with it as a necessary implication that they are employes of your Department.

The distinction between employes of your Department and employes of agencies included therein under the provisions of the Administrative Code is the same as the distinction between employes of your Department and employes of the normal schools which are connected with your Department under the provisions of the "School Code" of 1911.

Your letter does not indicate what particular phase of the law regulating the work or the rights or privileges of employes you

have in mind in making your inquiry and it is, therefore, impossible for us to apply the distinction which has been pointed out, to any specific problem which you may have before you.

Very truly yours,

DEPARTMENT OF JUSTICE,

By WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*Indebtedness—Consent of Electors—Election—Increasing Amount Authorized—  
Limitations Fixed by Law—Insufficient Funds.*

A school district board authorized at an election to increase the indebtedness of the district by \$125,000 for the acquiring of additional ground and a new building and its equipment cannot expend more than this amount for such purposes without first obtaining the approval of the electors. To do otherwise would be a "palpable breach of faith with the electors" and illegal.

February 25, 1924.

Honorable J. George Becht, Superintendent of Public Instruction,  
Harrisburg, Pa.

Sir: The School District of the township of Robinson, Allegheny County, Pennsylvania, found it necessary to increase its bonded indebtedness in the sum of \$125,000 for the purpose of "purchasing or acquiring sites of ground for public school buildings, and of erecting, equipping and furnishing a new school building on land to be acquired adjoining the present high school building site on Steubenville Pike, and a new school building located on the present site of the school building at Groveton, and on additional land to be acquired, and the enlarging, remodeling, equipping and furnishing of the present high school building on Steubenville Pike in said district."

On July 28, 1922 a resolution was duly passed by the corporate authorities of the said school district in which they signified and expressed their desire to increase the indebtedness of said school district.

On August 25, 1922 a resolution was duly passed by the corporate authorities of said school district authorizing an election to be held on November 7, 1922 for the purpose of obtaining the assent of the electors of said school district to the increase of

indebtedness. Legal notice of said election was given and the notice contained the amount of the proposed loan and the purposes for which it was to be used. An election was held and upon the ballots furnished to the voters the purposes of the loan were also set forth. A majority of the voters of the school district voting at said election, voted in favor of the increase of indebtedness, and a resolution was passed by the proper authorities "that the bonded indebtedness of said school district of the township of Robinson, County of Allegheny, Commonwealth of Pennsylvania, be and the same is hereby increased in the amount of \$125,000 for the purpose or purposes above set forth."

It is now found that the sum fixed for the increase of indebtedness is not sufficient for the purposes set forth and the school authorities desire to borrow an additional sum of money for the same purpose or purposes under the 2% Constitutional limitation, without submitting the matter to the electors of the said school district to vote upon it.

The school authorities fixed the purpose or purposes for the increase of indebtedness when they expressed their desire for it. This was their right and their duty. *Parr and Yocum v. Philadelphia, et al.*, 191 Pa. 438. *Major vs. Aldan Borough*, 209 Pa. 247. They also fixed the amount to be spent for such purpose or purposes, and by that action they are bound.

When the people voted to authorize the increase of the debt of the school district, the purposes for which the money was to be used were set forth. Anyone reading this would understand that the purposes were to be carried out for the amount of the increase of indebtedness, and not that that amount would be for only part of the things set forth in the notice of election and on the ballot.

The question here involved is definitely settled in *Naff v. Philadelphia*, 256 Pa., 312. In that case the City of Philadelphia submitted to its electors the question of an increase of its indebtedness. Among the items embraced was one, "for the erection of a convention hall." It was found that the sum set aside for the erection of a hall was not sufficient. Another election was held for the purpose of having the electors pass upon the question of an additional increase in the City's indebtedness; and among the items for which the debt was to be additionally increased was one, "toward the erection of a convention hall supplementing money borrowed under ordinance approved June 19, 1911." The election was in favor of the increase. Still the sums authorized by the elections were not sufficient and the City authorities proposed to use money raised in another way to carry out one of the purposes for which the City's debt had been increased.

A Bill was filed to enjoin municipal authorities from entering into a contract or contracts on behalf of the City for the erection of a

convention hall, the total cost of which would exceed the amount authorized by the electors to be borrowed. The bill avers "that the electors by their votes intended to and did limit the entire cost of the construction and erection of the convention hall to the sum of \$1,520,000 which they authorized the City authorities to borrow and expend therefor; that the erection of a building at a greater cost than the said sum of \$1,520,000 will be unlawful and in excess of the authority conferred by the electors of the City upon the municipal authorities, and that any contract or contracts of the City for the building of a hall, the total cost of which will be more than the fixed limit 'will be illegal, ultra vires, null and void.'"

It was held that the expenditure of any sum in excess of what was already borrowed or authorized to be borrowed in the erection of a convention hall would be illegal, and the Supreme Court said:

"Though, strictly speaking, the purpose of the increase of the municipality's indebtedness is for the municipal authorities, to whom the electors have delegated the power and authority to act for them, a vote in favor of the increase is an approval by the elector of the purpose for which the indebtedness is to be increased. His disapproval of that purpose would be followed by his vote against the increase. So after all, unless the electors approve the purpose of the increase of municipal indebtedness, it will not be authorized. When it is authorized by them, in approving the purpose for which the authorities have notified them it is needed, common honesty and fair dealing alike require that good faith be kept with them."

\* \* \* \* \*

"The electors were thus distinctly told, when they voted for the second increase, that the \$1,500,000 for which they first voted as the amount to be expended for the erection of a convention hall, needed supplementing to the amount of \$20,000, and that the cost of the erection of the building would not exceed \$1,520,000. After thus being authorized by the electors to expend \$1,520,000 for the erection of the hall, the city authorities propose to enter into contract for its erection at a cost of \$700,000 more. This is a palpable breach of faith with the electors. They have a right to insist that what the city authorities so clearly gave them to understand was to be the cost of the hall when they cast their ballots in favor of the increase of the city indebtedness for that purpose, shall not now be ignored by those authorities, for who can say that they would have voted for the increases if they had known the convention hall was to cost hundreds of thousands of dollars more than the sum indicated in the ordinances and in the notices of the elections held in pursuance of them."

In the case under consideration the electors of the school district were distinctly told in the election notices and on the ballots when they voted what the purposes of the loan were and that the cost would not exceed \$125,000. To further increase the indebtedness of the school district, without the assent of the electors, for the same purposes would be "a palpable breach of faith with the electors."

You are, therefore, advised that an increase in the indebtedness of said school district in any sum in excess of the \$125,000 already borrowed to be used for the same purposes for which the \$125,000 was borrowed, and without the assent of the electors, will be illegal.

Yours very truly,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General*

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*Religious Instruction—Directors—Power to Excuse Pupils—Constitution—School Code of 1911.*

A board of directors of a school district have not the right to excuse pupils who are between the ages of eight and sixteen years during legal school hours for the purpose of attending denominational schools to receive religious instruction.

May 7, 1924.

Hon. J. George Becht, Superintendent of Public Instruction, Harrisburg, Penna.

Sir: This Department is in receipt of your communication containing following inquiry:

"May the board of school directors of a school district excuse pupils at stated periods during legal school hours, to attend denominational schools for the purpose of receiving religious instruction"?

Every child between the ages of eight and sixteen years having a legal residence in this Commonwealth is required to attend a day school in which common English branches are taught in the

English language, and the attendance must be continuous through the entire term. Parents, guardians, or other persons having control of any child or children between such ages must send them to such a school.

The School Code, in Section 1414, provides:

“Every child having a legal residence in this Commonwealth, as herein provided, between the ages of eight and sixteen years, is required to attend a day school in which the common English branches provided for in this act are taught in the English language; and every parent, guardian, or other person, in this Commonwealth, having control or charge of any child or children, between the ages of eight and sixteen years, is required to send such child or children to a day school in which the Common English branches are taught in the English language; and such child or children shall attend such school continuously through the entire term, during which the public elementary schools in their respective districts shall be in session.”

The hours during which children shall attend school are also fixed by the School Code unless otherwise determined by the board of school directors. This is provided for in Section 1605, which is as follows:

“The board of school directors of each school district shall fix the date of the beginning of the school term, and, unless otherwise determined by the board, the daily session of school shall open at nine ante meridian and close at four post meridian, with an intermission of one hour at noon, and an intermission of fifteen minutes in the forenoon and in the afternoon.”

The directors may change the school hours, the hours during which pupils must be in attendance. They may determine that the session of school on one day in each week shall open at eight ante meridian and close at three post meridian, with the proper intermissions, and thus give pupils an opportunity to attend the school or church of their choice after legal school hours and secure religious instruction. This can be done by the directors exercising the right given them in the Code, for Section 1605 clearly gives the board of school directors power to determine school hours. In fixing the school hours, however, directors must not be unmindful of the fact that the law contemplates a certain number of hours which must be set aside for school sessions and these hours dare not be shortened. If the school session is changed by beginning an hour earlier and dismissing an hour earlier one day in each week



and in the hour after dismissal pupils attend denominational schools for the purpose of receiving religious instruction, the public school officials are relieved of all responsibility in connection with the attendance of the pupils at such denominational school.

By excusing pupils at stated periods during legal school hours to attend denominational schools for the purpose of receiving religious instruction, another question is presented. If this plan should be adopted pupils would attend schools over which the public school authorities have no supervision and the teachers in which are in no way answerable to such authorities. Notwithstanding this the school authorities would be responsible for the attendance of pupils at such schools during school hours. This would bring sectarian religious instruction definitely into the public school system and make the machinery of the public schools, particularly the Compulsory School Attendance Law, available to enforce attendance at denominational schools.

Sectarian religious instruction would become in effect an additional elective subject offered to pupils attending the public schools. When a pupil has elected a subject the responsibility of the public school system to enforce the Compulsory Attendance Law by keeping official records of attendance is no less operative than in the case of all required subjects. The Compulsory Attendance Law operates during the entire period of time in which the schools are required to be kept open, and if public school pupils are excused during legal school hours to attend a sectarian religious school official record of such attendance must be kept by the proper teachers and unexcused absences therefrom reported to local and State officers for action as in the case of non-attendance upon regular public school subjects. How can this be accomplished when, as was said before, the school authorities have no supervision or control over the schools imparting religious instruction.

Another serious question arises. If the pupils of public schools are excused during legal school hours to attend sectarian or denominational schools they must, and under the Compulsory Attendance Law can be compelled to attend such schools, and it would be the duty of the school authorities to see that the law is enforced. This might conflict with the Constitution of the State for in Article I Section 3 it is provided:

“No man can of right be compelled to attend, erect or support any place of worship.”

Under Section 404 of the School Code—

“The board of school directors \* \* \* may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper regarding the management of its school affairs.”

Such rules and regulations, however, must not conflict with the law as it is written, and the law fixes school hours unless otherwise fixed by the directors, but whether such hours have been fixed by law or by the board of school directors, the attendance of pupils must be continuous during such hours.

The School Code provides for compulsory education of children at school, and the only exemption from such attendance are provided by Section 1413 for blind, deaf, or mentally deficient children: by Section 1415 for children on account of mental, physical, or other urgent reasons; by Section 1416 for children regularly employed in useful and lawful employment or services during the time the public schools are in session. But to sanction the invasion of the requirements of this law by permitting pupils during legal school hours to leave the public schools and go to such sectarian or denominational schools as they may select,—schools in no way controlled by the public school authorities, would be to take from such authorities the power granted them by the Act to compel attendance and which would tend to the confusion, and perhaps to the destruction of the system.

To sum up briefly, if the directors of a school district may order that one hour out of the six required by the Code to be devoted to instruction in the prescribed branches of education, which excludes religious instruction, they may do indirectly what they can not do directly.

In other words they can make part of a public school education denominational or sectarian religious training, therein forbidden.

I am of the opinion and therefore advise you that the board of directors of a school district have not the right to excuse pupils who are between the ages of eight and sixteen years during legal school hours for the purpose of attending denominational schools to receive religious instruction.

Very truly yours,

DEPARTMENT OF JUSTICE,

By J. W. BROWN,

*Deputy Attorney General.*

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OPINIONS TO THE DEPARTMENT OF PUBLIC  
PRINTING AND BINDING

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## OPINIONS TO DEPARTMENT OF PUBLIC PRINTING AND BINDING

*Public Printing—Charge for Composition etc., of certain Automobile Registration Bulletins for The Year 1922, designated as Order No. 2572 and termed by the Contractor "objectionable matter"—Acts of 1905, P. L. 3, 1911 P. L. 210, 1919, P. L. 1128.*

The rate for the class of work referred to is fixed in the schedules and has been adopted by the parties in their contract and the bill rendered should be reduced and approved at the rate of \$0.224 per thousand ems as the lawful rate for such work.

January 25, 1923.

Honorable A. Nevin Detrich, Superintendent of Public Printing and Binding, Harrisburg, Pa.

Sir: This Department is in receipt of your inquiry of the 22d instant in which you ask for an opinion concerning a charge of \$1.50 per thousand ems for composition proof-reading, printing, etc., of certain Automobile Registration Bulletins for the year 1922, designated as "Order No. 2572" and termed by the contractor "objectionable matter."

The whole matter of State printing is governed by the Schedule of Rates forming a part of the Acts of Assembly approved May 11, 1911, P. L. 210, and July 23, 1919, P. L. 1128, and subject to the terms and conditions named in the Acts of Assembly approved February 7, 1905, P. L. 3, May 11, 1911, P. L. 210, and July 23, 1919, P. L. 1128, and the proposal and contract in writing for State printing and binding, dated March 29, 1921, between the contractor, J. L. L. Kuhn, and the Commonwealth which is authorized by, and made for the purpose of carrying out the provisions of said Acts of Assembly.

The question to be determined is whether the charge of \$1.50 per thousand ems, as charged in the bill rendered, is the rate authorized by law and fixed by the contract covering the case or must some other rate be approved by you for payment.

The schedule affixed to and made a part of said Act of 1919 is adopted in the contract without again enumerating the several items thereof, and the contractor's bid and contract establishes the price or rate of seventy-two per cent. below the maximum rates fixed in the schedules, which said contract is now and was in effect at the time the work in question was done and fully covers the matter now under consideration.

If the particular work done comes squarely within the prescribed schedules, then the same may be solved by comparison of the rate charged in this bill with the rates fixed in said schedules, but if the work under consideration constitutes a class of work, the price or value of which can neither be fixed by, nor is ascertainable under, either the Act of Assembly containing the schedules or the contract existing between the parties, then it must be fixed under the provisions of the thirtieth section of the Act of Assembly of February 7, 1905, P. L. 3, which has not been repealed by the later Acts and is still in force, which section reads as follows:

"The standard rates of compensation, or price, for the public printing and binding, for all objects of charge against the Commonwealth by the contractor or contractors, shall be according to the schedule appended to this act, which said schedule is made part of this act; the binding of pamphlets and other publications of similar character shall be done by the contractor or contractors at the same rates as those prescribed in the schedule for similar work; but any work required to be done by the contractor or contractors for the Commonwealth or any department or officer thereof, the price or value of which may not be fixed by, or otherwise ascertainable under, this act, shall be paid for at rates determined upon by the Superintendent of Public Printing and Binding, and shall in no case exceed the lowest rate or rates at which the same can be obtained elsewhere by the said Superintendent; and if the contractor or contractors shall decline to furnish said work at such reasonable rates, it shall be lawful for the Superintendent aforesaid to procure the same elsewhere, and certify the account to the Auditor-General for settlement, which account shall be subject to examination and revision by that officer, as in other cases, and the Auditor-General shall issue a warrant on the State Treasurer in favor of the person or persons from whom such work has been procured for the amount found due him or them."

The subject matter of your inquiry is printed matter known as Automobile Registration Bulletins and is column matter in four columns, depending upon each other, and reading across the page, consisting of words and figures without rules. The column headings are four in number and are, in form, as follows:

(1)	(2)	(3)	(4)
Lis. No.	Eng. No.	Make	Name and Address of Owner

The printed matter under the column heads in nearly all instances does not make up a full line across the page and does not logically fall into a greater number of column heads than four.

The schedule attached to and made a part of said Act of July 23, 1919, P. L. 1128, and which has been adopted as a part of the contract between the Commonwealth and the contractor, in paragraph four thereof, at page 1152, clearly provides for this character of work and the price thereof and, in my opinion, fixes the rate per thousand ems that should be approved for payment. Said paragraph reads as follows:

“Plain composition, sixty cents. Column matter, in three columns, depending upon each other, and reading across the page, either words, figures, or both, without rules, sixty cents; with rules, one or more vertical lines, seventy cents. Four columns or more, eighty cents; one or more vertical lines, eighty-five cents.”

The class of work billed corresponds precisely with the class of work described in the foregoing schedule paragraph, and the rate fixed is \$0.80 per thousand ems as the maximum rate and the net rate is by the proposal and contract seventy-two per cent. less than said maximum rate.

It is claimed by the contractor that this class of work is known as “objectionable matter” and is not covered by the specifications.

While the term “objectionable matter” is not mentioned nor defined in any of the Acts of Assembly covering printing nor in the contract, such work, however, if not covered by either schedules or contract, would be governed by the said thirtieth section of the Act of 1905 quoted above in full, and if the price or value of such work has not been fixed or is not ascertainable under said Act, the same shall be paid for at rates determined upon by the Superintendent of Public Printing and Binding and shall in no case exceed the lowest rate or rates at which the same can be obtained elsewhere by the said Superintendent, and if the contractor or contractors shall decline to furnish said work at such reasonable rates it shall be lawful for the Superintendent aforesaid to procure the same elsewhere and certify the account to the Auditor General for settlement, etc.

This section undoubtedly requires the rate to be fixed by the Superintendent before the work is done, and if the contractor is not satisfied with such reasonable price as fixed by the Superintendent and declines to do the work, then the Superintendent may proceed to contract for the said work elsewhere as above provided.

It is apparent that the contractor before doing said work did not request the Superintendent to fix a reasonable price for the work that he now terms “objectionable matter”; that he did not decline to do the work but proceeded to do the same without any questions being raised, and that he set up the work and printed it in four columns under four column heads and seemingly was satisfied that the

same was covered by his contract. In my opinion, if such work did not come squarely within the schedule rate fixed in the Act of Assembly, the contractor having proceeded without objection is estopped and would not now be in a position to complain.

Therefore I have the honor to advise you that the rate for this class of work is fixed in the schedules and has been adopted by the parties in their contract, and the lawful rate for the work done is \$0.80 per thousand ems maximum, which under the contract is subject to a discount of seventy-two per cent. below said maximum rate or schedule, making the net rate or contract price \$0.224 per thousand ems, and that the bill rendered should be reduced to and approved at the rate of \$0.224 per thousand ems as the lawful rate for such work.

Very truly yours,

ROBERT L. WALLACE,

*Deputy Attorney General.*

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**OPINION TO THE PUBLIC SERVICE  
COMMISSION**

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## OPINION TO THE PUBLIC SERVICE COMMISSION

*Public Service Commission—Basis of valuation for fixing rates of public utilities—  
Res adjudicata.*

1. The Public Service Commission is not bound by the valuation in the Philadelphia Rapid Transit Case, fixed by its decision of June 21, 1923, since that valuation was not complete, being merely a minimum valuation, to wit, that the present fair value of the company's property was substantially upwards of \$200,000,000.

2. The commission is not required to reopen the whole question of the valuation of the company's property, but may properly make such inquiry if necessary to determine whether the 8-cent fare proposed by the Company is equitable.

3. The commission is not bound by admissions of counsel for the city or other complainants as to the valuation, but must reach its own conclusions on the basis of its own investigation.

4. If a valuation be made by the commission, such valuation may be based on testimony gathered by its experts and employees in connection with its own investigation.

5. The fact that the Superior Court has not yet rendered its decision in the pending appeal from the commission's temporary order, need not delay further action by the commission, as the disposition by the Superior Court of that appeal will not discharge the commission from the duty of determining whether or not the 8-cent fare shall be continued.

October 30, 1924.

Honorable W. D. B. Ainey, Chairman, The Public Service Commission of the Commonwealth of Pennsylvania, Harrisburg, Pennsylvania.

Sir: Your letter of October 27th, written on behalf of the Public Service Commission is at hand. You ask to be advised regarding certain legal problems which the Commission feel must be solved in connection with the Philadelphia Rapid Transit Company rate case. As you had very kindly informed us that we might anticipate the receipt of a letter containing your present inquiries substantially in the form in which they have been stated therein, we are prepared forthwith to give you our views on the questions presented. If there are any other questions which this opinion may suggest to the Commission and upon which it may desire advice, we shall be glad to have you state them at your convenience.

A discussion of your questions is impossible without a clear understanding of the history of P. R. T. Company rate litigation to date. We shall, therefore, as a preliminary, state the history of that litigation.

*History of P. R. T. Company Rate Litigation.*

The first P. R. T. Company rate case to be brought before your Commission followed the filing on June 1, 1920 of a P. R. T. Company tariff in which that Company proposed to abolish free transfers at all points in Philadelphia and substitute three cent exchange tickets in lieu thereof, retaining five cents as the basic fare. Prior to June 1, 1920 trolley fares in Philadelphia were fixed by the agreement of July 1, 1907 between the City of Philadelphia and the P. R. T. Company. Under that agreement the fare was to remain at five cents with free transfers and three cent exchange tickets at certain points unless and until the Councils of the City of Philadelphia should consent to a change in rates. As the Public Service Company Law was not enacted until 1913 the agreement of 1907 had not been approved by your Commission. Following the filing of the tariff of June 1, 1920 the City of Philadelphia filed a protest against the establishment of the rates proposed therein; and at the suggestion of your Commission the Company first suspended and later abandoned this tariff. It then made application to the Councils of the City of Philadelphia for the consent of the City to a change in the rates of fare stipulated in the 1907 agreement. This consent was refused, and on October 4, 1920 the Company filed with your Commission a petition requesting permission to put into effect a new tariff eliminating entirely free transfers and three cent exchange tickets and charging a straight five cent fare. This petition your Commission refused on the ground that the proposed rates would be unreasonable and unjustly discriminatory. It found, however, that the Company needed a greater revenue and on October 18, 1920 entered an order directing the Company to file a tariff providing for a seven cent cash fare, four tickets for a quarter, the transfer and exchange privileges to remain as theretofore. The Commission also ordered the P. R. T. Company to file an inventory of its property to enable the Commission to place a valuation on the Company's used and useful property for rate-making purposes.

The order of October 18, 1920 was a temporary order effective for six months from November 1, 1920, at the expiration of which period the Company filed a tariff continuing the rates prescribed in the Commission's temporary order, thus adopting and establishing those rates.

The protest of the City of Philadelphia against the rates contained in the P. R. T. Company's tariff of June 1, 1920 was not abandoned but was transferred to the rates established by order of your Commission and later adopted by the Company. Throughout the proceedings certain associations of Philadelphia business men appeared as intervening complainants.

Many hearings were held and much evidence was taken following the Commission's order of October 18, 1920, but the Commission did not reach a decision in the matter until June 21, 1923 when it adopted a Report and made an Order dismissing the complaints of the City of Philadelphia and the intervening complainants.

Much of the testimony taken in the case decided June 21, 1923 was testimony relating to the value of the P. R. T. Company's property. However, in rendering its Report on the case the Commission said:

"After giving due consideration to the whole record we do not find it necessary in this case, for reasons already given, to fix with any degree of mathematical accuracy the present fair value of this property, for it is evident that any such figure we might find under the evidence would amply justify the return which the present rates of fare are producing and as it is these rates and no other which we are to pass upon we do not have to consider conditions which might arise were the Company seeking an increase in revenue."

Again:

"We do not find it necessary in this proceeding to arrive at a final determination of the present fair value of the property of the Company. However, our consideration of the items of evidence before us, including the questions of depreciation and going concern value, of matters in dispute between the Company and the City, lead us to the conclusion that under established legal principles the present fair value of the Company's property is substantially upwards of \$200,000,000."

An appeal was taken by the City of Philadelphia and the intervening complainants to the Superior Court. The appeal was argued December 13, 1923 and the opinion of the Superior Court dismissing it was filed February 29, 1924. In rendering the opinion of the Court Judge Linn said, at 83 Pennsylvania Superior Court 10:

"If, however, we examine appellant's contention that the rates charged would yield a higher net return than is justified by the fair value of the property, the inquiry at once is,—what is that value. The Commission did not determine definitely what it is, because, during the investigation, it found respondent's property was worth more than the sum required to justify charging the disputed rate; it did however find that, for rate making purposes, the value was substantially upwards of \$200,000,000; the record contains evidence supporting that conclusion."

There is one other fact in connection with the Commission's action of June 21, 1923 which must be noted, namely, that substantial admissions with respect to the value of the P. R. T. Company property were made both by counsel for the City and by counsel for the intervening complainants. In its Report the Commission stated:

"After conducting a check of this estimate of the Company (an estimate fixing the value of the property at \$252,000,000), the city admitted the substantial accuracy of a great majority in number of the accounts, and substituting its revised figures in disputed matters reached a total reproduction cost, undepreciated but exclusive of going concern value, of more than \$187,000,000."

With respect to the admissions made by the protestants the Superior Court in its opinion said:

"At figures shown in the report, in 1922, the rates charged earned net, seven per cent on only \$126,000,000; although all appellants concede that the value of the property was much greater; for 1923, the estimated net return was seven per cent on \$158,000,000. At the oral argument, counsel for the city informed the court that the evidence justified a rate base of from \$135,000,000 to \$138,000,000, counsel for one intervening appellant in his brief states it at \$133,000,000, while another put it at \$153,000,000. An expert who testified for the City stated that the cumulative total investment alone, was in excess of \$128,000,000, without including a surplus of over \$11,000,000 invested in capital expenditures. Those concessions frankly and commendably made, are not without convincing effect in an inquiry such as we must make, where the statute prescribes that the order of the Commission is *prima facie* reasonable, and imposes on appellants the burden of establishing the contrary. Considering the public importance of the case, we shall not,—as we might,—rest our decision on those concessions alone; we mention them, however, to show that there is not substantial difference between the parties to this appeal."

The figures used as a basis for the testimony in the case decided June 21, 1923 were as of June 30, 1919; and the Record discloses the fact that the Commission did not receive in evidence the results of any investigation made by it or at its direction, but arrived at its determination exclusively upon evidence offered by protestants on the one hand and the respondent P. R. T. Company on the other, apparently giving substantial effect to certain admissions made by the protestants.

Article II, Section 1 (f) of the Public Service Company Law (1913 P. L. 1379) provides that after the determination of a rate by the Commission it shall be unlawful for any public service company to change the same within a period of three years "without application to and the approval of the Commission, of which application thirty days' prior notice shall be given \* \* \* to the public." Desiring to establish an increased fare in less than three years after June 21, 1923, the Company found it necessary to seek the approval of the Commission therefor; and on July 21, 1924 the Company filed a new tariff providing for the establishment of a basic eight cent cash fare, two tokens for fifteen cents, with substitution of free transfers at certain points in place of three cent exchange tickets and the establishment on certain suburban lines of new fare zones. Concurrently with the filing of this tariff a petition for the approval thereof was filed with the Commission at application docket No. 11,417-1924. A protest against the new fare was filed by the City of Philadelphia on August 5, 1924 and on September 2, 1924 hearings on the petition and protest began. Additional protestants appeared at the hearings.

Counsel for the P. R. T. Company at the opening of its case offered in evidence "the entire record in the valuation case, known on the Commission's records as Complaint Docket No. 3504,"—the seven cent fare case. This evidence was followed by the presentation of oral testimony on behalf of the P. R. T. Company. The P. R. T. Company's witnesses were cross-examined at length by counsel for the protestants and a very limited amount of testimony was adduced in support of the protests. There was no testimony offered as the result of any investigation by your Commission.

On September 8, 1924 your Commission filed a Report and made an Order authorizing the Company to put the new tariffs into effect on five days' notice to the public. This Order was, however, declared to be a temporary Order pending the final determination by the Commission whether such new rates could be made permanently effective.

From the temporary Order of the Commission the City of Philadelphia and other protestants appealed to the Superior Court which has not as yet rendered its decision.

We understand that subsequent to the Order of September 8, 1924 the Commission engaged the services of an expert in municipal transit matters and that the questions stated in your letter calling for this opinion arise because of uncertainty as to the scope of the investigation which the Commission should make through the expert so employed or otherwise, and the scope of the future hearings to be held to determine whether the eight cent fare can become permanently effective.

*Questions Stated.*

The Commission asks to be advised with respect to the following questions:

"1. Whether the Commission is bound by the valuation in the Philadelphia Rapid Transit case by its decision of June 21, 1923?"

"2. Whether the Commission is not required by the law and the decision of the courts to reopen and consider anew from the beginning the whole question of the Philadelphia Rapid Transit valuation?"

"3. As to whether the Commission is in any sense bound by the admissions of counsel for the City of Philadelphia or other complainants as to the valuation of the Philadelphia Rapid Transit or whether it is not on the contrary required, while giving due weight to all evidence submitted, to reach its own conclusions upon the basis of its own investigations?"

You also suggest that it would be helpful to the Commission to have us give you our suggestions with regard to the procedure to be followed in the event that we advise that the Commission may inquire into the value of the P. R. T. property in the pending case, with particular reference to the question whether it would be proper for the Commission to proceed with the case pending the decision of the Superior Court on the validity of the Commission's temporary order.

We shall consider your several questions in the order in which they have been stated.

*First Question*

"Whether the Commission is bound by the valuation in the Philadelphia Rapid Transit case by its decision of June 21, 1923?"

This question immediately suggests the inquiry: Has the Commission at any previous date made a "valuation" of the used and useful property of the P. R. T. Company? It is quite clear that the Commission has not made a complete valuation of this property as it distinctly stated in its Report of June 21, 1923 that it was not undertaking to reach a "final determination" of the present fair value of the Company's property. The argument may, however, be made that while the Commission did not purport to make a complete valuation its conclusion that the "present fair value of the Company's property is substantially upwards of \$200,000.000" was what might be called a "minimum valuation." This leads us to inquire into the essential requisites of a "valuation" for rate making purposes.

The elements to be taken into consideration in evaluating the property of a public service company are clearly stated in Article V, Section 20 (a) of the Public Service Company Law, (1913 P. L. 1416), but the statute does not prescribe the extent to which the public and the public service company are entitled to know the values which the Commission has placed upon various items or classifications of property evaluated. The Supreme Court of Pennsylvania has, however, very clearly defined the law applicable to this very important subject. After the Commission had made its Order in the P. R. T. Company seven cent fare case and after the appeal thereon had been argued in the Superior Court, the Supreme Court, on January 7, 1924, rendered its decision in *ERIE CITY et al. vs. PUBLIC SERVICE COMMISSION*, 278 Pa. 512. In that case the Commission had fixed a value of \$14,380,000 on the property of the Pennsylvania Gas Company attributable to Pennsylvania. It found the value of "gas holdings" to be \$5,500,000, leaving the balance or \$8,880,000 as the fair value for all other classifications of rate base without specifying how this lump sum figure was determined.

In reversing the decision of the Superior Court which sustained the Commission's valuation, the Supreme Court, speaking through Mr. Justice Kephart, said at page 533:

"Lump sum or partial lump sum values are unfair both to the public and the utility where they represent the composite of a number of items entering into it. The Commission's findings need not set forth the value of each separate piece of property, but there are standard classifications entering into the rate base recognized in the many decisions of the Supreme Court of the United States, particularly noted in the dissent in the *Southwestern Bell* case. With the engineering force and assistants at hand, we see no reason, when facts are presented and determined, why they should not appear under the different classifications at least with sufficient clarity that the Courts may know the parties vitally interested have not been unfairly dealt with."

By reference to the Commission's Report of June 21, 1923 in the P. R. T. rate case, it appears that it would be impossible to ascertain therefrom how the Commission arrived at the figure \$200,000,000 used in its expression "substantially upwards of \$200,000,000." The closest approximation to an explanation of this figure would seem to be contained in the statements made in the Report that the City had admitted that the "reproduction cost" of the Company's property, undepreciated but exclusive of going concern value, was more than \$187,000,000; that the Company claimed a valuation of

\$252,000,000; that the difference between the City's admission and the Company's claim was approximately \$65,000,000, a difference arising "not because of any substantial difference as to quantity or unit prices but because of a difference in position as to the right to include certain items and the basis of estimating others"; and that upon consideration of the disputed items it was apparent that "the City's admitted figure of reproduction cost of \$187,000,000 must be very materially increased, certainly to a point substantially upwards of \$200,000,000. Except possibly with respect to one of the disputed items it is impossible to ascertain from the Report what figures were allowed by the Commission for these items; and nowhere in the Report does it appear how the figure of \$187,000,000, stated to have been admitted as "reproduction cost," was made up.

The Commission did not fix a value for accrued depreciation nor did it fix an amount for going concern value. It merely found that the latter substantially offset the former. These omissions violated the very specific requirement established by the Supreme Court in the Erie City Case that the rate to be applied for accrued depreciation must be found and that the Report in each instance must show plainly how much is allowed for going concern value, or if no such allowance be made, the reasons for disallowance.

Even if in cases where definite valuations have been made the proper procedure might be to make appropriate additions to or subtractions from the various items entering into such valuations to bring them down to date, it would be impossible to follow that procedure in the present case because the only finding of the Commission in its 1923 determination of the rate controversy was a lump sum of "upwards of \$200,000,000" without specifying any of the constituent items entering into that figure. Had this finding been intended to be a "valuation" or even a "minimum valuation," it would clearly have been necessary for the courts to send the case back to the Commission with instructions to proceed in the manner specified in the Erie City Case. The conclusion is inescapable that the Superior Court sustained the action of the Commission only because the \$200,000,000 figure was not intended to be, in whole or in part, a "valuation."

The present case demonstrates most clearly not only the wisdom but also the necessity of the requirement so clearly stated by the Supreme Court in the Erie City Case, that in order to be sustained a valuation must set forth the values placed upon the different classifications of property and not merely a lump sum or a partial lump sum. Had the Commission evaluated the P. R. T. Company's property in 1923 by classified items, it might now be possible to ascertain the present value of the property by additions to or subtractions from these items; and the process of reaching a determination in



the instant case might be relatively simple. However, even were it to be conceded that the \$200,000,000 figure was a "valuation," there is no possible method by which that figure could be corrected to date, as the items which entered into it are unknown. Instead of being able to use *items of value* as a working base, the Commission will be obliged to use *items of evidence* if it makes any use whatever of the former testimony. For this purpose all items of evidence stand on the same footing, none of them having been specifically adopted by the Commission in its former Report.

From what has been said it is clear that the Commission has not made a "valuation" or a "minimum valuation" which could be sustained as a basis from which to bring down to date the value of the P. R. T. property; and as the Commission has never made a "valuation" of the P. R. T. Company's property it necessarily follows that upon the present inquiry there is no past valuation which can be binding upon it.

### *Second Question*

"Whether the Commission is not required by the law and the decisions of the Courts to reopen and consider anew from the beginning the whole question of the Philadelphia Rapid Transit valuation?"

- We have already pointed out that there is not at this time any past valuation of the P. R. T. Company's property which could be regarded as binding upon the Commission.

At page 521 of the Supreme Court's decision in the Erie City Case which we have already cited, Mr. Justice Kephart said:

"Generally speaking the value of private property used in public service and affected with a public interest is to be determined at the time of the inquiry or investigation regarding rates."

Article V, Section 21 (a) of the Public Service Company Law provides that the Commission shall make a valuation "whenever it (the Commission) shall deem such valuation or determination necessary or proper under any of the provisions of this Act." This provision was construed by the Superior Court in its opinion in PHILADELPHIA vs. PUBLIC SERVICE COMMISSION (the seven cent fare case), 83 Pa. Sup. 8, at page 11, to mean that the question whether a valuation is necessary in connection with a rate case must be determined by the Commission: a valuation is not obligatory.

Plainly, if the Commission finds a valuation to be necessary or proper to a determination of a rate question it is its duty to make

one; and if a valuation be made it must be made as of the date of the inquiry into rates.

How then is the Commission to determine whether in any particular rate case a valuation is necessary and proper? To this question our answer is that if the actual or estimated net revenue from a proposed rate be less than the allowable per cent return upon an amount substantially less than the value of the public service company's property, this being admitted by all of the parties to the inquiry and clearly disclosed by any investigation made by the Commission, a valuation would not be necessary or proper. If, however, any of the parties to the inquiry, or the Commission itself as the result of its own investigation, be unwilling to concede that the net revenue from the proposed rate would not exceed the allowable per cent return upon an amount substantially less than the value of the Company's property, we cannot conceive that a determination of the rate controversy without a valuation could be sustained should there be an appeal to the courts from the Commission's determination. If as Mr. Justice Kephart said in the Erie City Case, the basis of the Commission's determination must be stated "at least with sufficient clarity that the Courts may know that the parties vitally interested have not been unfairly dealt with" a valuation itemized by classifications would seem to be indispensable.

It may be argued that under the Public Service Company Law there is an implied three year period of repose preventing the reopening of a valuation determination within that period. If such a three year period of repose exist it must be implied from the fact that Article II, Section 1 (f) of the Public Service Company Law imposes upon public service companies a three year period of repose for rates, during which period rates determined by the Commission cannot be increased by the interested public service company without the express approval of the Commission. However, whether there be a three year period of repose for valuation determination is a doubtful question upon which an opinion is unnecessary at this time for the following reasons:

The suggestion that a three year period of repose prevents the reopening of the valuation of the P. R. T. Company's property presupposes that a "valuation" has been made. This we have already shown is not the fact. Equally conclusive is the plain proposition that if within the three year period of repose for rates a public service company makes application for the approval of higher rates it thereby surrenders the benefit of any possible three year period of repose for valuation matters.

In this connection attention must be called to the fact that Article V, Section 21 (b) of the Public Service Company Law definitely and without any qualification as to time gives to your Commission

the power "to make revaluations of the property of any public service company, from time to time," so that even if a valuation of the P. R. T. Company property had been made a revaluation would be possible under the clear provisions of the Public Service Company Law.

The P. R. T. Company in offering in evidence in the pending case not only the Report of your Commission in the seven cent fare case, but also the testimony upon which that Report was based, evidently entertained the view that the evidence taken in the seven cent fare case is relevant in the pending proceedings; and, of course, if this evidence is relevant it may, like all other evidence adduced by the Company, be contradicted by evidence offered by the protestants or introduced on behalf of the Commission by any experts or employees who have investigated the question of the value of the property at the instance of the Commission.

Accordingly you are advised that the Commission may unquestionably inquire into the present value of the P. R. T. Company property if such an inquiry shall appear to be necessary and proper to a determination of the question whether the eight cent fare proposed by the P. R. T. Company can become permanently effective; but that a valuation is not obligatory unless the Commission shall find that it is necessary and proper.

### *Third Question*

"As to whether the Commission is in any sense bound by the admissions of counsel for the City of Philadelphia or other complainants as to the valuation of the Philadelphia Rapid Transit Company or whether it is not on the contrary required, while giving due weight to all evidence submitted, to reach its own conclusion upon the basis of its own investigations?"

Article V, Section 23 of the Public Service Company Law confers upon the Commission the fullest powers of investigation. These powers may be exercised, inter alia, in determining the reasonableness of any rates, fares, or charge of a public service company, or "in carrying out any of the provisions of this act." The Commission is authorized "to enter upon the premises, buildings, machinery, system, plant and equipment, and make any inspection, valuation, physical examination, inquiry or investigation of any and all plant and equipment, facilities, property and pertinent books, papers, memoranda, documents or effects whatsoever of any public service company."

In view of these broad provisions the Commission's power to make any appropriate investigation through its own experts or employees cannot be questioned. The Commission may, of course,

introduce into the record any evidence gathered in connection with its own investigation of the subject matter of the controversy.

It would, however, not be lawful for the Commission to base its determination of the value of a public service company's property exclusively upon the testimony of its own investigators. The Commission must also weigh carefully any testimony which may be introduced by any of the parties to the inquiry; and its determination must be reached upon a consideration of all of the evidence before it.

A rate investigation such as that now before the Commission in the P. R. T. case is not an ordinary law suit between the public service company on the one hand and certain adverse parties on the other. There is a public interest which should be protected in any inquiry of this character. The Commission's determination should not, therefore, be founded upon admissions made by counsel for any of the parties unless the Commission, as the result of its own investigation, is satisfied that the admissions conform to the facts. Should the Commission find that any such admissions are unwarranted it could, and we believe should, cause evidence to be introduced to counteract the force of such admissions.

You are accordingly advised that the Commission has the power to investigate through its own experts or employees any matter arising in connection with the pending rate case, to cause to be introduced in evidence any facts ascertained through such investigation, and to consider evidence so introduced along with all the other evidence in the case in reaching its determination. In a case of the public importance of the rate case in question, admissions particularly if made against the public, should be accepted as final only if, upon investigation by the Commission, they appear to be in accord with the facts. The rights of the public should not be allowed to be impaired by admissions made by any particular litigant or group of litigants.

#### *Procedure.*

You have asked our advice with regard to the procedure to be followed by your Commission in inquiring into the present value of the P. R. T. Company property. should such an inquiry be deemed necessary and proper. The answer to this question seems to us to be very simple. As evidence of the value of the P. R. T. Company's property its counsel have introduced into the Record in the pending case the entire Record in the seven cent rate case. That evidence may or may not be supplemented by other evidence adduced by the P. R. T. Company to bring the value of the property down to date. The protestants and intervening protestants may introduce evidence to contradict the testimony for the Company. Whether such evidence

be introduced or not your Commission can unquestionably cause to be introduced any evidence relating to the value of the property which may be at the Commission's command.

You have before you a rate case. The value of the property of the P. R. T. Company used and useful in the public service is one of the facts which must enter into your determination of the question whether the proposed rate is reasonable. Value is a fact and like all other facts entering into your determination must be proved by evidence. We can see no difficult procedural question of any character in connection with this matter.

We realize that on opening the pending case the Chairman of the Commission announced that the Commission would not cover the same ground which was covered in the last P. R. T. rate case so far as the question of valuation was concerned. For reasons already discussed we believe that this statement was premature. We feel that fairness to all parties concerned would dictate its modification at the earliest possible opportunity after the Commission shall have determined whether a valuation is necessary and proper.

You have also inquired whether it is our view that out of deference to the Superior Court you should postpone further hearings in the pending case until the opinion of the Superior Court on the appeal from your temporary order shall have been rendered, and the Record which is now before the Court, returned to the Commission.

The Commission has not in any wise indicated what its final determination will be with respect to the reasonableness of the eight cent fare. It has made only a temporary order. The pending appeal challenges only the temporary order. Whether the temporary order be sustained or reversed the Commission will not be discharged from the duty of proceeding with the case to a final determination. We cannot, therefore, believe that the Commission could possibly be criticised as discourteous to the Superior Court for proceeding with the case at the earliest possible moment.

### *Summary*

To summarize we advise your Commission:

1. That the Commission may legally make such investigation as will enable it to determine whether a valuation of the P. R. T. Company property is necessary and proper in connection with the pending eight cent fare case;
2. That should a valuation appear to be necessary and proper at this time there is no legal obstacle which would prevent the Commission from making it, because there has never been a valuation of this property along the lines specified by the Supreme Court of this State;

3. That a valuation will be necessary and proper and should be made unless the Commission be satisfied and all parties to the case agree that the return produced by the eight cent fare will not exceed the lawful percentage upon a value substantially less than the present fair value of the P. R. T. Company property.

4. That if a valuation be made the Commission may cause to be introduced in evidence any testimony gathered by its experts and employes in connection with the Commission's own investigation of the value of the property;

5. That there are no difficulties in procedure which must be overcome to enable the Commission to make a valuation;

6. That the fact that the Superior Court has not yet rendered its decision in the pending appeal from the Commission's temporary order need not delay further action by the Commission. The disposition by the Superior Court of that appeal will not discharge the Commission from the duty of determining whether or not the eight cent fare should be continued. Failure to await the Superior Court's decision could not possibly be deemed a breach of that courtesy which we all desire to extend to the Court.

Very truly yours,

GEORGE W. WOODRUFF,

*Attorney General.*

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OPINIONS TO THE DEPARTMENT OF PUBLIC  
WELFARE

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## OPINIONS TO THE DEPARTMENT OF PUBLIC WELFARE

*Adopted Child Returned to Mother—Adopting Parent Outside the State—Assistance—Act of May 20, 1919, P. L. 893.*

A mother may lawfully be given the assistance provided for by the Act of July 10, 1919, P. L. 893, as aid in supporting in her own home her child who had been adopted, but was returned to her by the adopting parent, who had removed out of the State.

January 15, 1923.

Miss Mary F. Bogue, State Supervisor, Mothers' Assistance Fund, Harrisburg, Pa.

Dear Madam: This Department is in receipt of your communication of the 6th inst. requesting an opinion as to the right of a certain mother to receive aid under the Mothers' Assistance Fund Act of 1919, in the following case:

It appears that after the death of her husband two of her four children were legally adopted, but that the adopting parent later returned them to their mother with whom they are now living in her home, the adopting parent contributing nothing to their support.

You ask to be advised as to her right to receive allowance on their account under the provisions of the Act of July 10, 1919, P. L. 893, establishing the Mothers' Assistance Fund. Section 6 thereof reads 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."

In my opinion, a mother in such a case as the aforesaid may be legally afforded the aid provided for under said Act. While the rights, duties and responsibilities of the natural parent pass to the adopting one, and the child inherits from the adopting and not the natural parent, yet it will be observed that the above quoted provisions of the Act do not set up any of them as a condition prerequisite for a mother to have the assistance thereunder. We cannot add to the tests as thereby expressly prescribed.



Here, I understand, the adopted children were returned to their mother and are now living with her in her own home and there supported by her, and that the adopting parent resides in another State. That a responsibility for their maintenance may rest elsewhere does not change the fact that she is actually maintaining them. A case so wholly within the spirit and so fairly within the letter may be safely held to be within the true contemplation of the law. It would be a harsh rule of construction that would deny its relief to a mother who in her natural maternal affection takes back and supports in her own home her own children solely for the reason that they had been adopted although returned to her by the adopting parent.

You are advised that a mother may lawfully be given the assistance provided for by the said Act, as aid in supporting in her own home her child who had been adopted, but returned to her by the adopting parent. This, however, is not to be taken as a precedent where the adopting parent lives in this State and is clearly able to support the adopted child.

Very truly yours,

EMERSON COLLINS,  
*Deputy Attorney General.*

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*School law—Condemnation of land—Land used for county or municipal purposes.*

A school board has no authority to condemn land for school purposes owned or used by a county or other municipal district.

February 19, 1923.

Dr. Ellen C. Potter, Commissioner of Public Welfare, Harrisburg, Pa.

Madam: I have your communication of February 13, 1923, in re condemnation proceedings of Lancaster City School Board vs. Directors of the Poor, in which the School Board of the City of Lancaster are proposing to bring condemnation proceedings to secure land now owned by the Poor Board of said City for the purposes of erecting thereon a junior high school, said land now being used by the County Poor Board of Lancaster for an asylum for the care of the insane, etc., and asking for an opinion as to whether or not the State should stand with the County Poor Board in resisting such condemnation proceedings.

In answer to your inquiry permit me to advise that under our law there is no legal right in a school board to appropriate or take by condemnation proceedings property owned and used by a municipality, city or county for such public purposes. Prior to 1889 no such right existed, and a school board could not have taken the property of a poor district for school purposes.

"It is quite clear that, prior to the act of 1889, \* \* \* the school board could not have taken the property of the poor directors for school purposes."

*South Lebanon Twp. School Dist.'s Petition, 22 Superior Ct. 320, at page 334.*

By the Act of April 24, 1889, P. L. 25, school directors of cities of the third class were authorized to appropriate such public lands for school purposes and to occupy and use the same in the sufficient amount for their purposes, provided that there was more of such land than was reasonably necessary to be used and occupied by the then owners thereof. This Act of Assembly remained in force and effect until the passage of the Act of 1911, P. L. 309, commonly known as the "School Code", which said Act of Assembly specifically repealed the above mentioned Act of April 24, 1889, P. L. 25, and from that time to the present we have not had any additional legislation authorizing such appropriation of public lands for school purposes.

In certain cases expressly authorized by law property previously devoted to public use may be appropriated for other public purposes, but in no case can this be done unless it is expressly authorized by statute.

"\* \* \* Property devoted to public use, including franchise, is subject to eminent domain, and may be taken for other uses; but it is equally settled that it cannot be taken without legislative authority expressed in clear terms, or by necessary implication."

*Warr Company vs. Delaware, L. & W. R. R. Co., 225 Pa. 152.*

*Groff's Appeal, 128 Pa. 621.*

It is a well known rule of law that statutes authorizing the appropriation of lands for public uses must be construed strictly, and without clear and express legislative authority condemnation proceedings will not lie for the appropriation of property already devoted to public use for other public uses.

I am, therefore, clearly of the opinion that school boards of cities of the third class have no authority whatsoever for appropriating or condemning property owned and used by a county

or other municipal district, and if such proceedings should be instituted in this case by the School Board of the City of Lancaster, the Department of Public Welfare would have such an interest in the matter as would fully warrant the Department of the Attorney General to intervene and join in resisting such proceedings.

Very truly yours,

ROBERT L. WALLACE,  
*Deputy Attorney General.*

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*Poor Districts—Directors—Duties and Powers—Employment of Investigators—Compensation.*

Directors of a poor district in Pennsylvania are public officials and are given wide latitude in the exercise of their discretion, so that they may very properly employ investigators or family visitors to aid in the care of poor persons in their districts and may appropriate money for such purpose.

March 6, 1923.

Dr. Ellen C. Potter, Commissioner of Public Welfare, Harrisburg,  
Pa.

Madam: I am in receipt of your request for an opinion regarding the powers and duties of poor districts of the Commonwealth of Pennsylvania, which, being more specifically stated, is as follows:

Is there any bar in the laws of Pennsylvania that would prevent poor districts employing persons, either trained or untrained, to act as investigators or family visitors to assist the boards of such poor districts to more effectually and economically furnish relief to the poor, destitute and paupers and in carrying out the general provisions of the law which they are to administer.

Under the Act of Assembly approved June 4, 1879, P. L. 78, poor districts are created in this Commonwealth for the purpose of furnishing relief to the poor, destitute and paupers, giving them employment and carrying out the provisions of the several Acts of Assembly. Poor directors are public officers and as such are charged with the responsibility of properly and humanely caring for all poor persons in their respective districts, and it is the policy of the law to exact from such public officers the faithful and humane administration of all laws enacted for the relief of such poor per-

sons. Such public officers have full discretion in all matters pertaining to the proper administrative duties of their office, and when such officers are performing their duties they will be given wide latitude in exercising their discretion.

In the case of *In re Report of County Auditors, Surcharge against Poor Directors of Lancaster County*, Brubaker, J., in 1895 in setting aside the report of the Auditors said, *inter alia*:

“But there is a still weightier objection to the surcharge, which we will notice in this connection, because it would be fatal to a recovery, and will save the time of the court and much expense in litigation. We allude to the discretionary powers vested in all boards of municipal institutions. There can be no appeal from an indiscreet exercise of a clearly defined discretion in the performance of their official duties. The case under consideration is not one of a failure or refusal to act or to perform their duties as poor directors, nor is their action tainted with fraud, so far as we can ascertain from the evidence. Under the law, therefore, as the case stands, we would have no authority to interfere with their judgment, no matter how suspicious the circumstances may be.”

*In re Report of County Auditors, 12 Lancaster Law Review, 409.*

It may be properly said that so long as there is no charge of failure or refusal to perform their duties, nor is their action tainted with fraud, there shall be no interference with the exercise of their discretion.

It is further provided in the Act of 1879, above referred to, in Section 7 thereof—

“They (referring to the Commissioners) shall also elect and fix compensation of all other necessary employes and assistants, all of whom shall be subject to removal by said commissioners at any time.”

It is not only permissible, but it is necessary that commissioners or poor directors shall employ sufficient help to properly care for the poor and destitute, the law recognizing that there are many persons who are unable to care for themselves, and with reference to these the law requires the faithful and humane administration of the laws enacted for their relief, and further that their inability to provide for themselves is not a crime or any excuse for neglecting or maltreating them, and poor boards may be indicted under the common law for failure to properly care for such persons or to permit such persons to be treated by others in a cruel, neglectful or abusive manner.

"We think the contention of the poor directors that that the common law does not hold them criminally liable for a willful neglect or refusal to discharge their duties as directors is unsound."

In Pennsylvania such indictments will lie.

*Commonwealth vs. Coyle*, 160 Pa. State 43,  
*American & English Ency. of Law*, Vol. 19, p. 504,  
*Russell on Crimes*, Vol. 1, p. 80,  
*Archbold's Criminal Pleading and Practice*, Vol. 2, p. 1365.

Officials charged with the care of the poor are not only permitted, but it is their duty in proper cases to apprentice infant paupers to fit and proper persons, and great care is required of them in selecting persons to whom such infants may be bound, and even after the delivery of such child to such fit and proper person there still rests upon the poor directors the obligation to see that the care given is proper and humane.

"In such a case it is the duty of the directors of the poor after a child is bound to service to see that the covenants of the master are substantially complied with, and, if these are wilfully and persistently violated to the injury of the child's health, to institute necessary proceedings to set aside the indenture."

*Commonwealth vs. Coyle*, *Supra*.

*Commonwealth vs. Miller*, 8 Pa., C. C. 525.

It will be observed from the foregoing abstracts of the law and decisions that poor directors are charged with caring for the destitute and poor persons and necessarily have many details under their care that undoubtedly in populous communities require considerable assistance and investigations, and, in view of this, they have as public officials been given wide latitude in the exercise of their discretion, and I am, therefore, of the opinion that they may very properly employ investigators or family visitors to aid in the care of poor persons in their districts and may appropriate money for such purpose, and that there is nothing in our law to bar such acts on their part.

Very truly yours,

ROBERT L. WALLACE,  
*Deputy Attorney General.*

*Hospital Service for Sick Soldier—State Employee—Payment of Bill—Adjutant General's Office—Individual Liability.*

A hospital bill for the care of a member of the National Guard of Pennsylvania taken sick in the service should be paid by him as an individual. Neither the Adjutant General's office nor the Commissioner of Public Welfare has authority to pay such bill.

March 27, 1923.

Dr. Ellen C. Potter, Commissioner of Public Welfare, Harrisburg, Pa.

Dear Dr. Potter: I am in receipt of your request of January 23rd, 1923, for an opinion covering the case of a member of the Pennsylvania National Guard admitted to the Harrisburg Hospital and suffering from an illness not an accident, and in which you ask whether or not the bill should be paid through the Adjutant General's Department.

In your letter you state:

"The Credit Department of the Harrisburg Hospital states its belief that the young man, being in the service of the National Guard which contracts to take care of a man who is ill in the service, should have the bill paid through the Adjutant General's Office rather than out of the funds which the State appropriates to private charities."

There is no provision in law affecting the National Guard for "contracts to take care of a man who is ill in the service." Under Section 40 of the National Guard Act of 1921, P. L. 869, it is provided as follows:

"If any officer or enlisted man of the Pennsylvania National Guard is wounded or otherwise disabled while doing duty in active service of the state for which duty a per diem rate of pay is paid, he shall receive from the Commonwealth just and reasonable relief in amount to be determined by the Military Board."

While there seems to be an understanding or undercurrent of thought that state employees are in some way provided with free service in hospitals in the State in case of illness or injury, I can find no warrant in law for such a proposition. If, as an individual they are admitted to hospitals and come within the classification of individuals as indigents, etc., then they would be taken care of in the same way as any other individual, but there is nothing which gives them a right to free service as "State employees" where they are able to pay for such services.

Under Section 40 of the National Guard Act where a member of the National Guard is wounded or otherwise disabled while doing active duty, the Military Board provides for compensation using substantially the same basis as that of the Compensation Law.

You are therefore advised that the bill in question should be paid by the member of the National Guard as an individual to the Hospital. It should not be paid by the Adjutant General's office or your Department.

Yours very truly,

JOHN N. ENGLISH,  
*Deputy Attorney General.*

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*Escape—Misdemeanor—Trial and Conviction—Maximum Sentence—Parole.*

The breaking of prison or the escape from prison constitutes a misdemeanor under our law, and on re-capture the prisoner is liable to a sentence not to exceed the maximum of the sentence he was serving at the time of his escape. The sentence for the escape is to begin at the termination of the maximum sentence he was serving at the time he broke prison. Having served the first maximum sentence, he is eligible for parole on the sentence for breaking prison.

April 12, 1923.

Dr. Ellen C. Potter, Commissioner of Public Welfare, Harrisburg, Penna.

Madam: I have your communication of March 27, 1923, requesting an opinion relative to a convict escaped from the Penitentiary and re-captured, with special reference to Clyde D. Carney.

Where a person has been convicted of a crime and sentenced to the Penitentiary, and while serving his sentence escapes and is re-captured, he is liable for indictment, conviction and sentence for the crime of escaping or breaking prison, which is made by law a misdemeanor, and he shall be sentenced by the Court for a term to commence from the expiration of his original sentence for a period of time not to exceed the original sentence, by virtue of which he was imprisoned at the time he broke prison or escaped.

There is a marked distinction between cases where persons are out on parole and persons who commit the offense of breaking prison or escaping during the time they are serving sentence. The latter case is governed by the third Section of the Criminal Code, approved the 31st day of March, 1860 (P. L. 382). The part of said Section covering this question reads as follows:

“\* \* \* if any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offense, other than murder in the first degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offence, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison although no actual escape was made by him.”

The breaking of prison or the escape from prison constitutes a misdemeanor under our law, which is a separate and distinct offense and, upon conviction, the Court shall sentence the defendant to a term in prison to commence at the expiration of the sentence by virtue of which he was imprisoned at the time of the breaking of jail or escape. However, it will be noticed that the length of sentence is not to exceed the original sentence which leaves with the Court the authority to sentence for such period as he deems proper and advisable under the circumstances, not to exceed in length the period of the original sentence. The law is very plain that the sentence shall not run concurrently, but rather that the second sentence must begin at the termination of the first one.

I am, therefore, of the opinion that the original maximum sentence must be served in full. The Supreme Court in *Commonwealth vs. Kalck*, 239 Pa. 533, said:

“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 readily seen that “the expiration of the original sentence” must necessarily mean expiration of the maximum sentence.

However, after the expiration of such original maximum sentence I see no reason why the prisoner could not be paroled the same as if he were serving his original sentence and had not committed the offense of breaking prison or escaping. The length of time the prisoner must serve in compliance with the sentences of both Courts must necessarily depend upon the length of sentence imposed by the Court in the second case.

You are, therefore, advised that the defendant must serve the full maximum of his first sentence and that he is eligible for parole only on his second sentence.

Yours very truly,  
ROBERT L. WALLACE,  
*Deputy Attorney General.*



*Department of Public Welfare—Prisoners—Transfer from Eastern Penitentiary to House of Correction in the City of Philadelphia—Acts of March 31, 1860, P. L. 427, Section 74, as amended by Act of February 28, 1905, P. L. 25—Act of May 25, 1921, P. L. 1144, Sub-Section (g) Paragraph 2, Section 13.*

The Department of Public Welfare has no authority to order the transfer of any inmates from the Eastern Penitentiary to the House of Correction, or to compel the House of Correction to accept such transfer, but all such transfers must be in strict accordance with an Act of Assembly passed for the purpose.

May 9, 1923.

Doctor Ellen C. Potter, Commissioner of Public Welfare, Harrisburg, Penna.

Madam: In reply to your letter in reference to transferring women prisoners from the Eastern Penitentiary to the House of Correction in the city of Philadelphia:

Section 74 of the Act of March 31, 1860, P. L. 437, as amended by the Act of February 28, 1905, P. L. 25, provides:

“Whenever any person shall be sentenced to imprisonment at labor by separate or solitary confinement, for any period not less than one year, the imprisonment and labor shall be had and performed in the State Penitentiary for the proper district.”

The only way the transfer could be legally made would be to have an act of assembly passed providing for it. This was done to allow the transfer of certain prisoners from the Eastern to the Western Penitentiary, and from the Western to the Eastern Penitentiary, and it was found to be the only method by which the transfer of prisoners from one institution to another could be accomplished.

The Act of April 23, 1829, P. L. 341, provides that the expenses of keeping the convicts in the Eastern and Western Penitentiaries shall be borne by the respective counties in which they shall be convicted. All salaries of officers shall be paid by the State.

The authority of the Department of Public Welfare in the matter of transferring prisoners from one institution to another arises from sub-section (g), paragraph 2, Section 13, of the Act of 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 therefore.”

The word “supervise” has been defined to mean “to be a general oversight of, superintend, inspect.” The word as used in the Act creating the Department of Public Welfare cannot be construed to

give power to order a transfer of inmates from one penal institution to another or to compel either institution to receive a transfer of inmates from the other.

The authority given to the Department of Public Welfare was not to order a transfer of inmates from one institution to another, but to see that the provisions of an act of assembly providing for such transfer are faithfully observed and to guard against any abuses thereunder.

You are therefore advised that the Department of Public Welfare has no authority to order the transfer of any inmates from the Eastern Penitentiary to the House of Correction, or to compel the House of Correction to accept a transfer of inmates, but all such transfers must be in strict accordance with an act of assembly passed for such purposes.

Yours very truly,

J. W. BROWN,  
*Deputy Attorney General.*

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*Prisons—Prison labor—Prison products—Surplus knit goods—Exportation for sale*  
• —Act of May 25, 1921.

1. The purposes for which prison labor is to be used in the manufacture and production of supplies, and the vendees to whom such products may be sold, are limited and classified by the Act of May 25, 1921, P. L. 1144. No provision is made for the exportation of any such products.

2. However desirable the opportunity to dispose by exportation of surplus stocks of knit goods and like products or prison labor may be, there is no legal authority to employ prisoners for, or to make sale of, prison products for export and delivery outside of the United States.

July 19, 1923

Doctor Ellen C. Potter, Secretary of Welfare, Harrisburg, Pa.

Madam: Replying to your inquiry of July 3, 1923, as to whether or not your department may dispose of surplus knit goods and like prison products for delivery outside of the United States, I beg to advise as follows:

The Act of May 25, 1921, P. L. 1144, creating the Department of Public Welfare, in defining its powers, in section 21 (a) and (c),

specifies the particular purposes for which prison labor may be used, and to whom the products may be sold, as follows:

"(a) To establish, maintain and carry on industries in 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 Reformatory 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. Such labor shall be for the purpose of the manufacture and production of supplies for said institutions, or for the Commonwealth, or for any county, city, borough or township thereof, or any State institution, or any educational or charitable institution receiving aid from the Commonwealth, or for the preparation and manufacture of building material for the construction or repair of any State institution, or in the work of such construction or repair, or for the purpose of industrial training or instructing, or partly for one and partly for the other of such purposes, or in the manufacture and production of crushed stone, brick, tile and culvert pipe or other material suitable for draining roads of the State, or in the preparation of road building and ballasting material. \* \* \*

"(c) To arrange for and make sale of the products, produced in the said industries carried on in the said penitentiaries, reformatory or other correctional institutions, to the Commonwealth, or to any county, city, borough or township thereof, or to any State institution, or to any educational or charitable institution receiving aid from the Commonwealth."

The purpose for which labor is to be used in the manufacture and production of supplies, and to whom the products may be sold, is thus limited and classified. The sale of products for export would not come under any of such classifications.

The purpose of the restriction on prison labor is undoubtedly to prevent materials coming into competition with products of home manufacturers. An examination of earlier legislation shows the restrictions on prison labor and products were gradually made more drastic, until, by the Act of June 1, 1915, P. L. 656, the purposes were limited to supplies for the Commonwealth or for any county or for any public institution owned, managed or controlled by the Commonwealth, as well as road construction work. The amendment of April 6, 1921, P. L. 101, added to that act "cities," "boroughs" and "townships," as well as "educational or charitable institutions receiving aid from the Commonwealth," to those who might benefit by

the manufacture and sale of prison products. These provisions are embodied in the Act of 1921, creating the Department of Public Welfare.

A question of a similar nature arose during the late war in connection with the contemplated manufacture and sale of half-hose for troops of foreign governments. At that time the work was done under the direction of the Prison Labor Commission, and this Department, in an opinion dated June 17, 1916, by Joseph L. Kun, Deputy Attorney-General, held there was no legal authority for the employment of prisoners except as specifically authorized by the Act of June 1, 1915, P. L. 656, and which, as in this instance, did not embrace the proposed new outlet for the prison products. The Act of 1921, under which you are operating, is a substantial re-enactment of the provisions of the Act of 1915, with specific new purposes designated.

You are, therefore, advised that, however desirable the opportunity to dispose of surplus stocks in this manner might be, both in preventing idleness and in building up your manufacturing fund, there is no legal authority to employ the prisoners for, or to make sale of, prison products for export and delivery outside of the United States.

Very truly yours,

JOHN N. ENGLISH,

*Deputy Attorney General.*

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*Care and legal custody of children born to a woman who afterwards remarries—Act of March 31, 1812, 5 Smith's Laws 391—Control and authority of mother over her own children—Acts of May 4, 1855, P. L. 430, Section 2, June 26, 1895, P. L. 316, Section 1, April 6, 1905, P. L. 112.*

Where a widow with children remarries, her second husband has no legal responsibility for the support of her children by the first husband unless he legally adopts them.

Where the husband refuses to support his own minor children, the mother has the same control and power as the father. A woman who during her widowhood surrenders her children to a fraternal organization or orphanage and afterwards remarries and establishes a suitable home for the care of the children, may, under certain circumstances, have her children restored to her custody.

July 30, 1923.

Dr. Ellen C. Potter, Secretary of Welfare, Harrisburg, Pa.

Madam: In answer to your inquiry of July 16, 1923, relative to certain legal questions relating to child care, I beg to advise as follows:

First. If a widow with children remarries, her second husband does not automatically assume any legal responsibility for the support of her children by the first husband. It is a moral obligation only, and a matter concerning which the parties would be expected to have some understanding at the time of marriage. However, if the second husband legally adopts the children then, of course, his responsibility is fixed but it is because of the adoption and not because of the marriage. There was a provision in the Act of March 31, 1812, 5 Sm. L. 301, which provided, in a limited manner, for the support of the wife's children, as follows:

"Section 5. The husband of every wife, whose father or grandfather, mother or grandmother, children or grandchildren, shall be poor, blind, lame, impotent or otherwise unable to maintain himself or herself, and being within the said city, district or township, not able to work, shall, if of sufficient ability, at his or their own charges, relieve and maintain every such poor person as the mayor's court for the city, or the court of quarter sessions for the county where such persons reside, shall order and direct, on pain of forfeiting seven dollars for every month he shall fail therein: Provided, That such relief so furnished by such husband shall be demanded only where such husband shall have obtained possession of personal property, or be entitled to the rents and profits of real estate belonging to his said wife, and then only to the extent of the value of such property, so acquired by his marriage."

This provision has been rendered obsolete by the Married Women's Property Act of 1848, and its supplements, which abolished the husband's property rights in the estate of his wife, except courtesy.

It should also be borne in mind that where the husband refuses to support *his own* minor children, the mother has the same power and control as the father, by the provisions of the Act of June 26, 1895, P. L. 316, Section 1, and the Act of May 4, 1855, P. L. 430, Section 2 as follows:

"Section 1. A married woman who is the mother of a minor child and who contributes by the fruits of her own labor or otherwise toward the support, maintenance and education of her said minor child, shall have the same and equal power, control and authority over her said child and shall have the same and equal right to its custody and services as is now by law possessed by her husband, who is the father of such minor child: Provided, however, That the mother of such minor child is otherwise qualified as a fit and proper person to have the control and custody of said child."

"Section 2. Whensoever any husband or father, from drunkenness, profligacy or other cause, shall neglect or refuse to provide for his child or children, the mother

of such children shall have all the rights and be entitled to claim, and be subject to all the duties reciprocally due between a father and his children, and she may place them at employment and receive their earnings, or bind them to apprenticeship, without the interference of such husband, the same as the father can now do by law: Provided always, That she shall afford to them a good example, and properly educate and maintain them according to her ability: And provided, That if the mother be of unsuitable character to be entrusted as aforesaid, or dead, the proper court may appoint a guardian of such children, who shall perform the duties aforesaid, and apply the earnings of such children for their maintenance and education."

Second. The answer to your second question as to "whether or not a woman who during her widowhood has surrendered her children to a fraternal organization or to an orphanage and then remarries, establishing a suitable home for the care of her children, can demand their return," is dependent upon the individual facts in the case. The basis of every court proceeding for the care and custody of children is the fitness of the person seeking such custody and the consideration of that which will be for the permanent best interests of the child. Whether the mother should compel the return of her children would be a question of fact which the Court in each case would determine. It may always be easily raised by a habeas corpus proceeding instituted by the mother against the institution, orphanage or person having the custody and control of the child. As a general rule, the mother is preferred over all others in the care and custody of children of tender years, and also as a general proposition a widowed mother could successfully demand the care and custody of her children. The interest of a fraternal organization or orphanage in children is such as they acquire by the Court order awarding the children to them, or the agreement made with the mother. They may not adopt children.

Third. Your third question is as follows:

"Can an organization, such as a fraternal order or an orphanage to whom children have been surrendered or indentured by a widowed mother demand that the mother and stepfather, after the mother's remarriage, take the children back to a home which is demonstrated to be a suitable one."

The answer to this question also depends in a measure upon the facts. If the demand of the fraternal order or orphanage that the children be returned to the mother, is founded upon the character of the home provided by the second husband, there would be no right to insist upon such return, where the second husband is unwilling

to voluntarily assume the support of the children. In the case of the mother alone, if the children were merely placed with the fraternal order or orphanage for their care, based upon the inability of the mother to care for them, the children could be returned to the mother when she is able to care for them herself, and the Court would so order their return, if it was satisfied the mother was able to care for them and was otherwise a proper person. I do not find any provision in the law making desertion of children as used in the usual sense in Juvenile Court proceedings, apply to the mother. The mother could, however, be proceeded against under the provisions of the Act of April 6, 1905, P. L. 112, Section 4 of which is as follows:

"The husband and wife, the father, the mother, and the children, respectively of every poor person shall, at their own charge, being of sufficient ability, relieve and maintain such poor person, at such rate as the court of quarter sessions of the peace of the county where such poor person resides shall order and direct, on pain of forfeiting a sum not exceeding twenty dollars for every month they shall fail therein, which shall be levied by process of court and be applied to the relief and maintenance of such poor person. And it shall be the duty of the directors or poor-law officers of such county, or either of them, to make applications to the said court by petition, under oath, setting forth the necessary facts in all such cases."

Fourth. The answer to your fourth question as to

"whether or not the organization by accepting this surrender puts itself on record as being willing to release the mother of responsibility does so no matter what circumstances may arise,"

would also depend upon the facts in each case. If there was no agreement entered into or consideration paid at the time the organization accepted the children, then the general rule as given in answer to your third question would apply.

On the other hand, if an agreement was regularly entered into or a consideration paid by or on behalf of the mother, or by reason of provisions of fraternal insurance rights, and a legal duty existed in the organization to support such children, there is no reason why the organization should not be held to its agreement or obligation.

The failure of such organization, however, to keep its obligation or agreement would not bar any rights or claims on behalf of the children themselves against the mother or others under legal duty to care for the children.

Yours respectfully,

JOHN N. ENGLISH,

*Deputy Attorney General.*

*State institutions—Hospitals owned by the State—Right to charge for medical and surgical services rendered.*

No general rule will apply; the law applicable to each particular institution covers right to receive compensation. Legislation pertaining to Ashland, Nanticoke, Coaldale, Scranton, Hazleton, Shamokin, and Cottage State Hospitals reviewed.

November 15, 1923.

Honorable C. W. Hunt, Deputy Secretary, Department of Welfare,  
Harrisburg, Pa.

Sir: Your communication of October 31st, relative to State owned medical and surgical hospitals charging for services rendered, has been received by this Department.

The hospitals owned by the State will have to be taken up and considered as the law applies to each of them. This precludes a general answer which would embrace them all.

The State Hospital at Ashland was constructed under the provisions of the Act of June 11, 1879, P. L. 157, and the Act provides:

“\* \* \* this hospital shall be specially devoted to the reception, care and treatment of injured persons, and that in the order of admission this class shall have precedence over paying patients.”

A supplement to the above Act was approved May 19, 1887, P. L. 135, which amended Section 9 of the original Act is as follows:

“This hospital shall be specifically devoted to the reception, care and treatment of injured persons, and, in the order of admission, priority shall be given as follows: First. To persons employed in and about the coal mines; Second. To persons employed on or about the railroads; Third. To persons employed in or about the workshops and to such laboring men, as the trustees of said hospital may deem proper to admit: Provided further, That the classes herein stated shall have precedence over paying patients.”

This was followed by a further amendment to the same Section, approved April 23, 1909, P. L. 139, which provides:

“That this hospital shall be specially devoted to the reception, care, and treatment of injured persons, and that, in the order of admission, this class shall have precedence over paying patients: Provided, That any patients, except those suffering from a contagious disease, may be received, cared for, and treated, whenever the facilities of the hospital are sufficient to accommodate such patients.”



This amendment evidently overlooked the amendment of May 19, 1887.

The language of the Act of 1879 provides that the hospital should be devoted to the reception, care and treatment of injured persons. The amendment of 1887 provides for the order of admission of injured persons, and the amendment of 1909 enlarges the powers of the hospital and provides that any patients, except those suffering from a contagious disease, may be received, cared for and treated when the facilities of the hospital are sufficient to accommodate such patients.

Both the Act and the amendments provide that injured patients "shall have precedence over paying patients." There may be two classes of injured persons, indigent injured, who are not able to pay for care and treatment, and persons who are able to pay when injured.

In an opinion by Deputy Attorney General Hargest, reported in 38, C. C. 218, it was held that the words "paying patients" refer, when construed with the rest of the Act, to paying injured patients, and that preference is to be given to injured persons who are unable to pay over injured persons who are able to pay.

I, therefore, advise you in this case that injured patients, when able to pay, should do so, and all other patients admitted to the hospital should pay when they are able.

The Act of June 14, 1887, P. L. 401, is entitled—

"An act to provide for the selection of sites and the erection of State Hospitals thereon for injured persons, to be located within the bituminous and semi-bituminous coal regions of this Commonwealth, to be called the State Hospitals for Injured Persons within the Bituminous and semi-Bituminous Coal Regions of Pennsylvania, and for the management of the same, and making appropriations therefor."

Section 9 of the Act provides:

"That these hospitals shall be specially devoted to the reception, care and treatment of injured persons, and that, in the order of admission, this class shall have precedence over paying patients."

This Section was amended by the Act of March 4, 1911, P. L. 11, to read as follows:

"That said hospitals shall be specially devoted to the reception, care, and treatment of injured persons, and that, in the order of admission, this class shall have precedence over paying patients: Provided, That any

patients excepting those suffering from a contagious disease, may be received, cared for, and treated, whenever the facilities of the hospital are sufficient to accommodate such patients."

This amendment was evidently overlooked when the amendment of June 9, 1911, P. L. 837, was passed. That amendment, June 9, 1911, provides:

"That these hospitals shall be especially devoted to the reception, care, and treatment of injured persons; but the trustees may, in their discretion, receive, care for, and treat patients other than injured persons, either medical or surgical, when the hospital facilities are for the time being more than sufficient for the accommodation of injured persons in the hospital, and a reasonable allowance of room for prospective patients of this class, and, in the order of admission, indigent injured persons shall have precedence over any other class of patients."

Both of these amendments enlarge the powers of the trustees by allowing them to receive patients other than injured ones. It was in construing this Act that the opinion of Deputy Attorney General Hargest was written, holding that "paying patients" refer to paying injured patients. Injured patients who are able to pay should be made to do so and, of course, other patients admitted under the provisions of the amendments to the Act should pay, when able, under rules and regulations made by the trustees.

The Act of June 14, 1887, P. L. 399, made provisions for the erection of the State Hospital at Hazleton. This Act provides that—

"\* \* \* this hospital shall be specially devoted to the reception, care and treatment of persons injured in and about the mines, workshops and railroads, and all other laboring men; Provided, however, That no patient shall be admitted for treatment in said hospital to the exclusion of the classes herein stated; and who have not contracted injuries in or at the coal mines embraced within the territorial limits of the fourth inspection district of the anthracite coal fields of Pennsylvania."

Section 10 of the Act provides:

"The trustees of said hospital may, from time to time, charge any patient, other than the classes named in section nine of this act, an amount sufficient to cover the cost of treatment."

The Superior Court in *State Hospital vs. Lehigh Valley Coal Co.*, 71 Superior 545, held, in construing this Act:

“\* \* \* The evident intention was that persons injured in the mines, workshops and railroads should be treated free. \* \* \*”

Of course under the provision in the charter the trustees may from time to time charge any patient, other than the classes named, an amount fixed by the trustees and sufficient to cover the cost of treatment.

The Act of June 13, 1907, P. L. 699, made provisions for the erection of the State Hospital at Shamokin. Section 9 of the Act provides:

“That this hospital shall be specially devoted to the reception, care, and treatment of persons injured in and about the mines, workshops, and railroads, and all other laboring men: Provided, however, That no person shall be admitted for treatment in said hospital, to the exclusion of the classes herein stated, and who has not contracted injuries in or at the coal mines, railroads, or workshops embraced within the limits of the aforesaid coal fields.”

And Section 10 provides:

“The trustees of the said hospital may, from time to time, charge any patient, other than the classes named in section nine of this act, an amount sufficient to cover the cost of treatment.”

What was said of the State Hospital at Hazleton applies here, and the trustees under the provision in Section 10 of the Act may, from time to time, charge any patient, other than the classes named, an amount fixed by the trustees and sufficient to cover the cost of treatment.

The Act of July 18, 1901, P. L. 775, authorized the taking over by the State of the Hospital at Scranton, and Section 2 of the Act provides:

“This hospital shall be specially devoted to the reception, care and treatment of injured persons in the Northern Anthracite Coal Region, composed of the county of Lackawanna and the adjacent counties of Wyoming, Susquehanna and Wayne, and in the order of admission this class shall have precedence over paying patients.”

The provision, "this class shall have precedence over paying patients," includes the two classes of injured persons above referred to; namely, indigent injured and persons who are able to pay when injured. "Paying patients" refers to paying injured patients, and a preference it to be given to injured persons who are unable to pay over injured persons who are able to pay.

The Act of June 14, 1911, P. L. 933, which authorized the taking over by the State of the Nanticoke Hospital, and the Act of June 14, 1911, P. L. 921, which authorized the taking over by the State of the Coaldale Hospital, both provide that the Board of Trustees—

" \* \* \* shall have full charge and supervision of said hospital and its affairs. It shall, subject to the approval of the Governor, prepare such rules and regulations for the government of said hospital as it may deem necessary. \* \* \* "

There is no provision in either of these Acts as to what and how patients may be charged and, therefore, the trustees may make such rules and regulations for charging as they deem necessary.

To recapitulate the conclusions arrived at, I advise you as follows:

1. As to Ashland Hospital, Cottage State Hospitals, and the Hospital at Scranton:

Indigent injured patients must be treated in these institutions without charge. Injured patients who are able to pay should be made to do so, and other patients admitted to the Hospital should pay when able to do so under rules and regulations made by the trustees.

2. As to Hazleton and Shamokin Hospitals:

The intention of the Acts creating those Hospitals was that persons injured in the mines, workshops and railroads should be treated free, and they were, therefore, obliged to treat such classes without charge prior to the passage of the Workmen's Compensation Act (see paragraph "4" below), but other than the classes named may be charged an amount fixed by the trustees.

3. As to Nanticoke and Coaldale Hospitals:

Nothing in the Acts providing for these Hospitals refers to any payment or paying patients, but, on the contrary, the trustees may make such rules and regulations in regard to charging patients for care and treatment as they may deem proper.

4. The Workmen's Compensation Act provides that an employer "shall furnish reasonable surgical, medical and hospital services, medicines and supplies as and when needed unless the employee refuses to allow them to be furnished by the employer." It was decided in *State Hospital vs. Lehigh Valley Coal Company*, 71 Super. Ct. 545:

"\* \* \* the Act of 1915 puts upon the employer the duty in case of injury of furnishing upon demand by its employees the treatment required. If not furnished the workman may procure it elsewhere and recover the cost from the employer."

Under this provision of the Compensation Act all persons injured in mines, workshops or railroads, when admitted to any hospital (including Hazleton and Shamokin Hospitals), become paying patients to the extent that the Act requires payment from the employer and continue as paying patients in hospitals where injured persons able to pay must pay if they are able to do so.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

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*Criminal law—Parole of prisoners—Recommendation of prison inspectors—Acts of June 19, 1911, P. L. 1055, and June 29, 1923, P. L. 975.*

1. The Board of Prison Inspectors have no power to release a prisoner on parole at the end of his minimum term of sentence. They have only power to recommend.

2. If the prison inspectors think that a prisoner should not be paroled, they may take into consideration not only his conduct in prison, but whether or not there is a reasonable probability that the convict will live and remain at liberty without violating the law.

3. In reporting to the Board of Pardons, the inspectors should state not only the prisoner's conduct while in prison, but also their reasons, based on other grounds, for thinking that he should or should not be released.

December 10, 1923.

Dr. Ellen C. Potter, Secretary of Welfare, Harrisburg, Pa.

Madam: This Department has your letter transmitting to it, for its opinion, inquiries of the Board of Inspectors of the Western Penitentiary.

These inquiries may be stated under three heads which, with our opinion to each, are as follows:

(1) Is it imperative upon the Board of Inspectors to parole a prisoner upon completion of his minimum sentence when his behavior in the prison has been good?

There seems to be some misconception of the province of the Board of Inspectors. It does not parole, simply recommends.

"The power given to the prison inspectors is not to release on parole at the expiration of the minimum term of the sentence, but is simply to recommend.

There is nothing in the act making it obligatory on the governor to adopt the recommendation of the prison inspectors."

*Com. ex rel. v. McKenty, 52 Super Ct. 332, 340.*

Section 6 of the Act of June 19, 1911, P. L. 1055, as amended by the Act of June 29, 1923, P. L. 975, requires the Court in sentencing convicts to a penitentiary to impose a maximum and a minimum term of imprisonment.

Sections 8, 9 and 11 specify the duties of the inspectors. They shall meet monthly and hear applications for release on parole from convicts whose terms will expire within three months: They shall determine whether or not there is a reasonable probability that any such applicant, if paroled, will live and remain at liberty without violating the law, if so, they shall recommend to the Governor that such convict be released on parole, if not they shall report in writing to the Governor, the reasons, in detail, for not recommending a parole.

In case a parole is recommended the recommendations shall include such rules and regulations for such convicts as the Board of Inspectors may prescribe together with certain data as prescribed in the Act.

(2) What course should the Board of Inspectors follow in cases in which it believes the prisoner should not be paroled at the expiration of his minimum sentence, not because of any misconduct while in the penitentiary, but because the sentence thus served is not adequate to the offense committed?

Section 9 of the aforesaid Act of 1911, provides that the Board of Inspectors shall recommend a parole in those cases in which it finds "that there is a reasonable probability that such applicant (convict) will live and remain at liberty without violating the law."

The question naturally arises as to what matters are to be taken into consideration in determining this question. The intent of these

Acts is to stimulate proper conduct on the part of the convict and to affect his reformation, and his conduct in the institution is, probably, the most important factor.

“When the sentence is for an indefinite term, and the law prescribes a maximum punishment for the crime committed, the prisoner in contemplation of that law is committed for the full term, but may secure a release at a much earlier period if by his deportment and good conduct he proves himself worthy of the clemency which it is the policy of indeterminate sentence laws to extend him.”

*Commonwealth v. Kalch*, 239 Pa. 533, 542.

As to what other matters are to be considered by the Board of Inspectors in arriving at its conclusion it must be the judge. The Act of 1911, *supra*, provides in Section 7 that it shall have for its use certain data which has no reference to the conduct of the convict while in the penitentiary, including stenographic notes of testimony taken at the trial. It would be useless to gather this data and consider it if the recommendation of the Board were to depend wholly upon the conduct of the convict during his term in the penitentiary.

However, the Court having fixed the minimum sentence and the general policy of the law being to discharge upon the expiration of the minimum sentence, the Board should be careful not to set its judgement up against the judgment of the Court upon the question as to what is an adequate sentence for the offense committed.

The Act places upon the Board of Inspectors the responsibility of determining whether or not “there is a reasonable probability that the convict will live and remain at liberty without violating the law”, and if the conscience of the Board will not permit a favorable recommendation on account of the length of time served or for any other reason, it should in its return give its reasons for not recommending parole and should also state its findings as to the conduct of the convict while in the penitentiary in order that the Board of Pardons may have the benefit of that finding in the final determination by it of the application for parole.

I think it clarifies this whole situation if it be borne in mind that the Constitution places the right of granting commutation and pardons in the Governor and restricts his action to such cases as are approved by the Pardon Board. Whether or not the Legislature could place that authority somewhere else to run concurrent with the authority of the Governor need not be considered because the Legislature has not attempted to do so. The Legislature has directed that persons sentenced to the penitentiary shall be given a maximum and a minimum term and at the end of the minimum term

the Board of Inspectors shall submit a recommendation to the Board of Pardons which shall be acted upon by the Board of Pardons and a recommendation made to the Governor. The province of the Board of Inspectors is merely advisory, but it has full discretion to recommend for or against parole.

(3) Should the Board of Inspectors recommend what action the Pardon Board should take on applications for pardon made on behalf of prisoners confined in the institution over which the Board of Inspectors presides?

This question may be best answered by reminding you that the matter of making a recommendation to the Pardon Board upon applications for pardon is entirely optional with the Board of Inspectors. No law places such a duty upon the Board of Inspectors. The Board of Pardons sits monthly, hears arguments pro and con upon the question, studies the whole case and may receive additional evidence.

The Board of Inspectors has no such opportunity. In my opinion the Board of Inspectors, as a Board, should not make any definite recommendation. On applications for pardon it may remain inactive, or file a report on the conduct of the applicant while within the penitentiary. This does not affect the right of any member of the Board of Inspectors, in his individual capacity to furnish in the regular way to the Board of Pardons any evidence he may have upon a case at issue. The Pardon Board will of course treat all such information merely as other evidence in forming its recommendation on the application.

Yours truly,

DEPARTMENT OF JUSTICE,

By JAMES O. CAMPBELL,

*First Deputy Attorney General.*



*Tuberculosis Hospitals—Trustees—Common Pleas Court—Ministerial Duties—Supreme Court—Jurisdiction—Act of 1921, P. L. 944.*

Where a county hospital for the treatment of persons afflicted with tuberculosis has been established under the provisions of the Act of May 20, 1921, P. L. 944, and the judge or judges of the Court of Common Pleas of that county refuses or neglects to appoint trustees for its management, a petition may be presented to the Supreme Court asking for a writ of mandamus to compel the making of such appointments.

December 17, 1923.

Doctor Ellen C. Potter, Secretary of Welfare, Harrisburg, Penna.

Madam: Your inquiry of December 1, 1923, in reference to appointment of trustees of county hospitals for the treatment of persons afflicted with tuberculosis, has been received by this Department.

The Act of May 20, 1921, P. L. 944, provides as follows:

"Section 1. Be it enacted, &c., That whenever one hundred or more citizens, residents of the county, petition the county commissioners for the establishment of a county hospital for the treatment of persons afflicted with tuberculosis, such commissioners shall, at the next general or municipal election, submit to the voters of the county the question whether or not the county shall establish such hospital. Such question shall be printed at the foot of the ballot, and shall be in the form provided by the general election laws for the submission of such questions. The vote on such question shall be returned in the manner prescribed by the general election laws.

Section 2. If a majority of the voters voting upon such question at such election shall be in favor of the establishment of the hospital, the county commissioners shall have plans and specifications prepared, and shall select and purchase a site for such hospital. Such plans and specifications and the location of such site shall be approved by the Commissioner of Health before the construction of any building is commenced.

Upon the approval by the Commissioner of Health of the plans and specifications and the location of such hospital, the hospital shall be constructed and equipped in the same manner as other county buildings are constructed and equipped.

Section 3. Such hospital shall be managed by a board of trustees, consisting of five members, who shall be electors of the county, one of whom shall be a licensed physician. Such trustees shall be appointed by the court of common pleas, one for a term of five years, one for a term of four years, one for a term

of three years, one for a term of two years, and one for a term of one year, or until their successors are appointed and have qualified. All appointments thereafter shall be for a full term of five years. All vacancies in the membership of the board shall be filled by the court of common pleas, upon the petition of the remaining members of the board." \* \* \* \*

The Act of April 3, 1923, P. L. 52, amends Section 2 of the Act of 1921, and provides as follows:

"Section 2. If a majority of the voters, voting upon such question at such election, shall be in favor of the establishment of the hospital, the county commissioners, county controller, where such office exists, and board of trustees, hereafter provided for, shall have plans and specifications prepared, and shall select and (purchase) acquire a site for such hospital by purchase or condemnation, with the same power and with the like procedure as land is now acquired under existing laws by school districts, for school purposes,—the county commissioners exercising the authority exercised by school directors for that purpose. Such plans and specifications and the location of such site shall be approved by the Commissioner of Health before the construction of any building is commenced." \* \* \* \*

As I understand your inquiry, some of the Judges of the Courts of Common Pleas in this State have refused or neglected to appoint trustees as provided for by the Act above quoted, and you want to know if they can be compelled to make such appointments.

The Constitution of the State, in Article V Section 3, provides:

"The jurisdiction of the supreme court shall extend over the state, and the judges thereof shall, by virtue of their offices, be justices of oyer and terminer and general jail delivery in the several counties; they shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the commonwealth whose jurisdiction extends over the state, but shall not exercise any other original jurisdiction; they shall have appellate jurisdiction, by appeal, certiorari or writ of error in all cases, as is now or may hereafter be provided by law."

The Supreme Court of our State, both before and since the above constitutional provision was adopted, has uniformly held that a mandamus will be awarded to compel the performance of a ministerial duty by an inferior court, and in *Commonwealth vs. Hartranft*, 77

*Pa. 154*, it was held that under Section 3, Article V of the Constitution the jurisdiction of the Supreme Court in mandamus is expressly limited to courts of inferior jurisdiction.

In *Commonwealth ex rel. vs. Cochran, Secretary of the Land office, 5 Binney 87*, it was held:

“Where a ministerial act is to be done and there is no other specific remedy, a mandamus will lie to do the act required; but where the complaint is against a person who acts in a judicial or deliberative capacity, he may be ordered by a mandamus to proceed to do his duty by deciding and acting according to the best of his judgment.”

In *Commonwealth vs. Bunn, 71 Pa. 405*, “mandamus lies to enforce ministerial acts although to be performed by a judicial officer.”

In *Douglass vs. Commonwealth, 108 Pa. 559*, the Court said:

“Where the complaint is against persons who act in a judicial or deliberative capacity they may be ordered by mandamus to proceed to do their duty by deciding and acting according to the best of their judgment.”

In *Dechert, Controller, vs. Commonwealth, 113 Pa. 229*, the Court held:

“It is well settled that mandamus will lie to compel the performance by public officers of duties purely ministerial in their character.”

In *Powel's Estate, 209 Pa. 76*, the following was held by the Court:

“If a court is evading its duty by refusing or neglecting to proceed, the Supreme Court may command it to hear and determine the case.” \* \* \* \*

In *26 Cyc. of Law and Procedure, 192*, it is laid down as a general principle “where a duty is imposed upon a judge or tribunal, and no discretion as to its performance given, performance may be compelled by mandamus.”

Is the appointment of trustees for hospitals for the treatment of persons afflicted with tuberculosis a ministerial act?

A ministerial act is—

“An act which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of his own judgment upon the propriety of the act done.” *26 Cyc. of Law and procedure, 793.*

In at least one specific case before your Department all the preliminary requirements of the law have been complied with and we therefore have a given state of facts. One hundred or more citizens, residents of the county, have petitioned the county commissioners for the establishment of a county hospital for the treatment of persons afflicted with tuberculosis. The Commissioners have submitted to the voters of the county the question whether or not the county shall establish such hospital. The question has been submitted as prescribed by the Act of Assembly, and the vote thereon has been returned in the manner prescribed by the general election laws. A majority of the voters voting upon the question at the election have voted in favor of the establishment of the hospital.

The appointment of trustees to manage such hospital should therefore be made in the prescribed manner in obedience to the mandate of the Act of Assembly.

If, therefore, the Court of Common Pleas of any county refuse or neglect to make appointment of trustees as provided for in the Act of May 20, 1921, P. L. 944, I advise you that under the constitutional provision and the decisions of the Supreme Court, a petition may be presented to the Supreme Court asking for a writ of mandamus to compel the making of such appointments.

Very truly yours,

DEPARTMENT OF JUSTICE

By J. W. BROWN,

*Deputy Attorney General.*

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*Mothers' assistance—Remarriage of mother—Desertion by husband—Absence for more than seven years—Death—Act of July 10, 1919.*

1. Under the Act of July 10, 1919, P. L. 893, where a mother with four dependent children remarries after the death of her husband, but thereafter secures a divorce from her second husband, she is entitled to assistance from the Mothers' Fund if she is poor, of proved character, and the children are still dependent upon her for support.

2. Where a woman is deserted by her husband, and she is not able to find him for seven years, she is not entitled, after the expiration of that period, to assistance from the Mothers' Assistance Fund on the presumption that her husband is dead.

December 19, 1923.

Miss Blanche E. Stauffer, Supervisor, Acting for Miss Bogue, Mothers' Assistance Fund, Harrisburg, Penna.

Madam: Your letter of the 14th instant asking for an opinion from this Department covering two distinct cases, has been referred to me.

The first case is that of a mother whose husband died leaving her with four dependent children. The mother remarried, but secured a divorce some time later. There were no children by the second marriage. The mother has the four children by her first marriage with her, and you now desire to be advised if she is entitled to assistance from the Mothers' Assistance Fund.

The Act of July 10, 1919, P. L. 893 repeals and takes the place of two previous Acts,—The Act of April 29, 1913, P. L. 118, and the Act of June 18, 1915, P. L. 1038. The title of the Act of 1919 begins with these words: "Providing for assistance to certain mothers," and while I cannot find that the Act has ever been construed by any of the courts, its meaning is not difficult to understand.

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."

As was said by Deputy Attorney General Swope in an opinion to your Department:

"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."

In the case now under consideration, the mother is supporting the children in their own home. She is poor and dependent, of proved character and ability, and has children under the age of sixteen years. Her husband, the father of the children who are with her and who are under the age of sixteen years, is dead. The children, so far as is shown, never left the home and care of the mother.

The real purpose of this legislation was undoubtedly to alleviate the condition of want and dependence of families which have permanently lost the usual and natural support furnished by the father and husband. The law was passed as much for the benefit of the dependent children as for the mother, and to hold that a mother,

under the facts as given in this case is not entitled to assistance would be to deprive the children of that aid to their support intended by the Act.

The effect of the divorce was to restore her to her former condition and to give to her the rights she had before the marriage. She is in the same position she would have been if such marriage had never taken place. Why then shall she be deprived of the privilege of seeking assistance from a source provided by a beneficent law. As was said by Mr. Justice Agnew in *Overseers of Williamsport vs. Overseers of Eldred*, 84 Pa. 429: "Humanity and law, its handmaid, do not say nay."

You are therefore advised in this case that the mother is entitled to assistance from the Mothers' Assistance fund. The right of this mother to assistance, if her second husband was not divorced from her and was living is not decided. That question can be passed upon when, if ever, it arises.

The second case you ask to be advised about is as follows:

A woman was deserted by her husband more than seven years ago and all efforts to locate him have failed. Is she entitled to assistance from the Mothers' Assistance Fund on the presumption that her husband is dead?

While the rule is well settled for most judicial purposes that there is a presumption of the death of a person of whom no account can be given at the expiration of seven years from the time he was last known to be living, this presumption, like all others of fact, may be overcome by legitimate evidence opposed to it.

The language of the Act of June 18, 1915, P. L. 1038, and of July 10, 1919, P. L. 893, is identical in referring to mothers entitled to assistance. The language is as follows: "whose husbands are dead or permanently confined in institutions for the insane."

While the Act of 1919 has never been passed upon by the courts, the Act of 1915 has been, and the very question here being considered has been decided. In *Commonwealth ex rel. Mothers' Assistance Fund vs. Powell*, 256 Pa. 470, the Supreme Court held the women for whom charitable provision is made under the Act of June 18, 1915, amending the Act of April 29, 1913, are not as under the Act of 1913, those whose husbands have abandoned them but "those husbands are dead or permanently confined in institutions for the insane," and the word "dead" as used in such act is to be given its popular, natural and ordinary meaning, and an award cannot be made upon a presumption of death arising from the absence of the husband for seven years.

The Supreme Court said:

“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 the 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.”

You are advised that a woman whose husband deserted her more than seven years ago and of whom nothing has been heard since is not entitled to assistance from the Mothers’ Assistance Fund on the presumption that he is dead.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

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*State Institutions—Allentown State Hospital—Authority of the Commonwealth to compel the City of Allentown, which owns its own water-supply system, to furnish adequate water supply for fire protection to said institution, owned by the Commonwealth and situated within the city boundaries—Acts of March 12, 1867, P. L. 388, Section 27, Paragraphs 18 and 20, March 22, 1870, P. L. 514, Section 4, May 23, 1874, P. L. 230, Section 20.*

The municipal authorities of Allentown (which city owns its own water supply system) have exclusive control of the question of furnishing water supply and apparatus for the Allentown State Hospital, located within that city. The grant of authority to city to supply water and apparatus is essentially discretionary. The Commonwealth cannot maintain an action to increase the amount of water for fire-protection purposes now supplied to said hospital or to the vicinity thereof.

April 30, 1924.

Honorable C. W. Hunt, Deputy Secretary of Welfare, Harrisburg, Pa.

Sir: Your recent letter to this Department sets forth the following facts concerning the lack of fire protection for the Allentown State Hospital.

"The Allentown State Hospital is wholly without fire protection from the City or through its own facilities, and in case of any fire that got beyond the control of a chemical cart, at the mercy of a conflagration; even the relaying of city steamers from Hanover Street would be ineffectual because the main supply line of this street is too small to furnish more than a couple of fire streams. The use of steamers drawing upon the present reservoir would only supply water for a few hours an an insufficient amount to fight a real fire here."

And you make the following inquiry: Does the Commonwealth have the power to compel the City of Allentown, which owns its own water supply system to furnish adequate water supply for fire protection purposes to an institution owned by the Commonwealth and wholly within the city boundary?

Allentown was incorporated as a City by the Act of March 12, 1867, P. L. 388. By Paragraph 18 of Section 27 thereof, the City was granted power "to make regulations relative to the cause and management of fires, and within such limits, within the city, as they may deem proper; to prescribe, and to authorize the city authorities to appropriate money for the purchase of fire engines, for the use of said city and fire companies." And by Paragraph 20 of the same section it was empowered, among other things, "to provide a supply of water for the use of the inhabitants, to make all needful regulations for the protection of the pipes, lamps, reservoirs, and other constructions, or apparatus, and to prevent the waste of water so supplied."

By a supplement to the Charter of said City, approved March 22, 1870, P. L. 514, in Section 4 thereof, it is provided as follows:

"That the councils of the city of Allentown shall have power and are hereby authorized to supply with water the said city of Allentown, and such persons, partnerships and corporations therein as may desire to use the same, at such prices as may be deemed just and right; and for that purpose to make, erect and maintain all proper works, machinery, cisterns, buildings, pipes and conduits for the raising, reception and conveyance of water, and also to extend, enlarge and increase the capacity of such works and machinery, should necessity require it; and in order to effect the object and purposes aforesaid, all the rights, privileges and franchises heretofore, by their several acts of incorporation, or otherwise, granted to, or vested in, the Allentown water company, are hereby extended and conferred upon said councils."

The City of Allentown accordingly purchased the water plant and system of the Allentown Water Company and is at present the owner of its water system.



On September 23, 1874, Allentown surrendered its old Charter and accepted the provisions of the Act of May 23, 1874, P. L. 230. By the terms of this Act none of the former powers, privileges, and franchises enjoyed by the City of Allentown not inconsistent with the provisions of the Act of 1874, were surrendered. Under Clause 9 of Section 20 of this Act the City was granted the power "to have at all times the exclusive right to supply with water, the City and such persons, partnerships, and corporations therein as may desire the same," and to maintain proper water works, pipes and conduits for the distribution thereof; and in Clause 25 of the same section it was empowered "to procure fire engines, hooks, ladders, buckets, and other apparatus, and to organize fire engine, hook and ladder, bucket companies, and to prescribe rules of duty and the government thereof."

The Municipal Corporation Acts of Assembly applicable to third class cities, of which Allentown is one, which have been passed since the aforementioned Act of 1874, make no material changes in the provisions of the Act of 1874, so far as the matter under discussion is concerned. It is therefore unnecessary to refer to them.

In Judge Dillon's excellent work on Municipal Corporations Vol. III, page 2301, he says:

"The protection of all buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger, and municipalities are usually authorized by statute to provide and maintain fire engines and to supply water for the extinguishment of fires. Those statutes generally do not impose any duty, and, when availed of, the task undertaken is discretionary in its character. The grant of such power must be regarded as exclusively for public purposes and as belonging to the municipal corporation, when assumed, in its public, political, or legislative character. A city, therefore, does not, by accepting or acting under such a statute, and building its water works, enter into any contract with or assume any implied liability to the owners of property to furnish means or water for the extinguishment of fires upon which an action can be maintained."

This quotation is fully in accord with the law in Pennsylvania.

In the case of *Grant vs. City of Erie*, 69 Pa. 420, the facts indicate that the City of Erie pursuant to an Act of Assembly authorizing the City to establish a number of reservoirs "to supply water in case of fire," did so establish a system of reservoirs, but allowed one of them to fall into decay so that it became useless. The plaintiff in the case alleged that in consequence of the fact that the City had

allowed the reservoir to fall into decay and no water was maintained therein, a valuable block of buildings belonging to him was destroyed by fire. His action was against the City for negligence in the maintenance of the reservoir. The lower court directed a verdict for the defendant and the judgment was later sustained by the Supreme Court in an opinion by Sharswood, J., wherein the principle laid down in the case of *Carr vs. The Northern Liberties*, 35 Pa. 330, is affirmed, and the Court in affirming this opinion, quoted from the opinion of Chief Justice Lowrie, as follows:

"We do not admit that the grant of authority to the corporation to construct sewers, amounts to an imposition of a duty to do it. Where any person has a right to demand the exercise of a public function, and there is an officer or set of officers authorized to exercise that function, there the right and the authority give rise to the duty; but when the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed."

These decisions have been followed and affirmed since by the Supreme Court of Pennsylvania in several important decisions: *Ethan vs. Phila.*, 196 Pa. 302; *Smith vs. Selinsgrove Borough*, 199 Pa. 615; *Thompson vs. Springfield Water Co.*, 215 Pa. 275; *McDade vs. City of Chester*, 117 Pa. 414.

We find a considerable number of decisions, by the courts of other States, which indicate a very general view that the powers conferred by the law of the State upon its municipal corporations to established water works and fire departments are, in their nature, legislative and governmental. An important decision in this respect is the case of *Tainter vs. City of Worcester*, 123 Mass. 311, where it was said by the court:

"The protection of all buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger; and cities and towns are therefore authorized by general laws to provide and maintain fire engines, etc., to supply water for the extinguishment of fires. The city did not, by accepting the statute, and building its waterworks under it, enter into any contract with, or assume any liability to, the owners of property to furnish means or water for the extinguishment of fires upon which an action can be maintained."

Neither the Act of Incorporation of the City of Allentown; the supplements thereto, the Municipal Corporation Act of 1874 accepted by said City when it surrendered its charter, nor any of the municipal corporation Acts applicable to third class cities passed since the Act of 1874, impose any legal duty on the City of Allentown

to supply water for fires that might occur. Whether the City of Allentown did so or not was a matter of municipal discretion. The further fact that it was actually attempted, either by itself or by another at its instance, in no wise affects the matter whatsoever. If it was not required in the first instance to accomplish it no obligation rested upon it to increase the supply, or even continue the supply, after it had once been accomplished.

The question might be asked in this connection,—does The Public Service Company Law of Pennsylvania afford any remedy to this case? It does not. In the case of *Barnes Laundry Co. vs. Pittsburgh*, 266 Pa. 24, which case was one where the lower court dismissed a bill in equity for an injunction and for a refunding of excessive water rates by the City of Pittsburgh, Moschzisker, J., rendering the opinion of the Court, said on page 33:

“While the statute declares the phrase ‘public service company’ comprehends ‘water corporations,’ it also, in effect, stipulates the latter term shall ‘not include municipal corporations’ or their regulation, even when rendering the same kind of service as the former class of companies, except as otherwise (to the limited extent) provided in the act. There being several provisions in the act governing municipalities, which state the exact jurisdiction of the commission in those particular instances, but nothing whatever concerning its power to regulate the rates and charges of such (municipal) corporations (keeping in mind the rule that bodies like our Public Service Commission are purely creatures of statute, having the powers there named and no others, which prescribed powers are not to be extended by implication ‘beyond what may be necessary for their just and reasonable execution’: *The People v. Willcox*, 200 N. Y. 423, 431; *State ex rel. v. Pub. Service Com’rs*, 270 No. 429, 443; *Kephart, J., in Lycoming, etc., Co. v. Pub. Serv. Com’rs*, 67 Pa. Superior Ct. 608, 611; *Cincinnati v. Pub. U. Com.*, 96 Ohio 270, 274), it cannot, by any proper rule of construction, be held that the present legislation controls municipal corporations beyond the limited extent therein expressly provided.”

The limitations therein referred to do not in any way include the right to furnish water for fire protection purposes.

You are therefore advised that the question of furnishing sufficient water supply and apparatus for the extinguishment of fires which may take place at the Allentown State Hospital located within the City of Allentown, is within the exclusive control of the municipal authorities of said City, which City owns its own water system, that the grant of authority to said City to supply water and apparatus for the aforementioned purposes is essentially dis-

cretionary, and that the Commonwealth can maintain no action to increase the supply of water now furnished to said Hospital or to the vicinity thereof for fire purposes.

We suggest that you communicate with the Superintendent of State Police and request that the Chief of the Bureau of Fire Protection of his Department or an inspector of said Bureau make an inspection of the local facilities and conditions of said Hospital and make recommendations to your Department as to what fire extinguishing apparatus and chemicals should be installed in said Hospital for protection of the same from fire hazards, upon which recommendations you can take the proper action.

Very truly yours,

DEPARTMENT OF JUSTICE,

By PHILIP S. MOYER,  
*Deputy Attorney General.*

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*Penal Institutions—Western Penitentiary—Supplies for use in the construction of the new penitentiary at Rockview—Where payable—Acts of March 30, 1811, P. L. 145, March 30, 1911, P. L. 32, April 18, 1919, P. L. 89, No. 76-A of 1921, App. Acts, page 140, June 7, 1923, P. L. 498, Section 3 and 9.*

Prior to June 15, 1923, a number of contracts were entered into between the Board of Inspectors of the Western Penitentiary and certain contractors, covering the furnishing of materials and supplies to be used in the erection of the new penitentiary. On the date mentioned, the said Board was abolished by operation of the Administrative Code, approved June 7, 1923; and the administration of the penitentiary was turned over to the Board of Trustees, a new administrative agency created by the Code. The abolition of the Board of Inspectors by the operation of the Administrative Code did not render unavailable for the payment of the contractors under outstanding contracts the unexpended balance of the appropriation made to the Board of Inspectors in 1921. The Auditor General, under the Act of 1811, *supra*, if satisfied that the amounts claimed are correct, may draw his warrants against 1921 appropriation for payment of the claims referred to.

June 12, 1924.

Dr. Ellen C. Potter, Secretary of Welfare, Harrisburg, Pennsylvania.

Madam: You have asked to be advised whether the Contractors who have been furnishing supplies for use in the construction of the new Western Penitentiary at Rockview, Centre County, can be paid out of the unexpended balances of 1921 Appropriation to the Board of Inspectors of the Western Penitentiary (Act No. 76-A, 1921 Appropriation Acts, page 140).

The relevant facts are as follows:

The Act of March 30, 1911, P. L. 32 authorized the Board of Inspectors of the Western Penitentiary to acquire land and proceed to build a new penitentiary thereon, appropriating three hundred thousand dollars (\$300,000) for the purpose. This money was "to be drawn from the State Treasury as the same may be required, on warrants drawn by the Auditor General in the usual manner, based on vouchers or statements to be approved by the Governor before such warrants are issued."

The Act of May 27, 1921 to which reference has already been made appropriated an additional three hundred thousand dollars (\$300,000) to the Board of Inspectors of the Western Penitentiary for the continuance of the work of erecting, constructing and equipping the new penitentiary at Rockview. The Act of 1921 is a supplement to the Act of 1911 so that the provisions of the Act of 1911 governing the manner in which the money appropriated shall be drawn from the State Treasury would apply under the Act of 1921 as well as under the original Act of 1911, but for the passage of the Act of April 18, 1919, P. L. 89 which repealed "all \* \* \* parts of acts which require the approval of the Governor to any warrant voucher or claim for the expenditure of public moneys." There is, therefore, no existing statutory provision establishing any special method of withdrawing funds from the 1921 appropriation to which we have referred.

Prior to June 15, 1923 a number of contracts were entered into between the Board of Inspectors of the Western Penitentiary and persons, associations and corporations which were to furnish materials and supplies to be used in the erection of the new Penitentiary. All of these contracts were entered into and executed as provided by law. All of them specify that the contractors shall be paid upon delivery of the materials and supplies which they agreed to furnish "and the acceptance thereof by the Superintendent of Construction of said new Western Penitentiary."

On June 15, 1923 the Board of Inspectors of the Western Penitentiary was abolished under the Administrative Code approved June 7, 1923. The administration of the Western Penitentiary was turned over to the Board of Trustees of the Western Penitentiary, a new administrative agency created by the Code.

The question before us is whether the abolition of the Board of Inspectors of the Western Penitentiary rendered unavailable for the payment of the contractors under outstanding contracts the unexpended balance of the 1921 appropriation to said Board of Inspectors.

The contracts in question were entered into by the contractors upon the faith of the 1921 Appropriation. That being the case it would have been impossible for the 1923 Legislature to have repealed expressly the 1921 Appropriation Act to the extent to which it had been encumbered by the execution of contracts involving payments out of it. Article I, Section 10 of the Constitution of the United States which prohibits any State from passing any law impairing the obligation of contracts is a complete bar to such legislative action. Many authorities could be cited to sustain this proposition, but it is so plain and so well established as to render the citation of authorities superfluous.

Accordingly, even if the Legislature in the Administrative Code had attempted either directly or indirectly to render unavailable the unexpended balance of the 1921 Appropriation the Act of the Legislature would have been void and of no effect to the extent to which the 1921 Appropriation had been charged with outstanding contractual liabilities. The Legislature did not, however, either expressly or by implication endeavor to accomplish this result. On the contrary Section 9 of the Administrative Code provides:

"All existing contracts and obligations of the \* \* \* \* commissions \* \* \* \* abolished by this act shall remain in full force and effect, and shall be performed by the departments, boards or commissions to which the rights, powers, duties and obligations of such governmental \* \* \* commissions \* \* \* are transferred";

and Section 3 of the Code provides that:

"All rights, powers, and duties, which have heretofore been vested in, exercised by, or imposed upon any \* \* \* commission \* \* \* abolished by this act, \* \* \* and which are by this act transferred, either in whole or in part, to a department, board or commission created by this act, shall be vested in, exercised by, and imposed upon the department, board or commission to which the same are transferred by this act, and not otherwise; and every act done in the exercise of such rights or powers and the performance of such duties shall have the same legal effect as if done by the former \* \* \* \* commission \* \* \* \*."

Plainly it was the intention of the Legislature when it provided that all existing contracts and obligations should remain in full force and effect that contractors and obligees should be paid out of moneys previously appropriated for the purpose.

The only possible objection to the payment of the claims of these contractors might be that as the Board of Inspectors of the Western Penitentiary was abolished that Board is not now in a position to issue requisitions against the 1921 Appropriation, and that the power

to issue such requisitions has not been specifically transferred to any other agency. There are several answers to this possible objection.

The first answer will be found in the language of Section 3 of the Code above quoted. The issuance of requisitions was a power of the Board of Inspectors of the Western Penitentiary, the powers of which were transferred in part to the Board of Trustees of the Western Penitentiary, and in part to the Department of Welfare.

But it is not necessary to resort to Section 3 of the Code to enable the claimants in question to be paid. There is nothing in the Constitution or laws of Pennsylvania which requires a requisition to precede the issuance of a warrant in this case. We have been unable to find any general law prior to the passage of the Administrative Code which requires requisitions to be presented to the Auditor General before he may issue a warrant; and the Act of March 30, 1811, P. L. 145 provides a method by which claimants may present their claims to the Auditor General directly without the intervention of any department, board or commission. In the event that claims were so presented under the Act of 1811 the Auditor General in this case would undoubtedly be justified in demanding the certificate of the Superintendent of Construction showing that the materials or supplies were delivered to the penitentiary and accepted; but unless the Auditor General were to find that the amounts claimed or any of them were not correct it would be his duty, under the Act of 1811 to draw his warrant against the 1921 Appropriation which, as we have previously shown, could not be repealed by the 1923 Legislature either directly or indirectly.

You are accordingly specifically advised that the 1921 Appropriation is available for the prompt payment of the contractors in question.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

*Soldiers and Sailors—Service Men—Inmates of Homes—Legal Residence—Funeral Expenses—County Liable.*

Inmates of a Soldiers' and Sailors' Home have a legal residence in the respective counties where they last resided before entering the home and the county from which an inmate of such home comes is the proper county to expend the sum of \$75.00 towards the funeral expenses of an inmate who was a service man.

October 29, 1924.

Dr. Ellen C. Potter, Secretary of Welfare, Harrisburg, Penna.

Madam: Your communication stating that "the question has been presented to us by a member of the Board of Trustees of the Soldiers' and Sailors' Home at Erie as to whether the Board of Trustees has a right to charge back upon the County from which an inmate of that home may come, the expenses of his funeral up to \$75.00," and asking to be advised upon the question, has been received by this Department.

The Act of May 10, 1921, P. L. 473 to which the Act of May 31, 1923, P. L. 472 and the Act of June 29, 1923, P. L. 971 are amendments provides:

"That the term 'Deceased Service Man,' as used in this Act, shall be defined and construed to mean and include any soldier, sailor, marine, or members of the enlisted nurse corps, having a legal residence within their county, who has died or shall hereafter die, anywhere within or without the United States \* \* \* or of any honorably discharged soldier, sailor or marine who served or should hereafter serve in any such combative force of the United States during any war in which the United States has been or shall hereafter be engaged."

The two Acts of 1923 above referred to are exactly the same, except the first Act provides that where the total expense of the funeral of any deceased service man, including an allowance of \$75.00, exceeds \$300.00 the County Commissioner shall not contribute, and the second Act increases the total expense of such funeral to \$400.00 and provides:

"The county commissioners of each county in this State are hereby authorized and directed to expend the sum of seventy-five dollars (\$75.00) toward the funeral expenses of any such deceased service man: Provided, however, That such county commissioners shall not contribute any moneys toward the funeral expenses of any such deceased service men where the total expense of any such funeral, including said allowance of seventy-five dollars (\$75.00), shall exceed four (three) hundred dollars (\$300.00) (\$400.00), nor unless application for



the payment of such moneys shall be made within one year after the date of the burial of such deceased service man."

"Any such deceased service man" mentioned in Section 2 of the Act are the deceased service men referred to in Section one, and are those "having a legal residence within their county."

The question, therefore, is: Has an inmate of the Soldiers' and Sailors' Home a legal residence within the county from which he came to the home?

Section 13, Article 8 of the Constitution of Pennsylvania, is as follows:

"For the purpose of voting no person shall be deemed to have gained a residence by reason of his presence, or lost it, by reason of his absence, while employed in the service, either civil or military, of this state or of the United States, nor while engaged in the navigation of the waters of the state or of the United States, or on the high seas, nor while a student of any institution of learning, nor while kept in any poor house or other asylum at public expense, nor while confined in any public prison."

In construing this Section of the Constitution, it was held in Registration of Voters in the City of Erie 21 Co. Court 473 that a soldiers' and sailors' home is clearly an asylum within the meaning of the law, and that inmates of such a home are legal voters, if otherwise qualified, in the respective districts where they last resided before entering the home, and not in the district where the home is located.

In passing upon the legal residence of an inmate of the Soldiers' and Sailors' Home at Erie, after referring to Registration of Voters in the City of Erie, Supra, and the authorities therein cited the Court held in Bertch's Estate 45 County Court 642:

"From these decisions it would appear to follow that the legal residence or domicile of Adam Bertch at the time of his death was in the county of Lancaster and not in the county of Erie. He was not a taxpayer in the county of Erie. He had no family residing therein and never had. He was not a voter in said county and never had been. He was simply an inmate of the Pennsylvania Soldiers' and Sailors' Home in the city of Erie, and kept there at the expense of the State of Pennsylvania. As said by Judge Walling in the decision above referred to, his relations were with the home and not with the city of Erie."

I, therefore, advise you that inmates of the Soldiers' and Sailors' Home have a legal residence in the respective counties where they last resided before entering the home and the county from which an inmate of such home comes is the proper county to expend the sum of \$75.00 towards the funeral expenses of an inmate who was a service man.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

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OPINIONS TO THE SECRETARY OF THE  
COMMONWEALTH

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## OPINIONS TO THE SECRETARY OF THE COMMONWEALTH

*Banks and banking—Banks as sureties for notaries public and public officers—  
Act of May 16, 1923.*

The Act of May 16, 1923, P. L. 248, affects only State banks, incorporated banking companies, trust companies, savings banks and unincorporated banks, and such such institutions may not after the date of the act become surety upon the bonds of notaries public and county officers.

October 31, 1923.

Honorable Clyde L. King, Secretary of the Commonwealth, Harrisburg, Pa.

Sir: Receipt is acknowledged of your letter of June 26, 1923, wherein you ask whether title insurance companies, fidelity insurance, safe deposit, trust and savings companies heretofore authorized to act in any fiduciary capacity, and who had accepted the prior acts of the Legislature, may continue to become surety upon the bonds of notaries public and county officers, or whether their powers have been curtailed, and if so, to what extent by the provisions of the Act of May 16, 1923, Act No. 161.

The provisions of the Act of May 16, 1923 are brief. Parts thereof that are material to this question are quoted as follows:

“That the word ‘bank’ as used in this act, means any State bank, incorporated banking company, trust company, savings bank, or unincorporated bank, heretofore or hereafter organized.

“No bank shall become surety on any bonds, except that any bank which has qualified itself, under the laws of this Commonwealth to engage in a fiduciary business, may become sole surety in any case where, by law, one or more sureties are or may be required for the faithful performance of the duties of any assignee, receiver, guardian, committee, executor, administrator, trustee, or other fiduciary, and may also become sole surety on any writ of error or appeal, or in any proceeding instituted in any court of this Commonwealth in which security is or may be required: \* \* \*

“Any bonds executed and delivered in violation of the provisions of this act shall be null and void.

“All acts or parts of acts inconsistent with this act are hereby repealed.”

Under the plain terms of this act any institution which comes within such definition of a "bank," that is, (a) any State bank, (b) incorporated banking company, (c) trust company, (d) savings bank, (e) or unincorporated bank, is prohibited from becoming surety on any bonds, except that such institutions which have qualified under the laws of this Commonwealth to engage in a fiduciary business, may do the bonding work that is usually done for fiduciaries. Companies that do not come within such specific designation of a "bank" as used in this act, are unaffected by it. The apparent purpose of the act is that of limitation and restriction only on banks. They are prevented from engaging in the bonding business generally, and permitted in a limited way only where they have legally become entitled to engage in a fiduciary business.

The act which permits banking companies, incorporated and organized under the laws of this Commonwealth, to act in fiduciary capacity is that of July 17, 1919, P. L. 1032. Sections 1, 2 and 4 are as follows:

"That corporations organized or hereafter to be organized under the laws of the Commonwealth for carrying on the business of banking, and having capital stock at least equal to the capital stock which trust companies are required by law to have, may be granted, by special permit, the right and power to act as trustees, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or habitual drunkards, or in any other fiduciary capacity in which trust companies organized under the laws of this Commonwealth have authority and are permitted to act.

"Such rights, powers and privileges shall be exercised by State banking companies for and during the term of the charter of said banking companies and any renewal and extension thereof.

"Banking corporations exercising the rights and powers conferred by this act, shall not be required to execute the bond usually required of individuals, but shall have the power to execute any bond required by law when acting in any fiduciary capacity."

The effect of the compliance with this act is that of reincorporation with the right and power to act as trustee, executor, \* \* \* "or in any other capacity in which trust companies organized under the laws of this Commonwealth have authority and are permitted to act."

It will be noticed that this act gives Banking corporations the right and power to act in certain specific capacities of a recognized fiduciary nature, or in any *other fiduciary* capacity in which trust companies have authority to act. The act does not broadly give the same right to transact business that a trust company may have. It is always limited to a fiduciary capacity. Section 4 relates only to the bond which the company may give itself, and does not cover bonds for assignees, receivers, etc. There are several acts of assembly which extend powers to trust companies to become sole surety. The Act of May 16, 1923, No. 161 therefore has the effect of removing any doubt, as to just what general bonds a bank qualified for a fiduciary business may execute, and in addition to the generally understood business of a fiduciary permits the bank to become sole surety on (a) any writ of error or appeal, or (b) in any proceeding instituted in any court of this Commonwealth in which security is or may be required.

It necessarily follows that a company such as a title insurance company covered by the Act of May 9, 1899, and given authority therein

“to become sole security for the faithful performance of any national, state, county or municipal officer, and execute such bonds or recognizances as may be required by law in such cases”,

would not be affected by the 1923 act for the very reason that it is not a “bank” as is embraced in the legal definition of the word.

It as clearly follows that any bank, so defined, and which has accepted the provisions of the trust company act of July 17, 1919, P. L. 1032, may not become surety on general bonds and is limited to those enumerated in Section 2 of the Act of 1923. Within this limitation are the items generally classified under fiduciaries, and bonds on appeal and for court where security is required. These latter cases are explicit, but just what constitutes a fiduciary relation is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards others, such as a trustee, executor, administrator, etc. It seems to be more often limited to technical trusts. Notaries public are public officers of ancient origin and certainly are not fiduciaries in any accepted legal meaning of that word. County officers, are also public officers, and are not fiduciaries if used as applying to technical trusts. As the apparent purpose of the Act as before stated is that limitation on banks, and restriction on their general right to become surety on bonds, in my opinion it should be construed as applying to fiduciaries in their relation to technical trusts.

You are, therefore, advised that the Act only affects State banks, incorporated banking companies, trust companies, savings banks and unincorporated banks, and that these institutions may no longer become surety upon the bonds of notaries, public and county officers.

Yours very truly,

DEPARTMENT OF JUSTICE,

By GEO. W. WOODRUFF,

*Attorney General.*

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*State Employees' Retirement System—Eligibility for membership therein of employees of the Department of Public Instruction formerly employed in the State Library and Museum; of persons employed by or for the Pennsylvania State Board of Censors; Pennsylvania Historical Commission and the several professional examining boards, placed within the Department of Public Instruction by the Administrative Code—Acts of May 24, 1923, P. L. 436; June 7, 1923, P. L. 498, Section 6; June 27, 1923, P. L. 858; June 29, 1923, P. L. 935; July 18, 1917, P. L. 1043.*

Employees of the State Library and Museum, of the Pennsylvania Historical Commission, and of any examining boards which were not integral Boards of the Department of Public Instruction prior to June 15, 1923, and who on said date were taken into the service of that department, are entitled to membership in the Retirement System established by the Act of June 27, 1923. Persons employed by said Department after June 15, 1923, for service in the State Library and Museum, above mentioned, are not entitled to membership in said Retirement System, but are confined to membership in the Public School Employees' Retirement System, created by the Act of July 18, 1917; members and Secretaries of the Boards and Commissions, above mentioned, whether appointed before or after June 15, 1923, are not eligible to membership in the Public School Employees' Retirement System. If entitled to retirements rights, they may become members of the Retirement System established by the Act of June 7, 1923.

February 11, 1924.

Dr. Clyde L. King, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request to be advised regarding the retirement rights under the several Retirement Acts now in force of (1) employees of the Department of Public Instruction who were formerly employees of the State Library and Museum; and (2) persons employed by or for the Pennsylvania State Board of Censors, the Penn-

sylvania Historical Commission and the several professional examining boards which were placed within the Department of Public Instruction by The Administrative Code.

To answer your inquiry, a brief resume of the several Retirement Acts now in force is a necessary preliminary.

The Act of July 18, 1917, P. L. 1043 created the Public School Employees' Retirement System. This act as originally passed applied to all "employees" as defined in Section 1 (7) of that act. The definition includes, in addition to teachers, principals, supervisors, and superintendents engaged in public school work directly, "any members of the Staff of the State Normal Schools, or of the Staff of the Department of Public Instruction, or of the Staff of the State Board of Education, or any clerk, stenographer, janitor, attendance officer, or other person engaged in any work concerning or relating to the public schools of this Commonwealth, or in connection therewith. \* \* \*" This definition was broadened by the Act of June 29, 1923, P. L. 935, to include employes of certain semi-state educational institutions which do not come within the purview of The Administrative Code.

The Act of May 24, 1923, P. L. 436 repealed and superseded pre-existing retirement acts relating to State employes generally. This act applies to "(a) 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; (b) all officers and persons employed by the Supreme and Superior Courts; and (c) all salaried officers and employes of hospitals, asylums, penitentiaries, reformatories, and other institutions operated by the Commonwealth."

Another 1923 Act,—that of June 27, 1923, P. L. 858,—established a State Employees' Retirement System and will supersede the Act of May 24, 1923, after December 31, 1924, except as to persons who shall prior to that date have become eligible to retirement under that act or any of the acts which it superseded. The Act of June 27, 1923 defines "state employes" as "any person holding a State office under the Commonwealth of Pennsylvania, or employed by the year or by the month by the State government of the Commonwealth of Pennsylvania in any capacity whatsoever. But the term 'State employe' shall not include judges, and it also shall not include those persons defined as employes in section one, paragraph seven" of the Act of July 18, 1917, P. L. 1043 as amended.

The Act of 1917 creating the Public School Employees' Retirement System provided for a service allowance to employes in the service



of the State when the Act became effective. This allowance is not granted to "new entrants,"—persons who become "employees" as defined by section 1 (7) of the Act, after the effective date of the Act.

The right to payments under the Act of May 24, 1923 is based entirely upon length of State service. This act specifically applies to 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; but as previously stated, the benefits of this act will not be available after December 31, 1924 except as to persons eligible to retirement thereunder prior to that date.

The Act of June 27, 1923,—like the Act of 1917,—makes a service allowance to persons in the State's service when the Act became effective.

One other statutory provision must be noted, namely, Section 6 of the Administrative Code (Act of June 7, 1923, P. L. 498) which reads as follows:

"Persons, who at the time when this act takes effect are appointed to or employed by any office, board, commission, institution, bureau, division, or department abolished by this act, and are appointed to positions in any other administrative departments, boards, or commissions, shall retain all rights to retirement with pension that shall have accrued or would thereafter accrue to them, and their services shall be deemed to have been continuous as if this act had not been passed."

In considering the effect of this section it must be noted that it applies only to persons who on June 15, 1923 were appointed to or employed by any office, board, commission, institution, bureau, division or department "abolished by this act" and appointed to positions in any other administrative departments, boards or commissions. So far as the activities of the Department of Public Instruction are concerned that Department is now performing the work formerly done by the State Library and Museum which the Code abolished. Persons formerly employed by the State Library and Museum and now employed by the Department of Public Instruction are plainly within the meaning of Section 6 of the Code.

The Pennsylvania State Board of Censors and the other boards to which your inquiry refers,—all of which, for fiscal purposes, have been placed within and made parts of the Department of Public Instruction,—are old boards. None of them was abolished. A narrow and literal interpretation of Section 6 would, therefore, exclude employes of these boards and commissions from the operation of that section. In a broad sense, however, while each of these boards and commissions has been retained, being merely placed

within the Department of Public Instruction for fiscal control, it has ceased to be an agency having the right to employ assistants and it has, therefore, from the standpoint of the right to employ persons been abolished and superseded by the Department of Public Instruction with which it is now connected. It is not conceivable that the Legislature intended to make an arbitrary distinction between the employes of an agency such as the State Library and Museum which was completely wiped out and the employes of the Pennsylvania State Board of Censors which although retained as an administrative agency ceased to have any employes upon the effective date of the Code. The employes both of the State Library and Museum and of the Pennsylvania State Board of Censors on June 15, 1923 because employes of the Department of Public Instruction. Unless their rights be saved by Section 6 of the Code all of these employes would be limited so far as retirement is concerned either to the benefits of the Act of May 27, 1923 which will cease to apply on December 31, 1924 or to membership in the Public School Employees' Retirement Fund. On becoming members of the latter Fund these employes would obtain no credit for past service; and it was this situation which Section 6 of the Code was unquestionably intended to prevent.

It is our opinion, therefore, that Section 6 of the Code was intended to preserve the rights of all persons whose positions were wiped out by the provisions of the Code if such persons were immediately re-employed for service in some other department, board or commission of the State government, and that all persons who would have been entitled to membership in the State Employees' Retirement System, if the Administrative Code had not been passed, are now entitled to membership in that system, notwithstanding the fact that they have become employes of the Department of Public Instruction as a result of the reorganization effected by the Code.

New employes of the Department of Public Instruction engaged for the service of the various boards and commissions connected with the Department will be in an entirely different situation. Their retirement privileges will be confined to membership in the Public School Employees' Retirement System.

We have in an opinion recently rendered to the Department of Public Instruction pointed out that all persons employed for service in the State Library and Museum are employes of that Department; that all persons employed to serve the Council of Education, the Pennsylvania State Board of Censors, the Public School Employees' Retirement Board, the Pennsylvania Historical Commission and the several professional examining boards and commissions and employes of that Department with the exception of secretaries to

these several boards chosen outside of their membership; and that the secretaries of these boards and commissions are not employes of the Department of Public Instruction but of the boards and commissions which select them.

We did not point out, but it is equally clear, that the members of the various boards and commissions connected with the Department of Public Instruction are not employes of that Department and are not, therefore, entitled to membership in the Public School Employes' Retirement System.

From what has been said it follows:

1. That persons who were employes of the State Library and Museum, of the Pennsylvania State Board of Censors, of the Pennsylvania Historical Commission and of any examining boards which were not integral parts of the Department of Public Instruction prior to June 15, 1923, and who on June 15, 1923 were taken into the service of that Department are entitled to membership in the Retirement System established by the Act of June 27, 1923;

2. That persons engaged by the Department of Public Instruction after June 15, 1923 for service in the State Library and Museum or for any of the Boards above mentioned are not entitled to membership in the Retirement System established by Act of June 27, 1923, but are confined to membership in the Public School Employes' Retirement System created by the Act of 1917; and

3. That members of and secretaries to any of the boards and commissions mentioned in your inquiry, whether appointed before or after June 15, 1923, cannot become members of the Public School Employes' Retirement System. Their retirement rights, if any, entitle them to become members of the Retirement System established by the Act of June 27, 1923.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,  
*Special Deputy Attorney General.*

*State Employees' Retirement System; eligibility to membership in by employees of the Boards of Trustees managing the Pennsylvania State Oral School for the Deaf, the Home for Training in Speech of Deaf Children before they are of School Age, and the Pennsylvania Soldiers' Orphan School—Acts of July 18, 1917, P. L. 1043; June 7, 1923, P. L. 498, Sections 2, 202, 435, 503, 1311; June 27, 1923, P. L. 858; June 29, 1923, P. L. 903.*

Employees of the Boards of Trustees, of the three Schools above mentioned, are entitled to membership in the State Employees' Retirement System.

February 11, 1924.

Dr. Clyde L. King, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether employes of the Boards of Trustees respectively managing the Pennsylvania State Oral School for the Deaf, the Home for Training in Speech of Deaf Children Before They Are of School Age and the Pennsylvania Soldiers' Orphan School may be admitted to membership in the State Employees' Retirement System established by the Act of June 27, 1923, P. L. 858.

An examination of the Opinions of this Department reveals the fact that the Public School Employees' Retirement Board has been advised (1) that employes of the Pennsylvania Soldiers' Orphan School could not become members of the Public School Employees' Retirement System, and (2) that employes of the other two institutions mentioned in your inquiry could become members of said system. However, the opinions advising the Public School Employees' Retirement Board were written without reference to the provisions of The Administrative Code, which treat the three institutions as of the same class. The employes of all of the institutions or of none of them must, therefore, be entitled to membership in the Public School Employees' Retirement Fund: and if so entitled debarred from membership in the State Employees' Retirement Fund. For this reason we shall here review the entire subject, and shall forward to the Public School Employees' Retirement Board a copy of this opinion.

The Administrative Code abolished the boards of trustees which formerly managed these three institutions (Section 2), and created new boards in their stead. (Section 202). These new boards of trustees are designated by the Code "departmental administrative boards." (Section 202). Their powers and duties are defined by Section 1311 of the Code, which provides that each board "shall have general direction and control of the property and management" of its institution, and, specifically, the right to elect a superintendent "who shall, subject to the authority of the board, administer the institution," to appoint such officers and employes as may be necessary, to fix the compensation of employes in conformity with the

standards established by the Executive Board, and, "subject to the approval of the Superintendent of Public Instruction, to make such by-laws, rules, and regulations for the management of the institution as it may deem advisable."

Section 503 of the Code provides that except as otherwise provided by the Code, departmental administrative boards within the several administrative departments "shall exercise their powers and perform their duties independently of the heads or any other officers of the respective administrative departments with which they are connected; but in all matters involving the expenditure of money all such departmental administrative boards \* \* \* \* shall be subject and responsible to the departments with which they are respectively connected." It further provides that whenever a department head is made ex officio a member of a departmental administrative board, he shall have the privilege of attending meetings and participating in debate, but shall not have the right to vote.

Under Section 435 of the Code, the Superintendent of Public Instruction is made ex officio a member of the three boards of trustees whose employes are involved in your inquiry.

The provisions of the Code to which reference has been made indicate clearly that the Boards of Trustees of the three institutions have complete control over their management except (1) that in dealing with fiscal affairs they are subject to the Department of Public Instruction, and (2) that their rules and regulations are subject to a veto power vested in the Superintendent of Public Instruction. As we have recently pointed out in an opinion to the Department of Public Instruction the employes engaged in the work of those institutions are State employes but not employes of the Department of Public Instruction. They are employes of the several Boards of Trustees.

Coming now to an examination of the Retirement Act of 1923 (P. L. 858), Section 1, clause 6 clearly entitles these employes to membership in the State Employes' Retirement System unless they are entitled to membership in the School Employes' Retirement System created by the Act of July 18, 1917, P. L. 1043; and by reference to Section 1, clause 7 of the Act of 1917 it is apparent that the employes of these institutions may become members of the School Employes' Retirement System only if the institutions are "public schools." "Public School" is defined by Section 1, clause 5 of the Act of 1917, as "any class, school, high school, normal school, training school, vocational school, parental school, and any or all classes or schools, within the State of Pennsylvania, conducted under the order and superintendence of the Department of Public Instruction of the Commonwealth of Pennsylvania and of a duly elected or ap-

pointed board of public education, board of school directors, or board of trustees, of the Commonwealth, or of any school district or normal school district thereof. \* \* \*."

Plainly the problems before us depends upon the answer to the question: Are the institutions involved "conducted under the order and superintendence of the Department of Public Instruction?"

The provisions of The Administrative Code already cited compel a negative answer. The boards of trustees have general direction and control of the management of the institutions. The superintendent of Public Instruction is a member of the boards but may not vote. The institutions are "administered" by superintendents "subject to the authority of the board." Only in dealing with expenditures of money does the Department of Public Instruction have the right to make orders relating to and superintend these institutions. While fiscal matters are important, they occupy a relatively minor place in the "conduct" of an educational institution. Similarly the power of the Superintendent of Public Instruction to disapprove rules and regulations of an institution cannot be said to render the institution subject to the "order and superintendence" of the Department of which he is the head.

We have not overlooked the fact that the Act of June 29, 1923, P. L. 903, authorizes the Council of Education "To supervise and inspect, to adopt standards for, and to require reports, financial or otherwise, from schools and institutions wholly or partly supported by the State which are not supervised by the public school authorities, including schools and institutions for the blind and the deaf and dumb." The Council of Education is, like the Boards of Trustees under discussion, a departmental administrative board. It is not the Department of Public Instruction, and even if the Boards under discussion could be said to be under the order and superintendence of the Council of Education, they would not by virtue of that fact be under the order and superintendence of the Department of Public Instruction.

You are accordingly advised that the employes of the Boards of Trustees of the three schools mentioned in your inquiry are entitled to membership in the State Employes' Retirement System.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

*Constitutional amendments—Timely and untimely submission—Construction of  
Armstrong v. King, Secretary of the Commonwealth.*

The effect of the decision of the Supreme Court in *Armstrong v. King*, Secretary of the Commonwealth, is that if the proposed amendments to the Constitution, authorizing the issuance of forest, armory and State College bonds should pass the Legislature of 1925, they could and should be submitted to the people at the November election in that year, but that thereafter no further amendments can be submitted until at least five years have elapsed.

July 11, 1924.

Honorable Clyde L. King, Secretary of the Commonwealth, Harrisburg, Pa.

Sir: You have asked me concerning the bearing of the Supreme Court decision handed down July 8, 1924, in the Soldiers' Bonus Constitutional Amendment case in which you were the Defendant, on your duty to submit that amendment to the voters this fall, and on the question as to which will be the next year in which there may be "timely submissions" of constitutional amendments:

First, the decision is that an order must issue in due time from the Dauphin County Court enjoining you from advertising the Soldiers' Bonus Amendment, or placing it upon the ballots for the election of November 4, 1924, as required specifically by Section 2 of the resolution providing for the amendment.

Second, as to the year when "timely submissions" of Constitutional Amendments to the voters will be next in order, we must turn to the first paragraph of the fifth page of the typewritten opinion of the Supreme Court, where this question is answered:

1. The Supreme Court calls attention to the fact that the Constitution of 1873, provides that "no amendment or amendments shall be submitted oftener than once in five years," and holds that there must be a lapse of at least five years between any "timely submission" of Amendments and the next "timely submission."

2. The Supreme Court states that submissions of amendments have been made to the people in the years "1901, 1909, 1911, 1913, 1915, 1918, 1920 and 1923."

It also states that of these submissions "the untimely submissions were in 1911, 1913, 1918 and 1923."

3. The identification by the Supreme Court of the "untimely submissions" without mention of the submissions of 1901, 1909, 1915 and 1920 must be taken to mean that it considers the unmentioned submissions to be "timely submissions."

The "timely submissions" of 1915 was preceded in less than five years by the submission of 1913, which latter the Supreme Court

declares was an "untimely submission." Likewise, the "timely submission" of 1920 was preceded in less than five years by the "untimely submission" of 1918.

This being the case, there is only one conclusion to be drawn, namely, that the Supreme Court holds that "untimely submissions," like those of 1913 and 1918, do not in any way affect the timeliness of submissions, like those of 1915 and 1920, which would have been "timely submissions" if the "untimely submissions" had not been made.

4. If, as I believe, the Supreme Court have held the submissions of 1915 and 1920 to be "timely submissions," it follows irresistibly that any submission of a Constitutional Amendment in 1925 would be a "timely submission." In other words, the "untimely submission" of 1923 could not prevent a submission in 1925 from being a "timely submission." Otherwise the submissions of 1913 and 1918 would have prevented the submissions of 1915 and 1920 from being "timely submissions."

#### CONCLUSION

I cannot read the Supreme Court decision otherwise than to the effect that if the proposed amendments to the Constitution authorizing the issuance of Forest, Armory and State College Bonds should pass the 1925 Legislature, they could and should be submitted to the people at the November election in 1925; but that, thereafter, no further amendments may be submitted until *at least* five years have elapsed.

Yours very truly,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,  
*Attorney General.*



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OPINION TO THE STATE TREASURER

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## OPINION TO THE STATE TREASURER

*Transfer inheritance tax—Appraisement—Failure to appeal—Refund of tax based on erroneous appraisement—Act of June 20, 1919.*

All questions of fact and law as to the valuation and liability of an estate appraised for the transfer inheritance tax, imposed by the Act of June 20, 1919, P. L. 521, are conclusively determined by the appraisement upon the failure to take an appeal as provided in the act, and the State Treasurer is without authority, where no appeal has been taken, to make a repayment of tax when the application for such repayment is based upon alleged error in the valuation or in deciding that the fund is liable to tax, "except in cases of overvaluation in the classes of estates expressly specified in the 40th section."

July 28, 1924.

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

Sir: With a letter from your Department, dated July 2, 1924, there were enclosed petition, proofs and correspondence in the matter of the application of the Executors of the Estate of John B. Steel, deceased, for a refund of the transfer tax imposed under and by the provisions of the Act of June 20, 1919, P. L. 521, alleged to have been paid in error. A request was made in said letter that, in view of the legal questions involved, an opinion from this Department was desired as to whether or not a refund should be allowed in this case, and, if so, what the amount of such refund should be.

## FACTS.

John B. Steel, a resident of the Borough of Greensburg, County of Westmoreland and State of Pennsylvania, died October 3, 1920. December 1, 1920, Edward A. Cremer, Register of Wills of Westmoreland County, appointed Joseph D. Wentling, of Greensburg, Pennsylvania, an appraiser "to make a fair and conscionable appraisement of such estate, and to assess and fix the cash value of all annuities and life estates growing out of said estate," in accordance with the provisions of the Act of June 20, 1919, P. L. 521. January 3, 1921, such an appraisement was made and filed. A tax was imposed in the sum of \$23,295.73 upon a clear value of the estate, subject to such tax in the amount of \$1,164,786.57. Payment of the said tax having been made within three months after the death of the decedent, a discount of five per centum of such tax was allowed in the sum of \$1,164.79. January 3, 1921, the date upon which the appraisement was made and filed, the executors of the last will and testament of the said John B. Steel paid the said tax in the amount of \$22,130.94.

It does not appear that at the time of the appraisement or at the time of the payment of the tax any question either as to the valuation or liability of the appraised estate for the tax was raised. The executors made payment of the tax promptly in order to secure the benefit of the discount allowed by Section 38 of said Act.

A petition for a refund of a portion of the tax paid was presented to the Register of Wills of Westmoreland County, addressed to the said Register of Wills, the State Treasurer and the Auditor General of the Commonwealth of Pennsylvania. The petition was forwarded to the Auditor General by the said Register of Wills by letter dated July 13, 1921. The Auditor General in turn referred it to the State Treasurer. This petition is styled a petition or application of the executors of the Estate of said decedent. It is not signed by such executors, but by attorneys for the Estate. The petition is alleged to be made in accordance with the provisions of Section 40 of the said Act of June 20, 1919, P. L. 521.

In this petition it is alleged that there was included within the appraisement of the estate of said decedent certain real estate, which, at the time of his death, was situate outside of the State of Pennsylvania; that the total value of this real estate, as valued in the appraisement, was \$477,062.40; that tax thereon, less discount for prompt payment, had been paid in the sum of \$9,064.19. The petition prays for a refund of the said sum of \$9,064.19 upon the ground that, such real estate being situate outside the State of Pennsylvania, its value could not be included in determining the clear value of the estate of said resident decedent to form the basis upon which the tax imposed by the said Act of 1919 could be calculated, and further that under the provisions of the will of the said decedent no conversion took place whereby the said real estate so situated outside of the State of Pennsylvania was converted into personal property and, therefore, brought within the jurisdiction of the Commonwealth of Pennsylvania for taxable purposes under the said Act of 1919.

It appears from a letter addressed to the Cashier of the Treasury Department of the State, dated August 12, 1921, and from the deductions allowed from the gross value of the estate in order to determine its clear value, and which deductions were exhibited in the appraisement filed, that the executors had the services of counsel, who was also, as appears by the receipts given by the Register of Wills for the payment of the tax, one of the executors.

#### DISCUSSION.

It is clear from the foregoing facts that the errors alleged in the petition raise questions of law. The contention of the petitioners is that under the provisions of the Act of 1919, *supra*, real estate

situated outside the State of Pennsylvania can not be included for the purpose of determining the clear value of the estate which constitutes the basis upon which the tax is imposed under the provisions of the said Act of Assembly, and that no conversion resulted from the language of the will of the said testator which brought such property within the jurisdiction of the Commonwealth of Pennsylvania wherein and whereby such tax could be imposed with reference thereto.

Sections 10 and 13 of Article II of the said Act of 1919 read as follows:

"Section 10. The register of wills of the county in which letters testamentary or of administration are granted upon the estate of any person dying seized or possessed of property while a resident of the Commonwealth, shall appoint an appraiser, whenever occasion may require, to appraise the value of the property or estate of which such decedent died seized or possessed and hereinbefore subjected to tax. Such appraiser shall make a fair, conscionable appraisement of such estates, and assess and fix the cash value of all annuities and life-estates growing out of said estates, upon which annuities and life-estates the tax imposed by this act shall be immediately payable out of the estate at the rate of such valuation."

"Section 13. Any person not satisfied with any appraisement of the property of a resident decedent may appeal, within thirty days, to the orphans' court, on paying or giving security to pay all costs, together with whatever tax shall be fixed by the court. Upon such appeal, the court may determine all questions of valuation and of the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme or Superior Court."

I do not think there can be any doubt that the questions of law raised in the petition in this case could have been raised upon appeal to the Orphans' Court of Westmoreland County, subject to the right of appeal to the Supreme or Superior Court, in accordance with the provisions of said Section 13 of the Act. The Orphans' Court is given express authority to "determine all questions of valuation and of the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme or Superior Court." Every question which is raised in this petition could have been raised by way of such appeal if it had been taken within the said period of thirty days. Instead of an appeal being taken the tax was paid by the personal representatives of the decedent.

Section 40 reads as follows:

"Section 40. In all cases where any amount of such tax is paid erroneously, the State Treasurer, on satisfactory proof rendered to him by the register of wills or Auditor General of such erroneous payment, may refund and pay over to the person paying such tax the amount erroneously paid. All such applications for the repayment of such tax erroneously paid in the treasury shall be made within two years from the date of payment, except when the estate upon which such tax has been erroneously paid shall have consisted, in whole or in part, of a partnership or other interest of uncertain value, or shall have been involved in litigation by reason whereof there shall have been an over-valuation of that portion of the estate on which the tax has been assessed and paid, which over-valuation could not have been ascertained within said period of two years; in such case the application for repayment shall be made to the State Treasurer within one year from the termination of such litigation or ascertainment of such over-valuation."

It will be observed under this section that the application for repayment is to be made to the State Treasurer for the repayment of tax erroneously paid in the State Treasury "within two years from the date of payment," except in certain cases. The State Treasurer is given authority to "refund and pay over to the person paying such tax the amount erroneously paid" "on satisfactory proof rendered to him by the register of wills or Auditor General of such erroneous payment." Under the language of this section the State Treasurer is without authority to make a refund except when the required proof is rendered to him by the Register of Wills or the Auditor General.

Attorney General Kirkpatrick, in an opinion rendered to the Auditor General May 2, 1887, as to the meaning of the word "erroneously" as contained in the Act of June 12, 1878, P. L. 206, held that the word as used in such statute "must be given its ordinary legal meaning, and applied to error in fact arising from ignorance or mistake." He expressly held that where the error is one of law it is not within the provisions of the said Act of 1878. This Act authorized the State Treasurer to refund collateral inheritance tax which had been paid "erroneously, to the register of wills of the proper county, for the use of the Commonwealth, \* \* \* on satisfactory proof rendered to him by said register of wills of such erroneous payment."

March 11, 1892, Attorney General Hensel, in an opinion rendered to the State Treasurer, approved the construction of the said Act of June 12, 1878, P. L. 206, given by Attorney General Kirkpatrick.

He held that the Legislature having provided in Section 12 of the Act of May 6, 1887, for an appeal from the appraisement it could not be assumed "that it was ever contemplated the State Treasurer should be constituted an appellate jurisdiction on this subject, or that he should be empowered to revise an error of judgment on the part of the appraiser, nor that interested parties should be permitted to take the chances of property being appraised too low, and secure a rebate from the Commonwealth if it happens to be appraised higher than its market price." In this latter case the basis of the alleged erroneous payment was the payment of the tax upon an alleged over-valuation of real estate made in the appraisement. The Attorney General held that having failed to take an appeal from the appraisement the appraisement was conclusive upon the parties. In conclusion he said:

"No error, therefore, appears \* \* \*, unless there was an error of judgment on the part of the appraiser selected by the register, and the parties having taken no appeal from that appraisement, it is to be assumed they were satisfied with it at the time.\* \* \*"

The error of judgment on the part of the appraiser in that case, if there was error, was an erroneous valuation of the estate. Such error was one of fact. It will be seen that the Attorney General made no distinction between error of fact and law.

In the case of *Hutchinson v. The Commonwealth*, 6 Barr 124, the Supreme Court said with reference to the appeal allowed under the provisions of the Act of March 30, 1811, 5 SM. L. 228, from settlements of accounts made by the Auditor General and State Treasurer, that a failure to take an appeal was conclusive. The Court said on page 128:

"\* \* \* The object of the appeal thus given is to enable the appellant to open the account settled by the accounting officers, and subject it to the scrutiny of a tribunal armed with all the powers necessary to a critical investigation. But what if no appeal be taken? In such case the implication that the lawmakers intended the settlement to be conclusive is necessary and irresistible. If this were not so, and the complaining party were at liberty to impeach the action of the auditor and treasurer in an action subsequently brought, the appeal provided by the statute would be altogether unnecessary, and the attempt to settle an account, in a large majority of litigated cases, end where it began. It is, however, insisted that the conclusive effect of such a settlement is to be confined to errors de hors the evidence of settlement, and does not embrace and protect such as appear on its face. But we see no warrant for this distinction

in the language or spirit of the Act of Assembly. By declining to appeal, the party concedes the correctness of the settlement in every particular, and he cannot afterwards be permitted to aver that his acquiescence was induced by misapprehension of the law. Admitting this to be true, it is beyond the power of the ordinary tribunals to afford redress. If injustice has been done, the only remedy is to be found in the exercise of the extraordinary power of the legislature."

(See also *Commonwealth vs. Pennsylvania Co.*, 145 Pa. 266.)

It is not within reason to conclude under the facts presented in the instant case that the executors did not know what they were doing. It is to be assumed that they examined the appraisement, knew its contents, verified the calculation of the tax they paid, the valuation of the estate upon which it was based and the deductions allowed from the gross value. The conclusion, therefore, is irresistible that all parties in interest were convinced of the correctness of the valuation and the liability of the appraised estate for the tax. With the knowledge that the real estate in question was included in the appraisement the tax was paid. Nothing was done by way of ignorance or mistake. They did what they intended to do.

In the case of *Commonwealth vs. Pennsylvania Co.*, 145 Pa. 266, 280, the Supreme Court had before it the question of the power of the Auditor General and State Treasurer to make settlements and resettlements of accounts between the State and its debtors and power of the Board of Revision created by the Act of April 8, 1869, P. L. 19. The Court in this connection considered the provisions of the Act of March 30, 1811, 5 SM. L. 228, section 8 of the Act of April 21, 1846, P. L. 415, and the Act of April 8, 1869, P. L. 19.

In answer to a contention that the taxes there in question had been omitted by mistake the Supreme Court said, on page 280 of the opinion:

"\* \* \* When one fails by some forgetfulness, or inadvertence, to do what he intended to do, or knew should be done, such failure may be said to happen by mistake. But, if one does just what he intended to do, in the way he intended, after careful deliberation and competent legal advice, his action is in no sense due to mistake. His conclusion may be wrong, but it has been considerably reached. His action may do some one an injustice, but, if so, it is not the result of accident, but of a conviction that the action is the proper one to take. Before such action can be reversed, or set aside, it is necessary to revise the conclusions on which it rested. An error in computation, or in transcribing, may be corrected, and such correction merely gives effect to the

purpose of him by whom the error was made. He failed to do what he intended, when he made the error, and its correction is in aid of his own execution of his intent.  
\* \* \*

I do not think the fact that by the following provision of Section 40—

“\* \* \* All such applications for the repayment of such tax erroneously paid in the treasury shall be made within two years from the date of payment, except when the estate upon which such tax has been erroneously paid shall have consisted, in whole or in part, of a partnership or other interest of uncertain value, or shall have been involved in litigation, by reason whereof there shall have been an over-valuation of that portion of the estate on which the tax has been assessed and paid, which over-valuation could not have been ascertained within said period of two years; in such case the application for repayment shall be made to the State Treasurer within one year from the termination of such litigation or ascertainment of such over-valuation.”

the Legislature intended that all questions of valuation of appraised estates fell within the scope of such section. So to hold would be in effect to nullify the provisions of Section 13 covering the jurisdiction of the Courts upon appeal as to valuation. So to hold would result in the very evil which the Supreme Court condemned in *Hutchinson vs. Commonwealth*, *supra*, relative to the appeal provided in the Act of 1811, *supra*.

Especially apt is the language of the Supreme Court in this case, as is made clear by the interpolation of language (indicated by parentheses) appropriate to the facts in the instant case.

“\* \* \* But what if no appeal be taken? In such case the implication that the lawmakers intended the settlement (the appraisal) to be conclusive is necessary and irresistible. If this were not so, and the complaining party were at liberty to impeach the action of the auditor and treasurer (the appraiser) in an action subsequently brought, (in an application for refund under Section 40 of the Act of 1919, *supra*), the appeal provided by the statute would be altogether unnecessary, and the attempt to settle an account, (to determine the valuation and liability of the appraised estate for the tax), in a large majority of litigated cases, (in a large majority of estates), end where it began. \* \* \*”

(*Hutchinson vs. Commonwealth*, 6 Barr 124, 128.)

Sections 13 and 40 must be considered together in order to arrive at their proper interpretation and construction.



What has been said applies with equal force with reference to the provisions of Section 27 of the Act providing for an appeal from an appraisement made by an appraiser appointed by the Auditor General.

I am, therefore, of the opinion that all questions of fact and law as to the valuation and liability of an appraised estate for the tax are conclusively determined upon a failure to take an appeal as provided in the Act and that the State Treasurer is without authority under the provisions of Section 40 of the Act to make a repayment of tax when the application for repayment is based upon alleged error in such valuation or liability, except in the cases of over-valuation in the classes of estates specified expressly in said Section 40.

You are, therefore, advised that no repayment or refund should be made in this case.

Yours very truly,

DEPARTMENT OF JUSTICE,

By JOHN ROBERT JONES,  
*Deputy Attorney General.*

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**OPINIONS TO DEPARTMENTAL ADMINIS-  
TRATIVE BOARDS AND COMMISSIONS**

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## OPINIONS TO BOARD OF EXAMINERS OF ARCHITECTS

*State Board of Examiners—Registration and Certification in other States—Powers of Board—Act of 1919, P. L. 933.*

The provisions of the Act of July 12, 1919, P. L. 933, relative to the registration of architects by the State Board of Examiners, do not compel the Board to accept registration and certificates from another State. While the Board may accept, there is nothing in the Act which makes it obligatory so to do.

December 10, 1923.

Mr. M. I. Kast, Secretary, Board of Examiners of Architects  
Harrisburg, Penna.

Sir: Your letter of November 21, 1923, has been received by this Department. As I understand the facts upon which you ask an opinion, they are as follows:

A number of architects, residents of and practicing in this State neglected to qualify as provided in the Act of July 12, 1919, P. L. 933. They now desire to become registered but do not care to file an affidavit as is permitted by the Act. To overcome this situation some have applied and been registered in other States and now seek registration in this State under Class "B," as provided by the Act.

You now want to know if the State Board of Examiners is bound to accept registration of other States and register the applicant in this state.

The Act of July 12, 1919, P. L. 933, in Section 7, provides as follows:

"The Board of Examiners may, in lieu of all examinations, accept satisfactory evidence of any one of the qualifications set forth under subdivisions "A" and "B" of this section."

Subdivision "B" provides:

"Registration and certification as an architect in another State or country where the qualifications required are equal to those required in this State."

Does the language of the Act just quoted make it obligatory for the Board of Examiners to accept such registration and certification, or is the language merely permissive?

In *Endlich on the Interpretation of Statutes*, Section 306, the following is laid down:

"Statutes which authorize persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they 'may' or, 'shall, if they think fit,' or, 'shall have power,' or that 'it shall be lawful' for them to do such acts, a statute appears to use the language of mere permission."

"When words are affirmative and relate to the manner in which power or jurisdiction in a public officer or body is to be exercised and not the limits of the power, they are in general directory."

*Pittsburgh vs. Coursin*, 74 Pa. 400.

It will be observed that the parts of the Act above set forth relate to the manner in which the power of the Board may be exercised and are, therefore, not mandatory, but simply directory.

In determining whether these provisions are mandatory or directory, we find no better statement of the principle that should control than is contained in the opinion of Mr. Justice Sharswood, in *Bladen vs. Philadelphia*, 60 Pa. 464:

"It would not perhaps be easy to lay down any general rule as to when the provisions of a statute are merely directory and when mandatory or imperative. Where the words are affirmative and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised and not to the limits of the power or jurisdiction itself, they may, and often have been construed to be directory."

Being of the opinion that the provisions of the Act of July 12, 1919, which are here under consideration, are not mandatory but directory or permissive, I advise you that the Board of Examiners is not bound to accept registration and certification of an architect in another State, but may do so if, in its judgment it is proper so to do, but there is nothing in the Act which makes it obligatory to accept such registration and certification. Especially is this the case where the qualifications of the State in which registration took place are not equal to those required in this State.

Very truly yours,

DEPARTMENT OF JUSTICE,

By J. W. BROWN,  
Deputy Attorney General.

*Corporations—Architects' certificates not to be granted to—Act of July 12, 1919.*

Under the Act of July 12, 1919, P. L. 933, corporations are not entitled to a certificate of qualification as architects, as they cannot comply with the requirements of the act.

May 15, 1924.

Mr. M. I. Kast, Secretary, State Board of Examiners of Architects,  
Harrisburg, Pa.

Sir: Your inquiries as to the right of a corporation to practice architecture in this State have been received by this Department.

The Act of July 12, 1919, P. L. 933, regulates the practice of architecture in the Commonwealth. It provides that any person residing in or having a place of business in this State who, upon the date of the approval of the Act, is not engaged in the practice of architecture shall, before engaging in such practice, secure from the Board of Examiners a certificate of qualification. Any person who has been engaged in such practice for at least one year prior to the passage of the Act must also obtain a certificate as provided by the Act.

It also prescribes the preliminary education necessary for an applicant to have in order to register and for "examination in such technical and professional courses as may be established by the Board of Examiners." Many other requirements are set forth in the Act and in the last section it is made a misdemeanor to violate any of the provisions of the Act.

An examination of all of its provisions clearly shows that the Act contemplated natural persons only. A corporate body could not comply with what is required because it could not show the necessary preliminary education; it could not be examined in technical and professional courses and it could not be visited with penalties prescribed for a violation of the provisions of the Act, at least so far as imprisonment is concerned. "As it can not observe the law of the State as a precedent requisite it can not exercise the franchise."

The general rule applicable to the learned professions is that they can not be conducted or practiced by corporations. As defined  
Words and Phrases—

"An 'architect' is one skilled in practical architecture, one whose profession is to devise plans or ornamentation of buildings or other structures or to direct their construction."

By common acceptance architecture is one of the professions and is so generally regarded.

So far as I have been able to find, the right of a corporation to conduct or to practice architecture has never been before any Court for determination, but the Courts have passed upon such right in the case of medicine, law, and dentistry.

In reference to a corporation practicing medicine Attorney General Carson, in an opinion dated March 21, 1904, Attorney General's Opinions 1903-04, page 40, held:

“\* \* \* My better judgment tells me that this is an effort to escape from the acts of Assembly which require medical examination and medical registration by those who intend to practice the medical profession. I do not think that it is competent for a corporation to practice medicine, even through duly qualified agents.”

In regard to a corporation practicing law it was laid down in 6 Corpus Juris 569, with a citation of authorities to sustain what was laid down, as follows:

“The right to practice law is not a natural or constitutional right, but is a privilege or franchise subject to the control of the legislature, and limited to persons of good moral character with special qualifications ascertained and certified as prescribed by law. The right to practice law is not ‘property,’ nor in any sense a ‘contract,’ nor a ‘privilege of immunity,’ within the constitutional meaning of those terms. It cannot be assigned or inherited, but must be earned by hard study and good conduct. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in.”

In *re Co-Operative Law Co.*, 92 N. E. 15, the following principle was enunciated:

“\* \* \* The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law is in the nature of a franchise from the state conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is attested by a certificate of the Supreme Court, and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal.

It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an invasion which the law will not tolerate. \* \* \*

\* \* \* \* \*

“A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it. \* \* \*”

In passing upon the right of a corporation to practice dentistry it was held in *Commonwealth vs. Alba Dentists Co.*, 30 C. C. 65, as follows:

“The company cannot be examined as to fitness, and, therefore, it cannot exhibit a license from the dental council to the prothonotary of the court of the county in which it desires to practice dentistry and be registered. But an examination by the applicant and the presentation of a license to practice, and consequent registry, are statutory prerequisites to engaging in practice, and to say that a corporate body cannot be examined in respect of qualifications to practice dentistry is only saying that the act of July 9, 1897, necessarily contemplated natural persons only. If it cannot observe the law of the state as a precedent requisite, it cannot exercise the franchise. The impossibility of compliance by the company with the law of this state works its exclusion from its limits to engage in the business authorized by that law.”

The same reasons set forth in the authorities above mentioned apply to the practice of architecture by a corporation. It can not comply with the requirements of the Act of 1919 and, therefore, it is excluded from engaging in the practice authorized by that law.

Very truly yours,

DEPARTMENT OF JUSTICE,

By J. W. BROWN,  
*Deputy Attorney General.*

## OPINIONS TO THE BOARD OF FINANCE AND REVENUE

*Finance and Revenue—Investment Securities—Act of 1923, P. L. 145.*

Authority of Board to invest the \$500,000 "Agricultural College Land Script Fund" in certain classes of securities.

April 29, 1924.

Honorable Clyde L. King, Secretary, Board of Finance and Revenue, Harrisburg, Pa.

Sir: I have your request for an opinion from the Department of Justice as to the list of securities in which the \$500,000 "Agricultural College Land Script Fund," provided for by the Act of May 7, 1923, P. L. 145, may be invested.

Section 2 of said Act of May 7, 1923 lays down the rule for the investment of said \$500,000 fund in the following language:

"The Sinking Fund Commissioners are hereby authorized and directed to invest the said five hundred thousand dollars in said fund in such securities as the said Sinking Fund Commissioners are authorized to invest the funds of the Commonwealth."

The powers of the Sinking Fund Commission are by Section 1102 of the Administrative Code of 1923 vested in the Board of Finance and Revenue, and therefore, in this opinion I will use the word "Board" to mean, as the reference may be, the "Sinking Fund Commissioners," the "Sinking Fund Commission," and "The Board of Sinking Fund Commissioners" because the Board of Finance and Revenue has at this time all the powers and duties of said Commission, Commissioners and Board.

The above quotation from Section 2 of the Act of May 7, 1923 gives the rule to follow in order to discover the securities in which the Board is authorized to invest the said \$500,000, and a search discloses that the Board has been authorized to invest "funds of the Commonwealth" in the following securities:

1. "Interest bearing indebtedness of the State" of Pennsylvania, (Section 4 of the Act of April 13, 1870, P. L. 67); "Any part of the loan of this Commonwealth next becoming due." (Section 8 of the Act of April 13, 1870, P. L. 67); "The public debt of the Commonwealth," (Sec. 1102 (k) of the Act of June 7, 1923, P. L. 498); "Lawfully issued interest bearing securities of \* \* \* the Commonwealth of Pennsylvania" (Section 2 of the Act of May 4, 1915, P. L. 524); in fact, to be more explicit, any bonds of the Commonwealth of Pennsylvania.



2. "Bonds of the United States" (Section 1102 (L) of the Act of June 7, 1923, P. L. 498). This does not include any bonds except those issued directly by the United States.

3. "Lawfully issued interest bearing securities of \* \* \* any county, city, borough or school district of this (Pennsylvania) Commonwealth." (Section 2. of the Act of May 14, 1915, P. L. 524).

4. "Any obligations of municipalities of other States," (Section 2, Act of May 14, 1915, P. L. 524).

There seems to be no opportunity for argument as to whether the securities mentioned in paragraphs numbered "1" and "2" directly above, are securities in which the Board is authorized to invest said \$500,000 fund.

As to the securities mentioned in paragraphs numbered "3" and "4," the immediate provision of Section 2 of the Act of May 14, 1915, P. L. 524, is for investment of fire and casualty insurance funds of the Commonwealth *by the State Treasurer*; but we are obliged to note that the State Treasurer is authorized to make such investment only "*under the supervision and direction of the Board of Sinking Fund Commissioners*" (now the Board of Finance and Revenue).

Therefore, it is my opinion that the securities mentioned in said paragraphs "3" and "4" are "such securities as the said Sinking Fund Commissioners (The Board) are authorized to invest the funds of the Commonwealth" in, for the reason that the power to direct another in the making of investments is clearly the power to make investment, especially when the investing agency, subject to such direction, is given no independent power to invest the funds in question.

It should not be overlooked that in identifying the above enumerated securities as those in which the \$500,000 fund may be invested no limitations, as to price or practice, are imposed. The Board is left free to exercise its own discretion in all particulars provided only it invests only in the securities identified.

Although, in my opinion the above list of four classes of securities in which the Board is authorized to invest said \$500,000 fund is correct and complete under existing law, it should not be overlooked that, within the limits of said list of securities the Board has entire discretion to limit its investments of the \$500,000 fund to any of said classes of securities, and to any particular securities within said classes.

Yours very truly,

GEORGE W. WOODRUFF,

*Attorney General.*

*State Board of Finance and Revenue—Claim for Taxes Erroneously Paid—Dissolution of Corporation—Act of June 5, 1913, P. L. 449.*

The dissolution of a corporation after filing a claim for a refund of state taxes erroneously paid did not terminate the claim, as under the Act of June 5, 1913, P. L. 449, said dissolution did not terminate its right to "Maintain and defend suits already brought for \* \* \* the collection of \* \* \* obligations owing to or by it." The officers of the corporation last elected had power to receive and dispose of the property of the corporation.

October 30, 1924.

Board of Finance and Revenue, Harrisburg, Pennsylvania.

Gentlemen: I have your request for an opinion on the following:

*Facts:*—Pennsylvania Reconstructed Stone Company filed a claim before the Board of Finance and Revenue for refund of certain taxes which the company claims were erroneously collected. The Board has decided that the claim should in the main be allowed. This claim was filed nearly a year ago, and in the interval before its consideration the company finally dissolved.

*Questions:*—(1.) Does the dissolution of the corporation after the filing of the claim, and before it was acted upon, terminate the claim?

(2.) If not, how shall the claim be credited on the books of the Commonwealth, and how can the credit be utilized by the dissolved corporation?

The Act of June 5, 1913, P. L. 449 provides that Section one of the Act of May 21, 1881 shall read as follows:

"That all corporations for mining, manufacturing, or trading purposes, or for the purchase and sale of real estate, and construction companies, whether created by general or special acts of Assembly, whose charters may have expired or may hereafter expire, or which may have been dissolved or may hereafter be dissolved by any judicial decree, may bring suits, and maintain and defend suits already brought, for the protection and possession of their property, and the collection of debts and obligations owing to or by them, and sell, convey, and dispose of their property, and make title therefor, as fully and effectually as if their charters had not expired, or such decree had not been made; and the officers last elected, or the survivors of them, shall be officers to represent said corporation for such purposes, and, if no officers survive the stockholders may elect officers under their by-laws: Provided, That this act shall be construed only so as to enable said corporations to realize and divide their assets and wind up their affairs, and not to transact new business."

As to the first question it is evident that the dissolution of the corporation does not terminate its right to "maintain and defend suits already brought for \* \* \* the collection of \* \* \* obligations owing to or by them." The pressing of the claim for the refund of taxes erroneously paid may be considered as being the maintenance of a suit; and the law quoted above not only clearly gives the dissolved corporation the right to maintain the suit, but also to collect "obligations owing to" the corporation. Therefore, the Board of Finance and Revenue has the duty, to the extent it considers the claim just and equitable, to order the reimbursement, by a proper credit on the books of the Commonwealth, of the amount found by the Board to be due to the corporation.

As to question (2), the credit having been allowed it should be duly entered upon the books of the Commonwealth in favor of the company in its corporate name; and the law quoted above clearly provides that "the officers (of the corporation) last elected, or the survivors of them, shall be officers to represent said corporation," in order that it may "dispose of their property, and make title therefor, as fully and effectually as if \* \* \* such decree (of dissolution) had not been made." Therefore, the officers of the above corporation, mentioned in the above quotation, may dispose of the property right of the corporation to the credit allowed by the Board by executing and delivering in the name of the corporation such assignment of the credit allowed as it might have made if it had not been dissolved.

Yours very truly,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General.*

## OPINIONS TO BOARD OF MEDICAL EDUCATION AND LICENSURE

*National Board—Pennsylvania Board—Certificate—Admitting to Practice—Discretion—Faculty Members of Medical School—Act of June 3, 1911, P. L. 639.*

The examinations conducted by the National Board of Medical Examiners are legal so far as the Pennsylvania laws are concerned, and if an applicant has successfully passed an examination by that Board and can present to the Pennsylvania Board of Medical Examination and Licensure satisfactory certificates of having in every way fulfilled all the scholastic and other requirements of the law, and the National Board of Medical Examiners is considered competent by the Pennsylvania Board such applicant may, in the discretion of the Board, without further examination, receive a certificate as provided by law.

The provision in the Act of June 3, 1911, P. L. 639, relating to the practice of medicine, that "no member of the Board of Medical Education and Licensure shall be a member of the faculty of any undergraduate school, college or university teaching medicine and surgery" is an express requirement, so that no member of the board dare be a member of the faculty of any such institution.

February 28, 1924.

Doctor I. D. Metzger, President, Board of Medical Education and Licensure, Harrisburg, Penna.

Sir: Your letter stating that your Board had passed a motion that the "Attorney General be requested to pass an opinion on the legality of the examinations given by the National Board of Medical Examiners in view of the fact that some of these examiners are members of the faculty of under-graduate medical colleges," has been received.

The Act of June 3, 1911, P. L. 639 is an Act relating to the right to practice medicine and surgery in the Commonwealth of Pennsylvania. It creates the Bureau of Medical Education and Licensure and defines its powers and duties. It has been amended by the Acts of July 25, 1913, P. L. 1220, May 24, 1917, P. L. 271, April 20, 1921, P. L. 158, and the Administrative Code changes the name of the body from Bureau to Board.

Section 1 of the Act of 1911 prescribes penalties for the violation of any of the provisions of the section, thereby making it a penal statute and one that must be construed with some strictness.

Section 2 of the Act creates the Bureau of Medical Education and Licensure; fixes the number of members of the Bureau and provides for their appointment, terms of office and qualifications. It further provides, "but no member of said Bureau shall be a member of the faculty of any undergraduate school, college or university teaching medicine and surgery."

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This is an express requirement of the Act and must be obeyed. Therefore, no member of the Board dare be a member of the faculty of any such institutions as are forbidden in the Act. It is a very proper prohibition and it is not hard to understand why the Legislature so provided.

If a member of the Board was a member of the faculty of an undergraduate school, college or university teaching medicine and surgery, he would naturally feel a pride in such institution and feel that it was fit to render its graduates eligible for licensure. This, if not agreed in by all the other members of the Board would soon lead to discord and confusion, for the Act provides,—“In the determination of the fitness of any Pennsylvania medical college to render eligible its graduates for licensure, unanimous consent of all seven members shall be necessary.”

This, however, is as far as the Act of 1911, or any of its amendments, goes in regard to membership in the faculty of any institution teaching medicine and surgery. It relates to members of the Board of Medical Education and Licensure, but to no others, and that which is not in the law cannot be read into it.

The Act of April 20, 1921, P. L. 158, amending the Act of 1911, provides, in Section 4, inter alia, as follows:

“Applicants for a licensing certificate who have been successfully examined by any medical board considered competent by the Bureau of Medical Education and Licensure, and who can, in addition, present to the bureau satisfactory certification of having in every way fulfilled all the scholastic and other requirements of this act, may, without further examination, receive from the bureau, in its discretion, a certificate conferring all the rights accorded by this act, provided the applicant has paid a fee of fifty dollars, and further provided that such applicant has not previously failed at an examination of this Commonwealth.”

This provision of the Act of 1921 contains no reference to membership in faculties of medical institutions by members of an examining board. All that is required is that the Board of Medical Education and Licensure consider the examining board competent, and the applicant can present satisfactory certificates of having in every way fulfilled the requirements of the Act, scholastic and otherwise, but even then it is discretionary with the Board whether to grant a certificate or not.

The National Board of Medical Examiners, I am informed, is incorporated under the laws of the District of Columbia. You report that its examinations are as thorough and exacting as any conducted

by State boards. A large number of States now grant certificates to those passed by that Board.

The question of whether any members of the National Board of Medical Examiners are members of a faculty of an institution teaching medicine and surgery does not, and cannot, under our Act of Assembly arise in granting a certificate to one examined and passed by it.

In holding examinations of applicants in this State, the law provides "for the purpose of conducting such examinations the Bureau shall have the privilege of calling to its aid medical assistance," and from the time the law was passed the Board has been calling to its aid teachers in schools where medicine and surgery is taught. This is entirely proper, for there is nothing in the law forbidding it, just as there is nothing in the law prescribing the qualifications of members of "any medical board considered competent by the Bureau of Medical Education and Licensure."

Reciprocity with other States has been established by the Board and the basis in which such reciprocity shall obtain between this and other States shall be a license earned by examination in either State, but when the license is earned in another State the question whether any of the examiners were members of the faculty of a school, college or university in which medicine and surgery is taught, is never raised, and it should not be for there is nothing in our laws which require such inquiry and nothing which forbids any member of any examining board being a member of such faculty.

The law which forbids a member of the Board of Medical Education and Licensure from being a member of the faculty of any undergraduate institution teaching medicine and surgery stops with the members of the board. It goes no further. It does not include members of any examining board, and the legality of examinations conducted by such board is not affected by that provision of the law.

I therefore advise you that the examinations conducted by the National Board of Medical Examiners are legal so far as our laws are concerned, and if an applicant has successfully passed an examination by that Board and can present to the Board of Medical Education and Licensure satisfactory certificates of having in every way fulfilled all the scholastic and other requirements of the law, and the National Board of Medical Examiners is considered competent by your Board such applicant may, in the discretion of the Board, without further examination, receive a certificate as provided by law.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN

*Deputy Attorney General.*

*Name—Change of name—Decree—License to practice medicine.*

1. Where a person has applied to take the State examination for a license to practice medicine, and thereafter he has procured a change of his name by a decree of the Common Pleas, a license may be issued to him under his new name, although his credentials filed with his application bore his old name.

2. In such case, the law does not look to the name, but only to the identity of the individual.

February 28, 1924.

Doctor I. D. Metzger, President, Board of Medical Education and Licensure, Harrisburg, Penna.

Sir: On May 15, 1923, Boleslaw John Bielski filed a petition in the Court of Common pleas of Allegheny County for a change of his name. After publication and compliance in all other respects with the Act of Assembly governing this procedure, a decree was entered by the Court changing the name of petitioner to that of Robert John Billings.

At the time the petition was filed Bielski was an interne in a hospital at Pittsburgh and about to take his State examinations for a license to practice medicine. He filed his credentials in the name he then bore, Boleslaw John Bielski, as at that time the decree had not been entered changing his name.

After the decree was entered and before his license was issued he forwarded a certified copy to the Department of Public Instruction with a request that his license be issued in the name of Robert John Billings. He was notified by your Board that it would be impossible to issue him a license in any other name than that under which his credentials were filed.

The question arises,—Can a license be issued to him in the name of Robert John Billings, the name he now legally bears?

In the case of a Notary Public who has had his name changed by decree of court, this Department has held that the commission was issued to a person certain and there was no reason why that person should not have a commission in the new name. The commission was issued to the person and not to the name. The same reasoning applies to a license issued to practice medicine. The person to whom a license was issued having changed his name by legal procedure, in a way recognized and approved by the law, he should not be deprived of any of his rights for doing so. He is entitled to all the rights which were his under his old name, and one of these rights was to practice medicine, and he ought not as Robert John Billings be compelled to practice under a license issued in the name of Boleslaw John Bielski.

A man's name is the mark by which he is distinguished from other men and as Robert John Billings is now the legal name of him who

formerly bore the name of Boleslaw John Bielski, he should be given a license in his legal name, for the only thing the law looks to is the identity of the individual.

Probably the leading case on a change of name is *Petition of Snook, 2nd Pittsburgh Reporter, 26*, and in that case the court speaking of a changed name, held: "Any contract or obligation he may enter into or which others may enter into with him by that name, or any grant or devise he may hereafter make by it would be valid and binding, for an acquired known designation it has become as effectually his name as the one he previously bore."

In *Clouser vs. Snyder, 8 Berks Co. Law Journal, 81*, it is laid down—"that a man may adopt any name he chooses and that his acts and contracts by such name will be legal."

You are therefore advised that if Robert John Billings returns the license issued to Boleslaw John Bielski, together with a certified copy of the decree of the court changing his name, if such decree is not already filed in the Department of Public Instruction, while it is not obligatory it is legal and only fair that a new license should be issued to Robert John Billings to practice medicine in this Commonwealth under that name.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*



## OPINIONS TO BOARD OF OSTEOPATHIC EXAMINERS

*State Board of Examiners—Knowingly Practicing Without a License—Good Moral Character—Discretion of Board.*

To practice osteopathy knowingly in Pennsylvania without a license is a misdemeanor under the law. It is not an infamous or heinous offense and in itself alone does not purport that one is not of good moral character. It is entirely a matter for the State Board of Osteopathic Examiners to determine whether this fact, together with all other facts of moral character presented to the Board, should disqualify an applicant for license on the ground that he is not of good moral character as required by the Act of March 19, 1909, P. L. 46, and its amendments.

February 8, 1924.

Dr. O. J. Snyder, President, Board of Osteopathic Examiners, Philadelphia, Pa.

Sir: In a recent communication to this Department you submitted the following facts:

A regular graduate in Osteopathy came into Pennsylvania in July, 1923, and engaged as Assistant to a regularly licensed Pennsylvania Osteopath, who has since died. This graduate inquired to your Board whether it was legal for him to practice Osteopathy until the next meeting of your Board, when he intended taking the examinations required for licensure. You advised him of the Act of Assembly applicable thereto and stated that no one can enter upon the practice of Osteopathy until a license is first procured from the State Board of Osteopathic Examiners without violating the law. Despite your notice he continued to practice up to January 25, 1924, when he came to Philadelphia to take the examinations scheduled to begin January 28, 1924. He admitted, when questioned at Philadelphia by you, that he had practiced Osteopathy in Pennsylvania from July, 1923, up to January 25, 1924; that he had received your letter, and that he knew he was practicing in violation of the law. You advised him that you considered that he was ineligible to take the examinations because one of the requirements for eligibility is good moral character, and that you did not regard him as fulfilling that requirement because he knowingly violated the law as indicated. He objected and was permitted to take the examinations on condition that if the Board found him to be ineligible after receiving an opinion from this Department he would forfeit his examination fee paid to the Board, as well as all claims to licensure should his examination prove successful. He entered upon the examinations on these terms.

You now ask for an opinion from this Department as to the procedure for the Board to adopt in this case, the report of the examina-

tions not having yet been completed. Your question appears to be: Whether one having intentionally and knowingly violated the law as to the practice of Osteopathy, is qualified to be licensed to practice Osteopathy, having complied with all other qualifications.

The procedure in this case is regulated by the Act of March 19, 1909, P. L. 46, and its amendments. Section 8 of this Act, as amended by Section 1 of the Act of May 17, 1917, P. L. 229, provides as follows:

“From and after the approval of this act, any person not theretofore authorized to practice osteopathy in this State, and desiring to enter upon such practice, may deliver to the Secretary of the State Board of Osteopathic Examiners, upon the payment of a fee of twenty-five dollars, a written application for license, together with satisfactory proof that the applicant is more than twenty-one years of age, *is of good moral character*, has obtained a preliminary education as hereinafter provided, and has received a diploma conferring the degree in osteopathy from some legally incorporated, reputable osteopathic college of the United States, or some foreign country, wherein the course of instruction consists of at least three separate years of not less than nine months in each separate year. \* \* \*”

It will be noted that “good moral character” is expressly made one of the qualifications of all applications. Even where one has failed to pass successfully upon a second examination and an application *de novo* is made, he must first comply with the standard of qualification “as to character, preliminary and osteopathic education, in force at the time of said application.”

There is under the law but one original tribunal to determine the question of the moral character of the applicant, and that tribunal is the State Board of Osteopathic Examiners. In the usual course of procedure it would appear to us to be well for the Board of Examiners to make, if possible, the determination of the qualifications, including good moral character, of all applicants before the day set for the beginning of the examinations. Those applicants who fail to meet the qualifications may then be notified in time to save the expense of their sojourn to the seat where examinations are held and the further possible loss of forfeiture of the examination fee. In this case the State Board of Examiners were probably not familiar with the full facts of the matter until the day when the examinations began, and then, upon questioning, it was admitted by the applicant that not only had he received the letter previously referred to from the President of the Board of Examiners, but that he had knowingly practiced Osteopathy in violation of the law up to the very time he presented himself to take the examinations.

In determining whether the applicant is of good moral character the Board should take into consideration all the facts presented concerning his moral character. The acts of the applicant in practicing osteopathy after notice from the Board of Examiners that to so practice without a license would be a violation of the law may indicate to your Board of Examiners not only a wilful disregard of the laws of the State, but also of the notice of your Board. Has the applicant conducted himself as a man of good moral character ordinarily would? The conduct of the average man is probably as high as the standard can be set. And in the consideration of this particular violation of the law in the determination of the moral character of the applicant, the Board of Examiners should take cognizance of all the surrounding circumstances of the act or acts complained of, and whether or not the applicant really knowingly and intentionally violated the law. The violation here referred to is a misdemeanor under the law. It is not an infamous or heinous offense, and the commission of these acts in themselves alone does not purport that one is not of good moral character.

You are therefore advised that knowingly practicing Osteopathy in violation of the law does not in itself disqualify one from being licensed to practice Osteopathy in Pennsylvania. It is entirely a matter for the State Board of Osteopathic Examiners to determine whether this fact, together with all other facts or moral character presented to the board, disqualify the applicant on the ground that he is not of good moral character as required by the Act of 1909 and its amendments. The Board of Examiners should accordingly proceed at once to determine the question as to whether or not the applicant "is of good moral character." If the determination by the Board be that the applicant is not of good moral character, they need go no further because the applicant is thereby disqualified from becoming licensed.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,  
*Deputy Attorney General.*

*Narcotic Law—Osteopaths—Doctors of Medicine—Administering Drugs—Personal Privilege—Act of March 19, 1909, P. L. 46, as amended by the Act of June 14, 1923, P. L. 795.*

Osteopathic physicians duly licensed under Section 11 of the Pennsylvania Act of March 19, 1909, P. L. 46, as amended by the Act of June 14, 1923, P. L. 795, may possess, employ and administer narcotic drugs, as defined by the Harrison Narcotic Law, but it is plain that they may not be dispensed, given away, or prescribed for use by patients, or alleged patients or any persons, except by the osteopath himself and his assistants directly under him in cases of minor surgery and obstetrics; and any effort to stretch this right beyond such personal professional use would make the osteopathic physician as criminally liable as though he were not licensed to practice the healing art.

The Osteopathic Surgeons' Examining Board provided for in Section 11 (a) of the Act of June 14, 1923, P. L. 795, has not as yet been appointed pursuant to that law, and therefore, there is not now, and never has been, an Osteopathic Surgeons' Examining Board in the Commonwealth of Pennsylvania, and no legally effective licenses have to this time been granted to osteopathic physicians authorizing them to practice osteopathic major, or operative surgery.

The laws of Pennsylvania recognize at least two different schools of physicians and licenses them to practice according to the tenets and principles of their schools respectively namely "osteopaths" and "Doctors of Medicine."

September 29, 1924.

Dr. O. J. Snyder, Chairman, State Board of Osteopathic Examiners,  
Harrisburg, Pa.

Sir: I am writing this opinion at your request; but because the United States Treasury Department, which is desirous of abiding by the rulings of the State (primarily the executive and finally the courts) in the matter of the enforcement of the Harrison Narcotic Law within the State, has asked specific questions, and further because these questions are in line with the subject matter of your request for an opinion,—I am setting forth these questions as the ones to which this opinion will be directed:

1. Are osteopathsists duly licensed under Section 2 of the Act of June 14, 1923, lawfully entitled under the provisions of that Section to distribute, dispense, give away or administer,—or supply prescriptions for, to be filled and used by patients otherwise than under direct supervision of said licensed osteopathsists or their assistants,—any of the drugs coming within the purview of Section 1 of the Act of Congress of December 17, 1914, as amended by the Revenue Act of Congress of 1918 known as the Harrison Narcotic Law?

2. Are osteopathic surgeons under Section 3 of the Act of June 14, 1923, lawfully entitled to distribute, dispense, give away or administer,—or supply prescriptions for, to be filled and used by patients otherwise than under direct supervision of said licensed osteo-

pathists or their assistants,—any of the drugs coming within the purview of Section 1 of the Harrison Narcotic Law, as amended?

3. Does the State Board of Osteopathic Examiners as mentioned in Section 2 of the Act of June 14, 1923, refer to the present board of osteopathic examiners of which Dr. O. J. Snyder is president and has such board issued any licenses under the provisions of that Section?

4. Has the Osteopathic Surgeons' Examining Board, referred to in Section 3 of the Act of June 14, 1923, been duly appointed, and if so, has such Board commenced to function to the extent that licenses have been granted to practitioners of osteopathic surgery?

### GENERAL DISCUSSION.

In determining what the word "narcotics" means we will for the purpose of this opinion take it for granted that, whatever may be the varying opinion of medical men and pharmacists, narcotics are the substances or drugs covered in Chapter 1, Section 1, of the Act of Congress approved December 17, 1914 as amended, namely, "opium or coca leaves or any compound, manufacture, salt derivatives, or preparation thereof", or to express it in the words of the Pennsylvania Act of July 11, 1917, P. L. 758, where the definition is attributed to "drugs", narcotics shall include—

"\* \* \* (a) opium; or (b) coca leaves; or (c) any compound or derivative of opium or coca leaves; or (d) any substance or preparation containing opium or coca leaves; or (e) any substance or preparation containing any compound or derivative of opium or coca leaves."

Section 4 of said Pennsylvania Narcotic Law of 1917, specifically exempts "licensed physicians" from the prohibition that—

"No person shall have in his possession or under his control, or deal in, dispense, sell, deliver, distribute, prescribe, traffic in, or give away, any of said drugs." ("narcotics").

This exemption of licensed physicians does not necessarily constitute a specific permission that they may do all or any of the acts quoted directly above from said Section 4. The exemption simply means that "licensed physicians" may, each and every one, *to the extent that he has rights concerning narcotics* by virtue of his particular license as a physician, exercise such rights without being liable under the prohibition of said Act of July 11, 1917.

Having determined what this opinion will mean by use of the word "narcotics" we are led directly to the consideration of the questions set forth above.

#### QUESTION NO. 1.

Persons licensed to practice osteopathy in the State of Pennsylvania are "osteopathic physicians" (see Section 12, Act of March 19, 1909, P. L. 46, and Section 11(a) of said Act as amended by Act of June 14, 1923, P. L. 795). The laws of Pennsylvania recognize at least two different schools of physicians and licenses them to practice according to the tenets and principals of their schools respectively, namely "osteopaths" and "Doctors of Medicine".

The Pennsylvania Drug Act of 1917 exempts "licensed physicians" from the prohibition in that Act against the various uses of "drugs" ("narcotics"). It is evident that licensed "osteopathic physicians" are "licensed physicians", and unless prohibited by the Act creating them (Act of March 19, 1909, P. L. 46; as amended by Act of June 14, 1923, P. L. 795), said osteopathic physicians are entitled to employ narcotics in their practice.

The question then becomes: "Are osteopathic physicians in general permitted by the Act, under which they obtain their licenses, to employ 'narcotics' in their practice?"

We may not overlook the fact that in the second paragraph of Section 11 as amended by the Act of June 14, 1923, the "independent scientific system for the preservation of health and the relief and care of bodily disorders", adopted by the law as the foundation of "osteopathy", states that said "scientific system" embraces the employment of "*antiseptics, anaesthetics, and germicides* in case of necessity and antidotes in case of poisoning", whereas new Section 11 (b) of the Osteopathic Law indicates for licensed osteopathic surgeons that they may use "*antiseptics, anaesthetics, narcotics and germicides*", and that the inclusion of the word "narcotics" in Section 11(b) combined with its omission in Section 11 must be taken into consideration. In fact, if there was no other indication that osteopathic physicians in general have the right to employ narcotics to some extent in their practice, I would be constrained to the opinion that osteopathic physicians who are not also osteopathic surgeons, would not have that right.

However, we must give weight to the entire law contained in said Section 11. It is evident that the second paragraph of said Section 11 lays down the broad general rules governing the "system" of osteopathy. It is equally evident that, besides these broad general rules, the right of osteopathic practitioners is not only "as the same is herein defined" which clearly refers to the "independent scientific system" broadly set forth in paragraph 2 of Section 11, but extends

also to the power to "practice osteopathy in all its branches, *including minor surgery and obstetrics, without restriction*, as the same is \* \* \* taught and practiced in the legally incorporated, reputable colleges of osteopathy."

The words quoted directly above should be used in considering the use of the word "anaesthetics" in the second paragraph of Section 11. The general licensed osteopathic physician may practice "minor surgery and obstetrics." The use of anaesthetics in practicing minor surgery and obstetrics is clearly indicated at times not only by humanity, but also by the necessity of making it possible for the patient to lend himself with reasonable fortitude to the successful outcome of the minor surgical operation or the case of obstetrics. It is a matter of common knowledge that practically every intelligent citizen whose attention has been called in that direction knows, and talks, and understands to some extent, the use of "local anaesthesia" and also "local anaesthetics"; and, therefore, the use of "anaesthetics" alone in the second paragraph of Section 11 is not repugnant to the use not only of ether, chloroform, and other general anaesthetics, but also the use of "narcotics."

Inquiry from the Board of Osteopathic Examiners as representative of a reasonably accurate knowledge concerning osteopathy, makes it possible for me to state, that the "legally incorporated, reputable colleges of osteopathy" teach and practice that narcotics must not be used otherwise by general osteopathic physicians, but may be used in connection only with minor surgical operations and cases of obstetrics; and further, when thus used, must be administered only directly by the osteopathic physician himself or by an assistant working under his specific orders in each case.

Therefore, the answer to question one in my opinion is, that osteopathic physicians duly licensed under Section 11 of the Pennsylvania Act of March 19, 1909, P. L. 46, as amended by the Act of June 14, 1923, P. L. 795, have the following rights with regard to the various uses of narcotics as defined in the Harrison Law and the Pennsylvania Drug Act of July 11, 1917, P. L. 758:

(a) They certainly have the right to procure, and have in possession, and entrust to assistants working directly under their orders such drugs and medicines or substances in addition to the general anaesthetics, as may be used to produce local anaesthesia, including the drugs and substances touched upon by the Harrison Narcotic Law of the United States and the "Drug Act" of the Commonwealth of Pennsylvania also usually known as the "Narcotic Law" of this State; such narcotics having been defined by quotation from said Acts earlier in this opinion.

(b) Osteopathic physicians may not distribute, dispense, give away or administer "narcotics" except only in the performance of minor surgical operations, or attending to obstetrical cases; and they must then administer or employ the narcotics, either themselves or by assistants under their direction. It is my opinion that not only "narcotics" may be thus used directly in minor surgery and obstetrics, but also that other drugs, medicines or substances than "narcotics", known as "anaesthetics", "analgesics" and the like may be used by them in minor surgery and obstetrics.

(c) It is also plain that the "scientific system" of osteopathy, and the teaching and practice of schools of osteopathy, do not contemplate the right of osteopathic physicians to use any drug, except in minor surgery, and obstetrics, or as antidotes for poisoning.

(d) Moreover, although narcotics may be possessed, employed and administered by all licensed osteopathic physicians as indicated above in this opinion, it is plain that they may not be dispensed, given away, or prescribed for use by patients, or alleged patients or any persons, except by the osteopath himself and his assistants directly under him in cases of minor surgery and obstetrics; and any effort to stretch this right beyond such personal professional use would make the osteopathic physician as criminally liable as though he were not licensed to practice the healing art.

#### QUESTION No. 2.

Section 11(a) of the Osteopathic Act provides for an "Osteopathic Surgeons' Examining Board," and Section 11(b) for the licensing of any osteopathic physicians who can qualify under the law before said Board, to practice major or operative surgery as taught in colleges of osteopathy.

The fourth paragraph of said Section 11(b) clearly provides that such licensed osteopathic surgeons shall have authority to use "anaesthetics, antiseptics, *narcotics* and germicides when used for the purposes, in the manner and to the extent, only as taught and practiced under surgical procedure in the legally incorporated, reputable colleges of osteopathy."

To decide that osteopathic surgeons may use narcotics is comparatively easy. The difficulty is to answer Question No. 2 as to whether osteopathic surgeons may "distribute, dispense, give away, or administer" (or prescribe) narcotics, namely, "any of the drugs coming within the purview of Section 1 of the Harrison Narcotic Law, as amended."

In order to decide this part of the question it would be necessary to determine what use of narcotics is "taught and practiced under



surgical procedure in colleges of osteopathy"; because in whatever way the use of narcotics is taught and practiced in osteopathic colleges, osteopathic surgeons may use narcotics accordingly.

It is therefore my opinion that osteopathic surgeons licensed pursuant to Sections 11(a) and 11(b) of the Osteopathic Law have the same limitations as to "narcotics" described under the answer to "Question No. 1," and also the same rights and powers with the addition of the right to employ them in major surgery.

#### QUESTION No. 3.

The Board of Osteopathic Examiners, of which Dr. O. J. Snyder is now President, has been in existence for a considerable time and pursuant to the authorization of laws of the Commonwealth of Pennsylvania, has issued a substantial number of licenses to persons, thus legally qualifying them by virtue of such licenses to practice osteopathy including minor surgery and obstetrics, but not including major operative surgery. In fact the said Board of Osteopathic Examiners has no power to license osteopathic surgeons.

#### QUESTION No. 4.

The Osteopathic Surgeons' Examining Board provided for in Section 11(a) of said Act of June 14, 1923, P. L. 795, has not as yet been appointed pursuant to that law, and therefore, there is not now, and never has been, an Osteopathic Surgeons' Examining Board in the Commonwealth of Pennsylvania, and no legally effective licenses have to this time been granted to osteopathic physicians authorizing them to practice osteopathic major, or operative surgery.

Yours truly,

DEPARTMENT OF JUSTICE,

By GEORGE W. WOODRUFF,  
*Attorney General.*

## OPINION TO BOARD OF PUBLIC ACCOUNTS

*Corporations—Capital stock tax—Corporate loan tax—Penalties—Remission—Auditor General—State Treasurer—Board of Public Accounts—Acts of April 8, 1869, and July 15, 1919.*

1. The penalties provided by the Act of July 15, 1919, P. L. 948, for failure on the part of a corporation to file reports for capital stock and corporate loan taxes within the time prescribed by the act, are mandatory and cannot be remitted by the Auditor General or State Treasurer.

2. Where penalties have been correctly and legally settled against a corporation for failure to file reports for tax purposes within the time prescribed by law, the Board of Public Accounts is without authority under the Act of April 8, 1869, P. L. 19, to reverse the settlements and remit penalties.

April 3, 1923.

Mr. F. H. Lehman, Secretary, Board of Public Accounts, Harrisburg, Pa.

Sir: Your letter dated February 16, 1923 addressed to the Attorney General submitting the request of the Board of Public Accounts for an opinion as to the authority of the said Board to remit certain penalties, received.

## FACTS.

May 19, 1920 the Pittsburgh-DesMoines Company, a domestic corporation, filed in the office of the Auditor General its Capital Stock and Corporate Loans Report for the calendar year ending December 31, 1919. February 27, 1920 the Auditor General granted to the company an extension of time to May 1, 1920 within which to file its reports for the said year of 1919. June 7, 1920 the Auditor General made a settlement of the amount of Capital Stock Tax due the Commonwealth for the year 1919 in the sum of \$394.05, consisting of taxes at the rate of 5 mills, \$358.23, and penalty for failure to file the Report within the time limit provided by law in the sum of \$35.82, the same being ten per centum of the said sum of \$358.23. This settlement was approved by the State Treasurer June 9, 1920.

June 7, 1920 the Auditor General made a settlement of the Corporate Loan Tax due the Commonwealth for the year 1919, in the sum of \$126.00, consisting of taxes due at the rate of 4 mills, \$120.00, penalty for failure to file the Report within the time limit provided by law, \$12.00, the same being ten per centum of the said sum of \$120.00, and made an allowance of a deduction of Treasurer's Commission in the sum of \$6.00. This settlement was approved by the State Treasurer, June 9, 1920.

Upon receipt of the statement for the said taxes, including the penalties, the company made no contention that the settlements of

the tax upon which the said penalties were based were erroneously or illegally made. The company did object to the penalties and requested the Auditor General to remit them. The Auditor General refused to remit the penalties holding that the time limit, within which the Reports were to be filed, expired May 1, 1920, and, the Reports not having been filed until May 19, 1920, the penalties were properly imposed, their imposition under the law being mandatory.

Thereupon the said company petitioned the Board of Public Accounts for a remission of the penalties.

### QUESTIONS.

1. Have the Auditor General and the State Treasurer authority to remit penalties imposed as aforesaid?
2. Has the Board of Public Accounts authority to remit penalties imposed as aforesaid?

### DISCUSSION.

The Act of July 15, 1919, P. L. 948 provides that a company such as the present one is \* \* \* \*

“\* \* \* \* \* to make annually, on or before the last day of February, for the calendar year next preceding, a report in writing to the Auditor General on a form or forms to be prescribed and furnished by him, stating specifically: \* \* \*”

The said Act further provides:

“If the said officers of any such corporation, company, joint-stock association, or limited partnership shall neglect or refuse to furnish the Auditor General, on or before the last day of February in each and every year, or within sixty days of the end of its fiscal year, as herein provided, with the report, as aforesaid, it shall be the duty of the accounting officers of the Commonwealth to add ten per centum to the tax of said corporation, company, joint-stock association, or limited partnership, for each and every year for which such report was not so furnished, which percentage shall be settled and collected with the State tax in the usual manner of settling accounts and collecting such taxes.”

“The Auditor General may, upon application made before the last day of February in each and every year and upon proper cause shown, extend the time of filing returns for a period not exceeding sixty days from the last day of February of the year for which the same are required to be filed.”

Manifestly, the question as to whether or not the Auditor General and the State Treasurer have the authority to remit the penalties imposed in accordance with the said provisions of this Act, is to be determined by a proper interpretation and construction of the said Act of Assembly.

In the case of *Haddock vs. Commonwealth*, 103 Pa., 243, the Supreme Court said on page 249:

"The first and cardinal rule for construction of statutes is, that when the intent of the legislature is plainly expressed, it must prevail, that when the language of a statute is clear and unequivocal, without ambiguity or uncertainty we are to presume that it expresses the intent of the legislature, and no construction is necessary."

In the case of *City of Pittsburg vs. Kalchthaler*, 114 Pa., 547, the Supreme Court said on page 552:

"We think it is always unsafe to depart from the plain and literal meaning of the words contained in legislative enactments out of deference to some supposed intent, or absence of intent, which would prevent the application of the words actually used to a given subject. Such a practice is really substituting the theories of a court, which may, and often do, vary with the personality of the individuals who compose it, in place of the express words of the law as enacted by the law-making power. It is a practice to be avoided and not followed. It has been condemned by many text writers and by many courts. Occasionally it has been departed from, but the path is devious and a dangerous one, which ought never to be trodden except upon considerations of the most convincing character and the gravest moment."

In the case of *Commonwealth vs. Clairton Steel Company*, 229 Pa., 246, the Court had before it for construction the Act of June 15, 1897, P. L. 292. The Court below, whose judgment was affirmed, said on page 249:

"By that act exemption from taxation on its bonds owned by it in its own right is given to a state bank or savings institution which shall pay into the State Treasury on or before March 1 in each year the tax imposed therein upon the shares of its capital stock: *Commonwealth vs. Clairton*, 222 Pa. 293. *The language of the proviso granting the exemption as to the time when the stock tax shall be paid is without ambiguity, and, therefore, is not open to construction. The exemption is conditioned upon the payment of the tax on or before March 1, in each year.* \* \* \*

“\* \* \* We are not at liberty to disregard the time fixed by the Act of 1897, on or before which the stock tax must be paid in order to obtain exemption, and thus to relieve the defendant company from its liability in the present instance.”

In line with this reasoning Deputy Attorney General Hargest in an opinion rendered to the Auditor General under date of April 12, 1916 (Report and Official Opinions of the Attorney General, 1915-1916, p. 143), held that the duty of the Auditor General to impose the penalty for non-payment of taxes by trust companies within forty days from date of settlement is mandatory, and that the Act of June 13, 1907, P. L. 640 gave the Auditor General no discretion to waive the penalty as he might see fit.

I do not think there is any ambiguity in the language of the Act of 1919 relative to the imposition of these penalties and their settlement by the Auditor General and State Treasurer. The direction to the accounting officers of the Commonwealth contained in said Act is plain and their duty is clear. The language is that

“\* \* \* it shall be the duty of the accounting officers of the Commonwealth to add ten per centum to the tax of said corporation, company, joint-stock association, or limited partnership, for each and every year for which such report was not so furnished, which percentage shall be settled and collected with the State tax in the usual manner of settling accounts and collecting such taxes.”

I am therefore of the opinion that the Auditor General was correct in holding that the imposition of the said penalties under the said Act of 1919 is mandatory, and that the Accounting officers of the Commonwealth are without authority to remit them.

We now come to a consideration of the second question as to whether or not the Board of Public Accounts has the authority to remit these penalties.

The Board of Public Accounts is created by, and its authority and power set forth in, the Act of April 8, 1869, P. L. 19. The Act reads as follows:

“Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That the Auditor General, State Treasurer and Attorney General be authorized to revise any settlement made with any person or body politic by the Auditor General, when it may appear from the accounts in his office, or from other information in his possession, that the same has been erro-

neously or illegally made, and to re-settle the same according to law, and to credit or charge, as the case may be, the amount resulting from such re-settlement upon the current accounts of such person or body politic."

It will be noted that the authority of the Board of Public Accounts to revise any settlement is confined to the situation where it may appear from the accounts in the office of the Auditor General or from other information in his possession that the settlement has been erroneously or illegally made.

Under the facts of the instant case it is clear that the penalties were correctly and legally settled against the company.

I am therefore of the opinion that the Board of Public Accounts is without authority to revise the settlements and remit the said penalties.

Yours very truly,

JOHN ROBERT JONES,  
*Deputy Attorney General.*

## OPINIONS TO BOARD OF TRUSTEES OF EASTERN STATE PENITENTIARY

*Penal Institutions—Eastern State Penitentiary—Authority to include as part of the cost of keeping prisoners all ordinary repairs to penitentiary property.*

The cost of ordinary repairs should be included as part of the expense of keeping convicts in the Eastern State Penitentiary and should be charged *pro rata* to the several counties.

April 30, 1924.

Mr. Henry N. Woolman, Secretary and Treasurer, Eastern State Penitentiary, Philadelphia, Pennsylvania.

Sir: We have your request for an opinion as to whether the cost of ordinary repairs to penitentiary property can be properly included as part of the cost of keeping prisoners and charged *pro rata* to the Counties whose prisoners are inmates of your Institution.

This specific question was answered in an opinion by Deputy Attorney General Morris Wolf, rendered October 15, 1913, to the Warden of the Western Penitentiary. (Official Opinions of the Attorney General 1913-14, p. 325).

After reviewing the applicable statutes and the rulings of the Attorney General's Department prior to that time Deputy Attorney General Wolf reached the conclusion that the cost of ordinary repairs of buildings is properly included as a part of the expense of keeping convicts and should, therefore, be charged to the Counties from which the convicts come.

There has been no change in the law since the opinion of Deputy Attorney General Wolf was rendered and we see no reason for modifying in any way the decision rendered by him.

You are accordingly advised that the cost of ordinary repairs should be included as a part of the expense of keeping convicts in your Institution and charged *pro rata* to the several Counties.

Very truly yours,

DEPARTMENT OF JUSTICE,

By WM. A. SCHNADER,  
*Special Deputy Attorney General.*

*Penitentiaries—Visitation—Grand Jury of Philadelphia County—Acts of April 23, 1829, P. L. 341, April 16, 1846, P. L. 353, and May 14, 1909, P. L. 838.*

1. There is nothing in any of the acts relating to the visitation of the Eastern Penitentiary at Philadelphia which gives the grand jury of Philadelphia County the right to visit the penitentiary and interview the prisoners without the written permission of the penitentiary authorities.

2. If the grand jury of Philadelphia County, as a matter of right, were permitted to visit the Eastern Penitentiary, it would be equally proper that the grand juries of all other counties having prisoners confined therein should be accorded a similar privilege. Such a situation would be serious interference with the discipline and management of the prison.

3. Penitentiaries are state institutions, while county prisons are county establishments.

4. The Act of April 14, 1835, P. L. 232, giving the right of grand juries to visit the county prison of Philadelphia County, was a proper legislative enactment, inasmuch as grand juries have peculiarly the province of exercising a vigilant care over the public buildings and property of the county.

March 18, 1924.

Mr. Alfred W. Fleisher, President, Board of Trustees of the Eastern Penitentiary, Philadelphia, Pa.

Sir: We have your letter of recent date asking to be advised whether your Board is required by law to permit the Grand Jury of Philadelphia County to inspect your Institution and interview prisoners.

We understand that for many years it has been customary for the Judges of Philadelphia County to instruct Grand Juries to visit the Eastern State Penitentiary. This custom, we are sure, originated through a desire on the part of the Judges of Philadelphia County to co-operate with the State in the proper management of your institution; but you have asked to be advised whether these visitations are authorized by law, and it is our duty to comply with your request.

The right to visit penitentiaries is regulated by the Act of April 23, 1829, P. L. 341, which provides in Article VII, Section 8, that:

"No person who is not an official visitor of the prisons, or who has not a written permission, according to such rules as the Inspector may adopt \* \* \* shall be allowed to visit the same; the official visitors are the Governor, Speaker and members of the Senate, Speaker and members of the House of Representatives, the Secretary of the Commonwealth, the Judges of The Supreme Court, the Attorney General and his deputies, the President and Associate Judges of all the Courts in the State, the Mayor and Recorder of the Cities of Philadelphia, Lancaster and Pittsburgh, Commissioners and Sheriffs



of the several Counties, and the acting Committee of the Philadelphia Society for the Alleviation of the Miseries of Public Prisons.

"None but the official visitors can have any communication with the convicts, \* \* \*."

The Act of April 16, 1846, P. L. 353 added to the list of official visitors of Penitentiaries the Mayor of Allegheny.

The rights of official visitors of jails, penitentiaries and other penal and reformatory institutions of the Commonwealth are defined by the Act of May 14, 1909, P. L. 838. This Act permits official visitors under certain conditions privately to interview prisoners and for that purpose to enter their cells, rooms or apartments.

If Grand Juries generally, or the Philadelphia Grand Jury in particular were official visitors of the Eastern Penitentiary, they would unquestionably have the rights conferred upon all official visitors by the Act of May 14, 1909. The Act of 1829 did not, however, include the Grand Jury of Philadelphia County or the Grand Jury of any other County among the official visitors to the State's Penitentiaries. Under the Act of 1829, therefore, Grand Juries are excluded from visiting State Penitentiaries unless with the written permission of the Penitentiary authorities; and if accorded such permission by the Penitentiary authorities they do not thereby become "official visitors" and are not permitted except with the consent of the Penitentiary authorities to interview prisoners.

The situation with regard to visitation of the Eastern State Penitentiary is quite different from that which exists with regard to the Philadelphia County Prison. The Act of April 14, 1835, P. L. 232, Section 8 designates the official visitors of the Philadelphia County Jail. Among such visitors are the Grand Juries of the Court of Oyer and Terminer of the County of Philadelphia.

That Grand Juries should be designated as official visitors of County Jails, but should not be named as official visitors of the Penitentiaries is entirely consistent with the difference between the management and control of these respective Institutions. The County jails are distinctively County Institutions and Grand Juries have "peculiarly the province of exercising a vigilant care over the public buildings and property of the county, and in recommending improvements, extensions or new structures to meet the growing needs of the county's legal and official business." *Bierly on Juries and Jury Trials*, page 119. The Penitentiaries on the other hand are State property managed by Boards of Trustees appointed by the Governor and having no relationship whatever to the Counties in which they exist except the fact that they happen to be located in such counties. The Counties are not responsible for their maintenance or management, and exercise no voice in their control.

If the Grand Jury of Philadelphia as a matter of right were permitted to visit the Eastern Penitentiary it would be equally proper that the Grand Juries of every other County having prisoners confined in the Eastern Penitentiary should be accorded a similar privilege. There are thirty-three such counties in addition to Philadelphia County, namely, the counties of Adams, Berks, Bradford, Bucks, Carbon, Chester, Columbia, Cumberland, Dauphin, Delaware, Franklin, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Monroe, Montgomery, Montour, Northampton, Northumberland, Perry, Pike, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Wayne, Union, Wyoming and York. Were the privilege of visiting the Eastern Penitentiary to be granted to and exercised by the Grand Juries of thirty-four counties, the discipline and management of the Penitentiary might very well suffer serious interference as the result of a multiplicity of visitations and inspections. The Legislature, therefore, wisely failed to name any County's Grand Jury as among the official visitors of the Penitentiary.

We express no opinion on the question whether the custom of having your Institution visited by Philadelphia Grand Juries should be continued. That is a practical question to be determined by the Judges of Philadelphia County and your Board. We are merely advising you that as a matter of law your Board has the right to control such visitations and, if they continue, to determine to what extent grand jurors may interview inmates of your Institution.

Very truly yours,

DEPARTMENT OF JUSTICE,

By GEORGE W. WOODRUFF,

*Attorney General.*

## OPINION TO BOARD OF TRUSTEES OF WESTERN STATE PENITENTIARY

*Penal Institutions, Board of Trustees, Western State Penitentiary—Authority to charge to the several counties the salaries of guards—Acts of April 25, 1829, P. L. 341, Section 9, February 27, 1833, P. L. 55, Section 5, Act of March 30, 1911, P. L. 32, Section 3 and July 13, 1923, No. 44A.*

The Board of Trustees of the Western State Penitentiary cannot charge the salaries of guards to the several counties but must charge the same to the appropriation made by Act of 1923, *supra*.

August 17, 1923.

Mr. H. D. W. English, Chairman, Board of Trustees, Western State Penitentiary, Pittsburgh, Pa.

Sir: This Department has received for answer your letter written to the Governor on July 31st in reference to charging to the several counties salaries of guards.

The Act of April 23, 1829, P. L. 341, Section 9 provides:

“That the expenses of maintaining and keeping the convicts in said Eastern and Western Penitentiaries, shall be borne by the respective counties in which they shall be convicted.”

So much of the above section as relates to the maintenance of convicts is repealed by Section 5 of the Act of February 27, 1833, P. L. 55. It is difficult to explain just what the Legislature intended by this repeal, but evidently had in mind some distinction between “maintaining” and “keeping.”

In the case of the Commonwealth vs. Floyd 2 Pittsburgh 342, a mandamus was granted on the Treasurer of Allegheny County to pay a warrant for expenses of keeping the convicts from that county in the Penitentiary. The Court said of this claim:

“We think it is distinguished from ordinary claims against the county by the Act of April 23, 1829 in relation to the Eastern and Western Penitentiaries, which directs that the expenses of keeping the convicts shall be borne by the respective counties in which they shall be convicted.”

It has been the uniform practice since the passage of the Act of April 1829 for the counties to pay the expenses of keeping the convicts. There is no appreciable difference between keeping and maintaining, and “maintenance” has been construed by this Department a number of times. It has been held broad enough to include repairs to buildings, roads and machinery.

In an opinion by Attorney General Hensel, given November 21, 1893, he held that maintenance included expenses incurred “for re-

pairs to buildings and equipment, such as are necessary to keep the existing institution up to its original condition." And in this opinion the general rule is laid down as follows:

"A fair and liberal construction of appropriation for maintenance would be to supply dilapidation, to arrest, prevent or remedy decay, to maintain or restore, to erect where destruction has taken place; for example: To paint buildings from time to time; to restore worn out furniture; to erect a fence where one has fallen down; to replace insecure or dilapidated walls, ceilings or foundations, etc."

This opinion has been approved in opinions by at least three other Attorneys General, but in no case has it been held that the language of the Act is broad enough to cover the compensation paid to guards.

By the Act of March 30, 1911, P. L. 32, Section 3, your Board is authorized to employ such persons as it may deem necessary to secure the speedy and economical construction of the building and compensation to be fixed by the Board and approved by the Governor. And because it is also provided that "so far as practicable the work shall be performed by the inmates of the Western Penitentiary," guards are necessary.

The Act of July 13, 1923, making an appropriation to the Western State Penitentiary provided that the amount of the appropriation should be "for salaries of officers, parole work, returning convicts, electrocution department \* \* \* for extraordinary repairs and insurance." These two Acts, the Act of 1829 and the Act of 1923, apparently are the only ones providing funds for the use of the institution, as the Act of 1829 does not in any way provide for the payment of salaries of guards, it follows that such payment cannot be charged to the several counties. But the Act of 1923 having specifically provided for such salaries, they must be charged to the appropriation made by that Act.

In an opinion given by Deputy Attorney General J. E. B. Cunningham in 1912, he said this:

"You are, therefore, advised that the compensation for overseers or guards employed at the site of the new penitentiary when fixed by your Board and approved by the Governor, should be charged to the appropriation made in said Act of 1911."

You are, therefore, advised that the salaries of guards cannot be charged to the several counties, but must be charged to the appropriation made by the Act of 1923.

Yours very truly,

J. W. BROWN,  
*Deputy Attorney General.*

## OPINION TO DELAWARE RIVER BRIDGE JOINT COMMISSION

*Contracts—Public construction contracts—Surety of contractors—Interest of member of Commission awarding contract—Soliciting agent of bonding company.*

1. A public construction contract, otherwise properly awarded, is not void because a member of the Commission authorized to award the contract is the soliciting agent of a surety company which became surety for the contractor.

2. The fact that the contractor stated in his proposal that no member of the Commission was interested directly or indirectly in the contract as "surety" did not render the contract void *ab initio*, inasmuch as it was not a material misstatement amounting to fraud.

3. In such case, as there was a capable and responsible contractor, with a qualified and responsible surety standing back of them, no danger could come to the Commission by a mere misstatement that no member of the Commission had an interest in the business connected with the contract.

4. Section 66 of the Act of March 31, 1860, P. L. 382, which makes it a misdemeanor for certain officials or officers and employees of corporations to be interested in public contracts, does not make contracts to which it is applicable void if they are otherwise legal.

5. A member of a Commission, with power to award public contracts, who has an individual interest in such a contract, should not participate in awarding it.

February 18, 1924.

Delaware River Bridge Joint Commission, 804-18 Widener Building,  
Philadelphia, Pa.

Gentlemen: I duly received copy of your Resolution, adopted February 15, 1924, which reads as follows:

"The Delaware River Bridge Joint Commission at a meeting Friday, February 15th, 1924, unanimously adopted the following resolution offered by Mr. Lewis and seconded by Mr. Smith:

"WHEREAS, repeated statements have appeared in the Philadelphia newspapers to the effect that a member of this Commission is identified with a bonding agency which has solicited and supplied surety bonds for contractors to whom construction work has been awarded for the Delaware River Bridge by this Commission,

"AND WHEREAS, by reason of this alleged connection the validity of these contracts has been brought into question,

"THEREFORE, BE IT RESOLVED, That, prior to the awarding of any new contracts, the facts in connection with these allegations be thoroughly investigated and that a legal opinion be promptly obtained as to the effect of such facts upon the validity of contracts let or to be let by this Commission."

There is one possible difficulty about giving an opinion on the validity of the contracts you indicate; namely, that you did not state the facts connected with the award of such contracts upon which "the validity of these contracts has been brought into question." However, I feel so sure that you desire me to give a prompt answer to your request for a legal opinion that I will assume the responsibility at this moment (subject to correction if your investigation should develop different facts) to state the facts upon which this opinion will be based and to restate the question.

#### STATEMENT OF FACTS.

Thomas B. Smith is a member of the Delaware River Bridge Joint Commission and also Chairman of the Executive Committee of that Commission. He is also a majority stockholder and Director, but not an officer, in the Thomas B. Smith Company, which is an insurance agency acting (among other activities) as soliciting agent for National Surety Company in a district which includes Philadelphia.

National Surety Company is a corporation authorized and qualified to become surety, both in Pennsylvania and New Jersey, for any contractors who may enter into contracts with the Commission.

The Executive Committee acts intensively upon the question of contracts desired and questions concerning such contracts and the proposals and bids to be submitted by contractors; and it reports its digested findings to the Commission. The Commission awards contracts to the lowest responsible bidders. A bond up to fifty per cent. of the contract price is required.

Several contracts have already been awarded, with National Surety Company as bondsman, wherein Thomas B. Smith Company has secured the bonding business from the contractor for National Surety Company and received the same commission on said business thus secured as would have been received if Thomas B. Smith were not a member of the Commission and his agency had secured the same bonding business for National Surety Company.

Other contracts have been awarded with other corporate surety than National Surety Company.

None of the contracts thus far awarded have been given to any contractors except the lowest responsible bidders, and the question of the responsibility of the bidders has not been determined or affected because of the offer by the contractor of a bond from National Surety Company as compared with the offer of bonds from other qualified corporate sureties. The Commission feels sure that in awarding further contracts it can, and will, make sure to award such contracts only to the lowest responsible bidders, and that the offer of National Surety Company as surety will not in-

fluence the determination as to which bidder is the lowest responsible bidder. The officers of Thomas B. Smith Company, in active solicitation of business for National Surety Company, sent out at least three letters to possible bidders on contract work advertised by the Commission. In these letters the Thomas B. Smith Company offered its services for the procurement of bonds and stated that "our Thomas B. Smith" was also a member of the Commission. After at least three of these letters had gone out Thomas B. Smith discovered what was being done and immediately forbade and stopped any further practice of that kind, and also strove to recall the letters already sent out. One of these letters, however, came to the attention of other interested bidders, insurance agencies, or bonding surety corporations, and finally to the attention of the newspapers where the matter was taken up vigorously. Thereby the public was fully and widely informed of the above facts.

Thomas B. Smith admits in substance all the above facts. He denies that any of these facts have influenced his action as Chairman of the Executive Committee and a member of the Commission. As a matter of fact the Commission feels certain that the above facts have not influenced, and will not influence, the awarding of contracts pursuant to the law and good business practice to the lowest responsible bidders.

#### STATEMENT OF THE QUESTION.

1. Granting that the above statement of facts is true and substantially complete, are the contracts thus far awarded by the Delaware River Bridge Joint Commission with National Surety Company as surety valid unless and until they are canceled by due legal action for some good and sufficient reason; the bonding business having been solicited and secured from the contractor by Thomas B. Smith Company on behalf of National Surety Company with or without knowledge on the part of the contractor that Thomas B. Smith is a majority stockholder of Thomas B. Smith Company, and also a member of the Commission?

2. The same question with regard to contracts of the same kind awarded hereafter?

#### ETHICAL AND LEGAL ASPECTS

In order that the following discussion and opinion may not be misunderstood I draw attention to the fact that I have turned my back resolutely upon, and refrained from taking into consideration, the ethical side of this question, namely, as to whether a principal stockholder and Director of an insurance agency which has directly

to do with the soliciting of bonding business in connection with contracts should or should not be a member of the Commission. The ethical side of this question is one solely for the member of the Commission involved and the appointing power. The Attorney General, in considering the validity of the contracts under the facts set forth above, must, and will, take into account nothing but the purely legal aspects of the case. The Pennsylvania Delaware River Bridge Act, approved July 9, 1919, P. L. 814, does not provide that none of the members of the Commission may have an interest directly or indirectly in contracts connected with the work of the Commission. The mutual law of the two States provides that all contracts over \$2,000 shall be advertised; and also that "no action of the said joint commission shall be valid and binding unless a majority of the Pennsylvania commission and a majority of the New Jersey commission shall vote in favor thereof." The Pennsylvania Commission consists of eight members and, therefore, no contract can be awarded unless at least five members vote in favor of the award. It must be taken for granted that all members of the Commission vote for what, as far as they can see, is the best interest of the work involved, both from the standpoint of efficiency and economy. Thomas B. Smith's vote can not possibly be more than one vote out of five, seven or eight; according to the number of members of the Commission voting on the award of any one contract. Although the Act itself is silent concerning this matter, the form of proposal required by the Commission (and this proposal becomes part of the contract, if awarded) causes the contractor to certify the following as part of the inducement to the award of the contract

"This Proposal is made without any connection with any other person making a proposal or bid for the same purpose, and is in all respects fair and without collusion or fraud. No member of the Joint Commission or agent or employee thereof, is interested directly or indirectly, as contracting party, partner, stockholder, surety or otherwise in the supplies, work or business to which it relates, or in any portion of the profits thereof."

This statement in the proposal becomes a material part of the contract and if, in any substantial way or to any substantial extent, the statement is false, it would be ground for action by the other contracting party, namely: the Commission as representing the Commonwealth, to cancel the contract.

Any such false statement in the proposal, however, would not in itself give the contractor or his surety the right to cancel the contract or the bond. If the contractor should fail, the bonding company could not under the facts set forth above try to evade responsibility under the bond.



In other words, the Commonwealth could take steps to cancel the contract if there were any misstatement in the proposal substantially affecting the interest of the Commonwealth, but the contractor and his bondsman could not take advantage of the contractor's own wrong to cancel the contract or the bond.

Let us first consider whether under the facts set forth above there was substantial misrepresentation or false statement in the portion of the proposal quoted directly above. The facts would not establish:

(1) "Any connection with any other person making a proposal or bid for the same purpose."

(2) "Any unfairness, collusion or fraud."

(3) That Thomas B. Smith (a member of the Joint Commission) was "interested directly or indirectly as contracting party, partner, stockholder, surety \* \* \* in the supplies, work, or business to which it (the contract) relates, or in any portion of the profits thereof."

At first blush it might be thought that Thomas B. Smith was interested as "surety", but there is no claim that he has any interest in National Surety Company itself either as stockholder, director, or officer. This leaves only one question under the statements in the above quoted part of the proposal, namely, was Thomas B. Smith "interested directly or indirectly \* \* \* otherwise in the supplies, work, or business to which it (the contract) relates or in any portion of the profits thereof"? He was certainly not in any way interested in the supplies or work as far as the facts disclose.

The business to which the proposal or bid relates did, however, involve indirectly an interest of the Thomas B. Smith agency and, therefore, somewhat more indirectly of Thomas B. Smith himself, because the bond was part of the "business to which it (the contract) relates"; and although neither the agency nor Thomas B. Smith himself were *directly* interested in the bond they were *indirectly* interested therein to the extent of a "portion of the profits thereof."

Hence the statement in the proposal, it seems to me, failed of being true to the ultimate extent because of the fact that a member of the Commission had an indirect interest in a "portion of the profits" aimed at by the proposal or bid.

#### WERE THE CONTRACTS VOID?

Did this misstatement make the contract void? Without going into the very voluminous law on this question, the answer is indubitably: "No, the contract was not void ab initio because of the indirect interest of Thomas B. Smith in the payments to the con-

tractor, from which premiums would be paid to secure the bond of National Surety Company, and commissions thereon to the insurance agency, and possible dividends therefrom to Thomas B. Smith."

### ARE THE CONTRACTS VOID?

The contracts already awarded are not void because of the misstatement for the reason that contracts already entered into are enforceable at law except for some really material fraud on the part of one of the parties. In order that a misstatement may be material it must have brought about a contract which in itself is contrary to public policy or it must have worked to the substantial harm of the innocent party. The supply of labor and material toward the construction of the Delaware River Bridge is clearly a legal performance, and since the contractor is capable and responsible, with a qualified and responsible surety standing back of him, no danger can come to the Commission on account of a mere statement (even if untrue) that no member of the Commission has an indirect interest in the business covered by the contract. The performance of the contract is after all the substantial and material end and aim of the Commission.

### ARE THE CONTRACTS VOIDABLE?

Whether the contracts in question are voidable because of the alleged misstatement need not be considered at this time unless the Commission should have in mind actual steps to rescind some one or more of the contracts; and I take it for granted that the Commission has no intention of voiding the contracts which it has considered with so much care and awarded.

Certainly the contractors were the lowest responsible bidders or the contracts would not have been awarded to them. It is a matter of general knowledge in the business world that National Surety Company is a qualified and responsible surety. Since the contract was awarded to the lowest responsible bidder there would be more danger of harm to the public interest from the rescinding of the contract than from requiring that it shall be fulfilled.

I am not overlooking the fact that Section 66 of the Act of March 31, 1860, P. L. 382, makes it in general a misdemeanor for certain officers or employes of "any corporation, municipality or public institution" to be interested in any contract having to do with such corporation, municipality or public institution. This Section falls short of covering the case in question. Even if it were applicable the punishment provided for applies to the officer or employe and not to the contractor. In other words, this penal statute surely does not

make contracts to which it is applicable void, and I do not believe that it even makes them voidable merely because of the interest of the officer or employe.

### CONCLUSION.

1. As to the first question, the contracts already awarded by the Delaware River Bridge Joint Commission to contractors whose bonds have been supplied by National Surety Company and solicited by Thomas B. Smith Company are, in my opinion, legally valid. The contractors should be paid as promptly as convenient according to the terms and provisions of the contracts. The same auditing scrutiny should be given to requisitions for payments on these contracts, no more and no less, as is given to contracts secured by bonds supplied by other bonding companies than National Surety Company.

2. As to contracts not yet awarded, the Commission should consider the bids and proposals and the surety bonds offered just as they have done heretofore in order to determine which is the lowest responsible bidder for each contract and whether the security offered is that of a qualified and responsible bonding company. When awards are made with reasonable care along these lines the contracts will be valid whether the bond is given by National Surety Company, with Thomas B. Smith Company acting as its soliciting agent, or not. If Thomas B. Smith Company is interested in the matter because of having solicited the bond to be supplied, it is a recognized principle amounting to a legal requirement that Thomas B. Smith, because of his indirect interest, should not take part in determining the award of the contract.

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General.*

## OPINION TO GENERAL GALUSHA PENNYPACKER MEMORIAL COMMISSION

*General Galusha Pennypacker Memorial Commission—Authority to retain the unexpended balance of appropriations made in 1919 and 1921 to complete the contract for the erection of a memorial.*

The Commission under the appropriations made to it by the Acts of July 18, 1919 and May 27, 1921, may retain for a reasonable time after May 31, 1923, the money set apart for dedication purposes, the contract for the erection of the memorial having been awarded and the expenditure of the money having been provided for.

May 16, 1923.

Walter George Smith, Esq., Secretary, General Galusha Pennypacker Memorial Commission, Philadelphia, Pa.

Sir: Your inquiry of May 10, 1923, has been received by this Department. I understand the facts upon which you request an opinion to be as follows:

By an Act of Assembly, approved July 18, 1919, the sum of \$15,000 was specifically appropriated for the purpose of erecting a suitable monument or memorial to commemorate the distinguished military services of General Galusha Pennypacker. On February 1, 1921, you were advised by this Department that unless a contract was awarded for the erection of a monument or memorial before May 31, 1921, the appropriation would merge into the general funds of the Commonwealth. A contract for the erection of such memorial was entered into by your Commission on March 24, 1921. By an Act of Assembly approved May 27, 1921, an appropriation of \$30,000 and the unexpended balance of the 1919 appropriation was made to the Commission.

Under these facts you ask to be advised whether it is necessary to execute a second contract covering the balance of the appropriation unexpended before the end of the fiscal year and if the Commission would be authorized to retain a certain sum to cover the costs of dedication of the memorial.

The said Act of 1921 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 an appropriation is contemplated by the Acts making such appropriations.

In an opinion written by Deputy Attorney General Hargest he used the following language:

“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 of 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 said moneys are appropriated.

The contract for the erection of the memorial having been awarded and the expenditure of the money provided for, I am of the opinion that it is not necessary to execute a second contract and that the Commission is authorized to retain the sum of money mentioned for dedication purposes and that said sum will not lapse into the State Treasury if expended by the Commission within a reasonable time after May 31, 1923.

Yours very truly,

J. W. BROWN,  
*Deputy Attorney General.*

## OPINION TO PENNSYLVANIA BOARD OF PHARMACY

*Pharmacy—Permits to Conduct—Fees—Act of 1921, P. L. 1172.*

Fee not collectible when issuing a permit to conduct a pharmacy whose owner is not a registered pharmacist, when there has been a change of manager. Fee is collectible if there is a change of location and a new permit issued, or if there is a change of ownership.

January 10, 1923.

Mr. Charles F. Kramer, Director, Bureau of Permits, The Pennsylvania Board of Pharmacy, Harrisburg, Pennsylvania.

Sir: This Department has received your request for opinions on the following questions:

"1. Are we not required to collect the fee when issuing a permit to conduct a pharmacy whose owner is not a registered pharmacist when there has been a change of manager?

"2. When there is a change of location and a new permit is issued should we not charge the usual fee?

"3. When there is a change of ownership is it not required that the fee be charged?"

We understand that none of these questions have any reference to the license or permit issued to a pharmacist or assistant pharmacist—that all concern the permit for the pharmacy itself as issued under authority of the Act of May 26, 1921, P. L. 1172. To determine the questions you have raised it will be necessary to construe the following parts of the Act referred to:

"Section 1. Be it enacted, &c., That no pharmacy, as defined by the act to which this is a supplement, shall be kept open for the transaction of business until it has been registered with and a permit therefor has been issued by the Pennsylvania Board of Pharmacy: \* \* \*.

"Section 2. Upon application, on a form to be prescribed and furnished it, and the payment of a fee of two dollars (\$2.00), the Pennsylvania Board of Pharmacy shall issue a permit to conduct a pharmacy to such persons, associations, copartnerships, or corporations, as the board deems qualified to conduct such business. All permits issued under the provisions of this act shall be exposed in a conspicuous place in the pharmacy for which it was issued, and shall expire on the first day of July following the date of issue. No permit shall be issued unless it appears to the satisfaction of the board that the management of the pharm-

acy is in the charge of a pharmacist registered under the provisions of the act to which this is a supplement. All permit fees collected under the provisions of this act shall be paid into the State Treasury.

"Section 3. The Board of Pharmacy may suspend or revoke any permit obtained by false representations made in the application therefor, or when the pharmacy for which a permit shall have been issued is kept open for the transaction of business without a registered pharmacist in charge thereof, \* \* \*."

In the light of these provisions let us now consider the first question:

"1. Are we not required to collect the fee when issuing a permit to conduct a pharmacy whose owner is not a registered pharmacist when there has been a change of manager?"

You will notice that the registration of a pharmacy is a separate act from that of issuing a permit for its operation. There is no charge for registration, but there is a charge for a permit. The permit may issue to "such persons, associations, copartnerships or corporations, as the board deem qualified to conduct such business." There is no requirement that the holders of such permits shall know anything about pharmacy or hold any other license. Each holder of a permit must at all times have the pharmacy for which the permit is issued in charge of a registered pharmacist. The Board must be satisfied that the pharmacy will be so conducted before it may issue a permit, but it makes no difference who the pharmacist is nor how often a change is made so long as each one is duly registered. After registering a pharmacist the Board may exercise no discretion as to where he may be employed. A proper protection of the interests of the public, which is the purpose of the Act, is provided for by the requirement that the pharmacist must display conspicuously his own certificate.

"That all certificates as pharmacists or assistant pharmacists, issued under the authority of the Commonwealth of Pennsylvania, shall at all times be conspicuously exhibited in the place of business where the pharmacist or assistant pharmacist is employed. Any pharmacist violating this section of this act of Assembly, as to the display of his own or his employes' certificates, shall, upon conviction, be sentenced to pay a fine of ten dollars (\$10.00) and the costs of prosecution."

Act of May 17, 1917, P. L. 208, Sec. 8.

It is not required by law that the name of a pharmacist shall be on a permit to conduct a pharmacy. Therefore a change in pharmacists would not affect the original permit. If, as it appears, the placing of the name of a pharmacist on such a permit serves a useful purpose, there is no legal objection to putting it thereon nor to the issuance of a new permit when there is a change of pharmacists, but such not being required by law there would be no justification for making a charge for the new permit.

Your second question is as follows:

"2. When there is a change of location and a new permit is issued should we not charge the usual fee?"

A pharmacy, according to the Century Dictionary, is "A place where medicines are prepared and dispensed; a drug-store; an apothecary's shop." As a pharmacy is a place it obviously cannot be *two* places, and one permit could not be issued for more than one place. It must be issued for a particular place and "shall be exposed in a conspicuous place *in the pharmacy for which it was issued.*" It would, therefore, appear that when a change is made in the location of a pharmacy it is necessary to issue a new permit, and where it is necessary to issue a new permit it is proper to charge therefor.

We now come to the discussion of your last question:

"3. When there is a change of ownership is it not required that the fee be charged?"

Permits are not only issued for the operation of a pharmacy at a certain place, but they are issued to such persons, associations, co-partnerships or corporations, as the Board deems qualified to conduct such business. The Board must be satisfied as to the qualifications of the permit holder. The investigation and issuing of a permit involve the same amount of trouble and expense whether there is a change in management or a new store is to be established. The law requires that a new permit shall issue, and, having fixed a fee for all permits, you should make a charge therefor.

You, are, therefore, advised (1) that you are not required to collect the fee when issuing a permit to conduct a pharmacy whose owner is not a registered pharmacist when there has been a change of manager; (2) that if there is a change of location and a new permit is issued you should charge the usual fee, and (3) that if there is a change of ownership and a new permit is issued a fee should be charged therefor.

Very truly yours,

STERLING G. McNEES,

*Deputy Attorney General.*



## OPINIONS TO PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

*Public School Employees' Retirement System—Eligibility for Membership by Persons employed on a daily wage—Act of 1917 P. L. 1043.*

Payment of school employes upon the basis of a daily wage does not of itself exclude them from the benefits of the retirement system.

January 9, 1923.

Mr. H. H. Baish, Secretary, State School Employees' Retirement Board, Harrisburg, Pa.

Sir: This Department is in receipt of your communication of the 22d ult. asking to be advised whether "school employes who are employed on a daily wage basis" are thereby excluded from the Retirement System. It appears that certain janitors who have been so employed have remained out of said system by reason thereof.

Section 1 of the Act of July 18, 1917, P. L. 1043, inter alia, defines an "employee" within the meaning of the Act as not only including school teachers, principals, superintendents, members of the staff of State Normal Schools and (optionally) the staff of the Department of Public Instruction, but also:

"Any clerk, stenographer, janitor, attendance officer, or other person engaged in any work concerning or relating to the public schools of this Commonwealth, or in connection therewith, or under contract or engagement to perform one or more of these functions: Provided, That no person shall be deemed an employe, within the meaning of this act, who is not regularly engaged in performing one or more of these functions as a full-time occupation, outside of vacation periods."

This definition is an exceedingly broad one and no school employe can be taken from the scope of the Act who fulfils its conditions except by virtue of some express provision therein or necessary implication therefrom.

Section 7 of the Act to which special reference is made in your communication makes it the duty of the employer before employing any employe to notify such employe of his duty and obligations under the Act as a condition of his employment, and in September of each year to certify to the Retirement Board the names of all employes to whom the Act applies, and on the first day of each month to notify the Board of changes that have occurred during the previous month as to new employes, removals, withdrawals and salary. It is further therein provided that;

"Each employer shall cause to be deducted on each and every pay-roll of a contributor, for each and every pay-roll period \* \* \*, such per centum of the total amount of salary earnable by the contributor in such pay-roll period as shall be certified to the said employer by the retirement board as proper, in accordance with the provisions of this act. \* \* \* In determining the amount earnable by a contributor in a pay-roll period, the retirement board may consider the rate of salary payable to such contributor on the first day of each regular pay-roll period as continuing throughout such pay-roll period, and it may omit salary deductions for any period less than a full pay-roll period in cases where the employe was not a contributor on the first day of the regular pay-roll period; and, to facilitate the making of the deductions, it may modify the deduction required of any contributor by such amount as shall not exceed one-tenth of the one per centum of the salary upon the basis of which the deduction is to be made."

The employer is required to certify to the treasurer of the employer on each pay-roll a statement as voucher for the amount so deducted and send a duplicate of the statement to the Retirement Board, and the said treasurer is in turn required to transmit monthly, or at such times as the said Board shall designate, the amounts specified in such voucher to the Secretary of the Retirement Board, who pays such receipts to the Treasurer of the Commonwealth for use according to the provisions of the Act.

After careful consideration of the provisions of Section 7 and of the Act as a whole, I am of the opinion that there is nothing therein which would justify an exclusion from the application of the Act of school employes solely in consequence of their being paid upon the basis of a daily wage. That the compensation of such employes is always in the Act called "salary" and nowhere "wages" is not sufficient from which to imply such a construction. While in strict usage "the word 'salary' imports a specific contract for a specific sum for a specified period of time, while 'wages' are compensation for services by the day or week," (*Words & Phrases, 2nd Series, Vol. 4, 436*), yet, as used in this Act, I am satisfied that it denotes the compensation generally that may be paid to school employes. That of most school employes is such as is commonly denominated "salary," and it is likely that this led to the use of this term for compensation payable to all such employes. In the above mentioned volume of *Words & Phrases*, at the same page, a case is cited holding:

"Broadly, the word 'salary' means a recompense or consideration made to a person for his pains or industry in another man's business. Whether it be derived from

'salarium,' or more fancifully from 'sal,' the pay of the Roman soldier, it carries with it the fundamental idea of compensation for services rendered. Indeed, there is eminent authority for holding that the words 'wages' and 'salary' are in essence synonymous. *Hopkins v. Cromwell*, 85 N. Y. Supp. 839, 841, 89 App. Div. 481."

It will be observed that the deductions from the earnings of a member of the System are not for some stated calendar period, as a week or a month, but for a "pay-roll period." There can be such a period as well where the compensation is based upon a daily wage as a monthly salary. Under the familiar rule in the interpretation of statutes the express enumeration of the several requirements as to who is to be deemed an "employee" within the meaning of the Act, as contained in the aforesaid definition of that term, forbids us adding any additional test, such as the manner by which the employee is to be compensated for his services. Of course the application of the Act would not extend to any employee paid on said basis unless the employment strictly complied with the aforesaid requirements as to being a regular one and a full-time occupation. To hold otherwise than herein decided would put it within the power of the employer to exclude from the retirement system many school employes by the simple device of paying them by the day, although the employment may be a regular one and constitute the employes full time occupation. We cannot presume that this law intends that its application can be limited in such way.

You are advised that to pay school employes upon the basis of a daily wage does not of itself exclude them from the Retirement System, or operate to deny them its benefits.

Very truly yours,

EMERSON COLLINS,

*Deputy Attorney General.*

*Public School Employees' Retirement—Duty of Retirement Board—Section 14, Paragraph 2, Act of July 18, 1917, P. L. 1043—Act of May 18, 1911, P. L. 309.*

A contributor to the retirement system having attained the age of seventy years during the months of July or August, or any other time between yearly school terms, the Retirement Board must retire the said contributor forthwith, inasmuch as the intervening time between school terms does not constitute a part of the school term within the meaning of the Act.

May 16, 1923.

Doctor H. H. Baish, Secretary of the Public School Employees' Retirement Board, Harrisburg, Penna.

Sir: I have your request for an opinion from this Department dated April 11, 1923, which is as follows: "When a teacher attains the age of seventy years during the months of July or August the Retirement Board is uncertain as to whether such teacher can be permitted to teach during the following school term before compulsory retirement is enforced. In other words, since the months of July and August are vacation months should they be regarded as a part of the preceding school term or as a part of the succeeding school term?"

By Section 14, paragraph 2, of the State School Employees' Retirement Act of 1917, it is provided:

"Each and every contributor who has attained or shall attain the age of seventy years shall be retired by the Retirement Board, for superannuation, forthwith, or at the end of the school term in which said age of seventy years is attained."

For a proper consideration of this paragraph, we must not lose sight of the distinction between the "school term" and the "school year." The "school term" has to do with the teaching time of the year and is fixed and determined within certain limitations by the Board of Directors of the several school districts of the Commonwealth and is the time during which schools are open and teaching is done during each year; while the "school year" has to do with the business side of our school system and the questions of organization of boards, the levying of taxes and the management of finances of the several school districts, and is fixed and determined by law.

By Article III, Section 301, page 24, of the School Code, in all school districts of the first class the school year shall begin on the first day of January each year, and in all other school districts in this Commonwealth the school year shall begin on the first Monday of July of each year. It will therefore be readily seen that the

school year in first class districts is from January 1 to December 31, both days inclusive, and in other districts from July 1 to June 30, inclusive, but with reference to the school term, by Article XVI, Section 1601, page 102 of the School Code, it is provided, *inter alia*,

“All the public, elementary and high schools in the several school districts of this Commonwealth shall be kept open each year as follows: In school districts of the first and second class at least nine months; in school districts of the third class at least eight months; and in school districts of the fourth class at least seven months, etc.”

And by Article IV, Section 403, page 31, the members of the Board of School Directors by an affirmative vote of a majority thereof are authorized to fix the length of school terms, and by Article XVI, Section 1605, page 103, the Board of School Directors of each school district are authorized and directed to fix the date of the beginning of the school term.

The question of retirement for superannuation must necessarily be determined with reference to the school term and has nothing to do with the school year. If the contributor attains the age of seventy years during the school term, that is, while school is being conducted within the time fixed by the directors under the provisions of the law, the contributor may teach during the remainder of that term, but if the contributor attains the age of seventy years during the vacation period, that is, between the last day of the term and the first day of the next succeeding term of school, such contributor must be retired forthwith and may not be allowed to teach the following term.

I therefore have the honor to advise that if the contributor attains the age of seventy years during the months of July or August, or any other time between the yearly school terms, the Retirement Board has no option in the matter but must retire said contributor forthwith, as the intervening time between the school terms does not constitute a part of the school term under the meaning of the said Retirement Act.

Very truly yours,

ROBERT L. WALLACE,

*Deputy Attorney General.*

*State Employees' Retirement System—Eligibility for membership therein of employees of certain homes and schools for the training of the deaf. Acts of June 20, 1891, P. L. 371; June 2, 1893, P. L. 272; May 18, 1911, P. L. 309; May 8, 1913, P. L. 163; May 18, 1917, P. L. 1043; May 20, 1921, P. L. 1014; and June 29, 1923, P. L. 930.*

Employees of the Home for the Training in Speech of Deaf Children before They are of School Age, located in Philadelphia, and the Pennsylvania State Oral School for the Deaf, located at Scranton, are within the benefits of the School Employees' Retirement System.

December 4, 1923.

Mr. H. H. Baish, Secretary, Public School Employees' Retirement Board, Harrisburg, Pa.

Sir: Your letter of November 28, 1923, has been received by this Department.

You ask to be advised whether employees of the Home for the Training in Speech of Deaf Children before They are of School Age, located at 2201 Belmont Avenue, Philadelphia, and of the Pennsylvania State Oral School for the Deaf, located at Scranton, are eligible for membership in the State Employees' Retirement System.

The Act of May 18, 1917, P. L. 1043 provides:

“‘Public School’ shall mean any class, school, high school, normal school, training school, vocational school, truant school, parental school, and any or all classes or schools within the State of Pennsylvania, conducted under the order and superintendence of the Department of Public Instruction of the Commonwealth of Pennsylvania and of a duly elected or appointed Board of Public Education, Board of School Directors or Board of Trustees, of the Commonwealth, or of any school district or normal school district thereof. \* \* \* ‘Employee’ shall mean any teacher, principal, or other person engaged in any work concerning or relating to the public schools of this Commonwealth, or in connection therewith.”

It is evident from the language of the Act that a school in order to come within its scope shall also come under the order and superintendence of the Department of Public Instruction.

The Act of May 18, 1911, P. L. 309, the School Code, gives powers to and imposes duties upon the State Council of Education and in Section 906 of the Act, which is amended by the Act of May 20, 1921, P. L. 1014, the following power is conferred:

“To inspect, and require reports from the educational work in schools and institutions wholly or partly supported by the State, which are not supervised by the public school authorities.”

This section was further amended by the Act of June 29, 1923, P. L. 930, and now reads as follows:

“Section 906. To supervise and inspect, to adopt standards for, and to require reports, financial or otherwise, from, (the educational work in the) schools and institutions wholly or partly supported by the State which are not supervised by the public school authorities including schools and institutions for the blind and the deaf and dumb.”

The institutions under consideration are wholly or partly supported by the State, and under the provisions of the Act of June 20, 1891, P. L. 371, as amended by the Act of June 2, 1893, P. L. 272, Trustees were appointed for the Home for Training in Speech of Deaf Children before They are of School Age. Under the provisions of the Act of May 8, 1913, P. L. 163, Trustees were appointed for the Pennsylvania State Oral School for the Deaf, located at Scranton.

These two institutions are schools within the definition of the Act of May 18, 1917, P. L. 1043. They are “conducted under the order and superintendence of the Department of Public Instruction of the Commonwealth of Pennsylvania and of a duly elected or appointed Board of \* \* \* Trustees.”

Therefore, I am of the opinion that teachers or employes of these two institutions are within the benefits of the School Employes' Retirement System.

Yours truly,

DEPARTMENT OF JUSTICE,

By J. W. BROWN,  
*Deputy Attorney General.*

*Retirement Fund—Schools—Withdrawal—Classification Act of 1921, P. L. 245—Act of June 27, 1923, P. L. 858.*

When any employees of the Department of Public Instruction exercised the privilege given by the Act of April 21, 1921, P. L. 245, and withdrew from the School Employees' Retirement System, they did not thereby sever their connection with the work concerning or relating to the Public Schools of this Commonwealth. They still remain "of the staff of the State Department of Public Instruction" or "engaged in any work concerning or relating to the public Schools of this Commonwealth." As such they are by the Act of June 27, 1923, P. L. 858, expressly excluded from membership in the State Employees' Retirement System and must seek protection if they desire it, in the State School Employees' Retirement System.

March 14, 1924.

Mr. H. H. Baish, Secretary, State Retirement Board, Harrisburg, Penna.

Sir: Your letter asking "whether the employees in the Department of Public Instruction who withdrew from the State School Employees' Retirement System are eligible for membership in the new State Employees' Retirement System, or whether they must secure their protection by again becoming members of the School Employees' Retirement System," has been received by this Department.

The Act of July 18, 1917, P. L. 1043 established the Public School Employees' Retirement System, and it applied to all "employees" as defined in Section 1, paragraph 7 of the Act, which is as follows:

"'Employee' shall mean any teacher, principal, supervisor, supervising principal, county superintendent, district superintendent, assistant superintendent, any member of the staff of the State normal schools, or of the staff of the State Department of Public Instruction, or of the staff of the State Board of Education, or any clerk, stenographer, janitor, attendance officer, or other person engaged in any work concerning or relating to the public schools of this Commonwealth, or in connection therewith." \* \* \* \*

The Act of April 21, 1921, P. L. 245, amended the Act of 1917 in Sections 1 and 12, and the amendment to Section 1 provides that these employees of the Department of Public Instruction who are members of or are entitled to membership in the State School Employees' Retirement System may withdraw from the System and be entitled to reimbursement of moneys which they have paid in, by so electing in writing filed with the Retirement Board on or before the first day of July, 1921.

The definition of "employees" in the Act of 1917, was enlarged and broadened by the Act of June 29, 1923, P. L. 935, but only in so



far that it would include employes of certain semi-State educational institutions.

The Act of June 27, 1923, P. L. 858 established the State Employes' Retirement System, and in Section 1, paragraph 6 defines State employes as follows:

“‘State employe’ shall mean any person holding a State office under the Commonwealth of Pennsylvania, or employed by the year or by the month by the State Government of the Commonwealth of Pennsylvania in any capacity whatsoever. But the term ‘State employe’ shall not include judges, and it also shall not include those persons defined as employes in section one, paragraph seven of the act, approved the eighteenth day of July, nineteen hundred seventeen (Pamphlet Laws, one thousand forty-three), entitled ‘An act establishing a public school employes’ retirement system,’ as amended by section one, paragraph seven of the act, approved the twenty-first day of April, nineteen hundred twenty-one (Pamphlet Laws, two hundred fifty-five.)” \* \* \* \*

When any employes of the Department of Public Instruction exercised the privilege given by the Act of 1921 and withdrew from the School Employes' Retirement System, they did not thereby sever their connection with work concerning or relating to the public schools of this Commonwealth. They still remain “of the staff of the State Department of Public Instruction” or “engaged in any work concerning or relating to the public schools of this Commonwealth”. As such they are by the Act of June 27, 1923 expressly excluded from membership in the State Employes Retirement System and must seek protection, if they desire it, in the State School Employes Retirement System.

Very truly yours,

DEPARTMENT OF JUSTICE,

By J. W. BROWN,  
*Deputy Attorney General.*

*Public School Employees' Retirement System—Retirement Board—Authority to bid for proposed securities, such as the proposed issue of State Highway bonds. (Act of July 18, 1917, P. L. 1043.)*

The Retirement Board may bid for such portion of the proposed bond issue as it may desire, provided that such issue is one in which the Board is authorized to invest retirement funds.

July 21, 1924.

Mr. Henry H. Baish, Secretary, Public School Employees' Retirement Board, Harrisburg, Pa.

Sir: I have considered carefully your inquiry as to whether the "Retirement Board" for the "Public School Employees' Retirement System" may legally bid for proposed securities like, for instance, the proposed issue of Highway Bonds, bids for which have been advertised to be opened July 22, 1924.

#### FORMER OPINION ON THIS SUBJECT.

I find an opinion of Deputy Attorney General Emerson Collins, dated September 10, 1920, which is an answer to a similar request made by the Honorable Harmon M. Kephart, State Treasurer, on August 24, 1920.

A rule, which I consider highly salutary, has been laid down by me for opinions of the Department of Justice to the following effect: Former opinion will not be reviewed and modified or reversed, unless in those instances, which naturally will be very few, when the Attorney General feels that the previous opinion is clearly against the correct legal status of the question involved, or because the opinion was actually practical rather than legal advice.

The opinion of September 10, 1920, noted above, can not be corrected, if wrong, by the Courts, and for that reason I have decided that it should be made an exception to the general rule laid down above and that it should be reviewed and restated.

#### ARGUMENT.

Said opinion of September 10th is hereby confirmed as far as quotations of the power to invest granted to the "Retirement Board" by the Act of July 18, 1917, (P. L. 1043) and the definitions of "invest" and "investment" set forth by Deputy Attorney General Collins are concerned. But the powers there granted and the definitions there cited do not, in any way or to any extent, limit the right of the "Retirement Board" to invest any of the funds under its control in new securities, nor does it prohibit bidding for such securities. The opinion of September 10, 1920, failed to point out any such prohibition against the right of the Board to bid for proposed issues of securities, and invest in them if the bid were accepted.

There are two restrictions and two restrictions only upon the "Retirement Board."

First. It might not invest in securities forbidden by the "Teachers' Retirement Act", or by the laws determining in what securities savings banks in the Commonwealth may invest.

Second. It might not use any methods in arriving at such investments forbidden by the "Teachers' Retirement Act" or forbidden to savings banks.

The "Teachers' Retirement Act" authorizes the "Retirement Board" to invest its funds only in any securities in which savings banks may invest. This restriction must be observed and no proposed issue of securities may be bid for or purchased unless it is a class of security in which savings banks would be entitled to invest their funds.

The opinion of September 10, 1920, does not point out any restriction in the "Teachers' Retirement Act" directly or indirectly ordering the "Retirement Board" not to bid for proposed proper securities. Neither does it point out any such restriction against savings banks, in the laws providing for investment of their funds.

Therefore if it would be illegal for the "Retirement Board" to bid for part of a proper issue of bonds, the reason for such illegality must be found in general principles, and the opinion of September 10, 1920, does not point out any such general principles, neither have I been able to find them.

The opinion, therefore, seems to me to be such as one can be reviewed and set aside without breaking the underlying principle of stare decisis which should be followed as far as possible in the Department of Justice as it is in the Courts. The opinion of September 10, 1920, does not point out any law against bidding, but merely attempts to tell the "Retirement Board" what it considers would be an improper practical procedure in the investment of the Teachers' Retirement Funds. This practical question should be left to the good sense and judgment of the "Retirement Board". It must be taken for granted that the Board will use its best judgment to invest the funds under its control to the best advantage, always, however, in permissible securities. If the "Retirement Board" chooses to bid for a proposed issue of such securities, it would be out of place for the Department to interfere. Either the bids would be accepted and the Board would thereby invest in securities which seem to it desirable at rates which seem to it fair and just, or the bid will be rejected and the "Retirement Board" must look elsewhere to invest its funds. Either result of the bidding is certainly one which is not contrary to good legal practice in the absence of prohibitory general legal principles or specific prohibition in the "Teachers' Retirement Act"

## CONCLUSION.

1. The opinion of September 10, 1920, is not advice on the legal aspect of the powers of the Teachers' Retirement Board.

2. Therefore the opinion is withdrawn and the "Retirement Board" is specifically advised that neither in said opinion of September 10, 1920, nor elsewhere does the Department of Justice find that it is not legal for the "Retirement Board" to bid for such part as it desires of a proposed bond issue, provided always that the bond issue is one in which the "Retirement Board" is authorized to invest the Retirement Funds.

Yours very truly,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General.*

OPINIONS TO STATE BOARD FOR REGISTRATION OF  
PROFESSIONAL ENGINEERS AND OF  
LAND SURVEYORS

*Office Equipment—Telephone Service—Engineers' Fund.*

Duty of Board of Commissioners of Public Grounds and Buildings to furnish office equipment and telephone service.

May 23, 1923.

Honorable Richard L. Humphrey, Chairman, State Board for Registration of Professional Engineers and of Land Surveyors, Philadelphia, Pa.

Sir: Answering your request for an opinion as to whether or not your Board may arrange for office equipment by purchase, rental or otherwise: It appears to us that this question is entirely covered in the opinion of Honorable Fred Taylor Pusey, Deputy Attorney General, addressed to your Board under date of December 27, 1922. We are enclosing a copy of this opinion and believe that it will entirely cover your questions. We may add that we concur in said opinion.

You further inquire as to whether or not telephone service comes within the class of supplies which the Board of Commissioners of Public Grounds and Buildings is required to supply to your Board. The law governing that question is apparently found in Section 10 of the Act creating your Board which reads 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, etc., which shall be necessary for the transaction of its business."

It is our opinion that this is inclusive and that it was intended that all the ordinary and usual equipment of a modern office was intended to be included among the things which the Board of Commissioners of Public Grounds and Buildings are required to furnish to your Board.

We, therefore, advise it would not be proper to enter into contract to pay for such service out of what is known as the "Engineers' Fund".

Very truly yours,

J. W. BROWN,  
*Deputy Attorney General.*

*State Board for Registration of Professional Engineers and of Land Surveyors— Authority to revoke the certificate of registration of a professional engineer who is found guilty of the practice of fraud or deceit in obtaining his certificate— Authority of Board, of its own volition, to start proceedings for such revocation, without the submission of written charges—Act of May 25, 1921, P. L. 1131, Section 24.*

The Board for Registration of Professional Engineers and of Land Surveyors may, of its own volition, from information in its possession, without the submission of written charges, start proceedings to revoke a certificate of registration where the applicant has been found guilty of fraud or deceit in obtaining such certificate.

April 3, 1924.

Mr. Richard L. Humphrey, Chairman, State Board for Registration of Professional Engineers and of Land Surveyors, Harrisburg, Pa.

Sir: Your inquiry as to whether your Board is empowered to revoke the certificate of registration of a professional engineer who is found guilty of the practice of any fraud or deceit in obtaining his certificate and if your Board may of its own volition start proceedings for such revocation without the submission of written charges and detailing the facts in a given case, has been received by this Department.

An applicant in his application for a certificate of registration as professional engineer and land surveyor made, inter alia, the following representations:

1. That his engineering education had been obtained at a certain college from 1908 to 1911, and that the degree of Bachelor of Science had been conferred upon him by said college.

2. That he had been employed by a certain firm for four years, and during three years of that time he was engaged in drafting on general engineering work, designing retaining walls and street improvements, and for one year was transit man in charge of municipal improvements and general engineering.

3. That from July, 1915, to May, 1916, he was construction engineer for a contractor, and that he was engineer in charge of construction of manufacturing buildings for Westinghouse Companies.

4. That from May, 1916, to August, 1917, he was employed by the Bell Telephone Company.

5. That he was employed by the City of Pittsburgh from August, 1917, to February, 1922.

A certificate of registration as professional engineer was granted to the applicant and some time after such granting it was brought to the attention of your Board that the statements made by the

applicant in his application for registration were not true. A letter was addressed to him by the Board, asking for an explanation, but no attention was paid to it. A second letter brought a postal card in reply, but no explanation. After waiting for some time the Board summoned him to appear at a certain time and place to show cause why his certificate of registration as professional engineer should not be revoked. At the time and place designated, the applicant and his counsel, as well as witnesses subpoenaed by the Board, appeared, and a hearing was held.

Based upon the testimony of the witnesses examined at the hearing the following facts were established.

1. That the college at which applicant stated he obtained his engineering education had no engineering course and that applicant only finished about one-half of the Freshman Year and was never granted a degree of any kind by said college.

2. That the firm by which applicant stated he was employed for four years employed him for two years and seven months, and that during such employment he was a chain man, later a draftsman and did transit work, and was not engaged upon the design of retaining walls or of street improvements and never had charge of design work.

3. That applicant was classified as an inspector and his only duty was to see that work was carried out according to plans.

4. That applicant was not from May, 1916, to August, 1917, employed by the Bell Telephone Company.

5. That applicant was not in the employ of the City of Pittsburgh from August, 1917, to February, 1922.

The applicant made misleading and false statements in his application for registration and your Board is justified in taking action against him.

The twenty-fifth section of the Act regulating the practice of the profession of engineering and land surveying provides for the revocation of registration as follows:

“Revocation of Registration.—Procedure.—The Board shall have the power to revoke the certificate of registration of any professional engineer or of any land surveyor who is found guilty of:

“(a) The practice of any fraud or deceit in obtaining a certificate of registration; or

\* \* \* \* \*

“Any person may prefer charges of fraud, deceit, negligence, incompetency, or misconduct against any registered professional engineer or any registered land sur-

veyor. Such charges shall be in writing, and shall be sworn to by the person making the same, and shall be filed with the secretary of the board."

Under this section of the law your Board may revoke a certificate of registration either upon proceedings started by the Board itself on information obtained that an applicant has been guilty of "the practice of any fraud or deceit in obtaining a certificate of registration," or upon charges preferred by any person "of fraud, deceit, negligence, incompetency, or misconduct against any registered professional engineer or any registered land surveyor," the charges so preferred to be in writing and sworn to by the person making the same.

I, therefore, advise you that your Board may of its own volition from information in its possession start proceedings to revoke a certificate of registration following, of course, the procedure laid down in the Act, and this may be done without the submission of written charges.

Very truly yours,

DEPARTMENT OF JUSTICE,

By J. W. BROWN,

*Deputy Attorney General.*

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*State Board for Registration of Professional Engineers and of Land Surveyors—Applications for Registration—Detailed experience required to be set forth therein—Act of May 25, 1921, P. L. 1131, Sections 19 and 20.*

The State Board for Registration of Professional Engineers and of Land Surveyors may require an applicant for registration to set forth his experience in chronological order, with a statement of the nature and extent of the work upon which he has been engaged and of his responsibility in connection therewith.

April 9, 1924.

Honorable Righard L. Humphrey, Chairman, State Board for Registration of Professional Engineers and of Land Surveyors, Philadelphia, Pa.

Sir: This Department has received your inquiry as to whether or not you may require an applicant for registration as professional engineer or as land surveyor "to set forth his engineering or land surveying experience, in chronological order with each engagement numbered with a statement of the nature and extent of the work upon which he has been engaged and his responsibility in connection therewith."



The Act of 1921, P. L. 1131, was intended, as stated in Section 1, "to safeguard life, health, and property." The Legislature after due consideration determined to place the responsibility for licensing of competent engineers and land surveyors with your Board. The Act by which this was done contains the following in reference to persons entitled to registration:

"Persons Prima Facie Entitled to Registration.—Unless disqualifying evidence be given before the Board, the following facts, established in the application, shall be regarded as prima facie evidence, satisfactory to the Board, that the applicant is fully qualified to practice, to wit:

"(1) As a professional engineer—

"(a) Ten or more years of active practice of the profession of engineering.

"(b) Graduation from a school or college approved by the board as of satisfactory standing and having a course in engineering of not less than four years, and an additional four years of active engagement in engineering work: or

"(2) As a land surveyor—

"(a) Not less than six years of active practice in land surveying work of a character satisfactory to the board."

Act of May 25, 1921, P. L. 1131, Section 19.

The evident question which may be raised here is as to what constitutes "ten or more years of active practice in the profession of engineering," or "not less than six years of active practice in land surveying work of a character satisfactory to the board." What constitutes such active practice must be "established in the application" and the application must be on the form prescribed by your Board. Certificates of registration shall be issued to "any person who submits evidence satisfactory to the Board, that he or she is fully qualified to practice the profession of engineering or land surveying." You desire to supplement the affidavits as to active practice or persons acquainted with the applicant, with a statement covering the details of such practice. Under the law it is apparent that you are to judge whether or not the applicant has actually actively practiced and you may require such reasonable evidence thereof as you desire.

In addition to the foregoing provision of the law, Section 20 thereof permits your Board to require further evidence as to practice where you are not satisfied.

“Furnishing of Additional Evidence by Applicants for Registration.—Examinations.—Applicants for registration, in cases where the evidence presented in the applications does not appear to the board conclusive or warranting the issuing of a certificate of registration, may present, for the consideration of the board, further evidence, which may also include the results of a required examination.”

I am of the opinion, therefore, and so advise you that you may require an applicant for registration as a professional engineer or as a land surveyor to set forth his engineering or land surveying experience, in chronological order with each engagement numbered with a statement of the nature and extent of the work upon which he has been engaged and his responsibility in connection therewith.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

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*Plumbers—Registration—Engineers—Engineers' Act of May 25, 1921—Statutes—Repeal—Plumbers' licenses—Acts of June 24, 1895, June 7, 1911, and May 21, 1913—Constitutional law—Title of act—Words and phrases.*

1. It was not the intention of the legislature by the general repeal clause of the Engineers' Act of May 25, 1921, P. L. 1131, to repeal the Plumbers' Licensing Acts of June 24, 1895, P. L. 232, June 7, 1911, P. L. 680, and May 21, 1913, P. L. 276.

2. The title of the Engineers' Act of May 25, 1921, is not broad enough to include plumbers.

3. A plumber is not a professional engineer within the meaning of section 2 of the Engineers' Act of May 25, 1921.

4. Under the act the term “professional engineer” means any person who, through technical knowledge gained in one or more branches of engineering, initiates, directs, etc., the control of the forces of, and the utilization of the materials of, nature and of human activities in connection therewith for the benefit of man, and who represents himself to be such a professional engineer. The term does not include plumbers.

5. Repeal of a statute by implication is not favored.

December 23, 1924.

The State Board for Registration of Professional Engineers and of Land Surveyors, Philadelphia, Pennsylvania.

Gentlemen: This Department is in receipt of your request for an opinion as to whether or not plumbers are within the scope of the Act of May 25, 1921, P. L. 1131 (hereinafter referred to as the Engineers Act).

The Act is entitled "An Act to regulate the practice of the profession of engineering and of land surveying; creating a State Board for the Registration of Professional Engineers and Land Surveyors; defining its powers and duties; imposing certain duties upon the Commonwealth and political subdivisions thereof in connection with public work; and providing penalties."

Section 1 requires every person, with certain exceptions not here of interest, practicing or offering to practice the profession of engineering or land surveying to be registered as a "professional engineer" or as a "land surveyor."

Section 2 contains the following definition:

"The term 'professional engineer,' as used in this Act, means a person who, through technical knowledge gained by education or experience in one or more branches of engineering, initiates, investigates, plans, and directs the control of the forces of, and the utilization of the materials of, nature and of human activities in connection therewith, for the benefit of man, and who represents himself or herself to be such a professional engineer, either through the use of the term 'professional engineer,' with or without qualifying adjectives, or through the use of some other title implying that he or she is such a professional engineer."

Three subjects of inquiry arise in the discussion of this question.

1. Is the definition of the term "Professional Engineer" as given in Section 2 of the Act broad enough to include plumbers?
2. Does the title of the Act give sufficient notice of their inclusion?
3. Does the Act clearly set forth the intent of the Legislature to repeal by implication the provisions contained in prior legislation to regulate and license plumbers?

1. It is contended that a professional engineer is one who "initiates, investigates, plans, and directs the control of the forces of, and the utilization of the materials of, nature and of human activities in connection therewith, for the benefit of man;" that water, gas and heat are such forces and materials of nature which a plumber so initiates, investigates plans or directs together with human activities in connection therewith; and that therefore every master plumber must be registered under the provisions of the Act. If the definition is that broad a plumber seems to be included if he "represent himself—to be such a professional engineer, either through the use of the term 'Professional Engineer'—or through the use of some other title implying that he—is such a professional en-

gineer." If a plumber is included in the definition then the term "plumber" is a "title implying that he—is such a professional engineer."

The same reasoning could be applied to other trades and business. Water, gas, oil, coal, iron and all other minerals, timber and even that combination of soil, heat and moisture which produces agricultural products are forces and materials of nature. Was it intended to include within this definition every person who initiates, investigates, plans and directs the control of these forces or the utilization of these materials or any human activities in connection therewith?

By the use of the word defined, within the definition, the scope of the definition itself seems to have been restricted. The definition provides that the term "Professional Engineer" means any person who, through technical knowledge gained in one or more branches of engineering initiates, directs, etc., the control of such forces and materials, and who represents himself to be such a professional engineer.

The definition given in the Act is therefore not broader than the terms "engineering" and "engineer" as the same are generally understood.

The following definitions are given of engineering:

The science and art of making, building or using engines and machines, and designing and constructing public works or the like, requiring special knowledge of materials, machinery and the laws of mechanics.

In the different branches of engineering mechanical principles are applied as explained below: Inter Alia in heating—to the heating of buildings as by steam or hot water: In sanitation—to the design, construction, arrangement and inspection of systems of plumbing, drainage and sewerage, the disposition of sewerage, the abatement of industrial nuisances, etc. (when especially applied to the needs of a town, called municipal). *Standard Dictionary*.

The art of constructing and using engines or machines, the art of executing civil or military works which require a special knowledge or use of machinery, or of the principles of mechanics.

Illustrations—civil engineering—electrical—hydraulic—mechanical, or dynamic—military—mining—naval or marine. *Century Dictionary and Cyclopaedia*.

As commonly understood, then, engineering involves a special knowledge of the laws and principles of mechanics utilized in the making, building, designing and constructing of engines and machines and public works. This requirement is not met by the knowledge gained by the ordinary artisan through his observation of the

operation of these laws of mechanics: It is more than a mere "rule of thumb"; it involves a knowledge of the principles underlying such laws.

It appears, therefore, that the term "Professional Engineer" as defined in section two of the Act is not broad enough to include plumbers as such.

2. Even if the definition of "Professional Engineer" as contained in Section 2 of the Act is broader than that which attached to the term in the common understanding, it must be limited to the term as commonly understood because there is no notice in the title of the Act of an intent to give to the term a special meaning.

"The right of the legislature to define the terms it uses is beyond question and the meaning it so attaches is mandatory upon the courts in the construction of the statute. But where such meaning is given to the words describing the subject of the Act, and is not that which attaches to them in the common understanding, the constitution (Art. III, Section 3) requires that the title shall express such special meaning with at least sufficient clearness to put readers on inquiry as to the full provisions," *Commonwealth vs. Kebort* 212 Pa. 289, 291.

3. For many years there has been statutory provision for the licensing of plumbers in boroughs and in cities of the first, second and third classes.

Section 1 of the Act of June 24, 1895, P. L. 232 (West Pa. Statutes, Section 15770) authorizes boards of health in cities and boroughs to provide for the registration of journeymen and master plumbers and persons engaged in the plumbing business in cities and boroughs.

Section 1 of the Act of June 7, 1911, P. L. 680 (West Pa. Statutes, Section 3522) provides that it shall be unlawful for any person to carry on or work at the business of plumbing or house drainage in cities of the first class, until a certificate or license to engage in or work at said business shall have been granted said persons by the Director of the Department of Public Health and Charities, or the Department or Bureau or Board of Health of such cities; or until they have registered as such in the office of the Board or Bureau of Health of said cities.

Section 1 of the Act of May 21, 1913, P. L. 276 (West Pa. Statutes 2845) contains a similar provision with reference to second and third class cities as that for first class, except that the license is to be issued by the director of the Department of Public Safety or Department or Board or Bureau of Health. (These acts of Assembly providing for the licensing of plumbers are hereinafter referred to as Plumbers Acts).

The Engineers Act did not specifically repeal any of the Plumbers Acts. It contained a general repeal of all acts inconsistent therewith. Was it the intent of the Legislature by implication to repeal the Plumbers Acts and provide for the licensing of plumbers under the Engineers Act?

Certain general rules as to the repeal of statutes by implication are applicable in determining this question:

"It is a reasonable presumption that all laws are passed with a knowledge of those already existing, and that the legislature does not intend to repeal a statute without so declaring.

*I Sutherland Statutory Construction, (2nd Ed.) Section 267."*

"But repeal by implication is not favored. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments in the statute-book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it is inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. Hence it is,—in order to give an act, not—clearly intended as a substitute for it, the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict or liberal, construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject." *Endlich on Interpretation of Statutes Section 210.*

"Repeal of statutes by implication is not favored, and unless a statute is repealed in express terms, the presumption is always against an intention to repeal. A presumption to repeal an earlier by a later statute can only arise when the two statutes are irreconcilable or the intention is clearly expressed. There must be a clear repugnancy between the two statutes to justify the court in declaring that the one repeals the other." *Carpenter vs. Hutchuson, 243 Pa. 260, 266; Jackson vs. Penna. R. R. Co., 228, Pa. 566, 574.*

"It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute, to say that a general act is to be construed as not repealing a particular one, that is, one directed towards a special

object or a special class of objects, \* \* \* Having already given its attention to the particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language. \* \* \* The general statute is read as silently excluding from its operation the cases which have been provided for by the special one \* \* \*” *Endlich on Interpretation of Statutes* Section 223.

“It is also a rule that where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular provisions.” *I Sutherland Statutory Construction* Sec. 274.

“A general statute without negative words does not repeal a previous statute which is particular, even though the provisions of one be different from the other.” *Rymer vs. Luzerne Co.* 142 Pa., 108, 113 and *Commonwealth vs. Lloyd* 2 Pa. Sup. Court 6, 17.

The fact that the General Act contains a clause repealing acts inconsistent with it does not diminish the force of these rules of construction. *Endlich on Interpretation of Statutes* Section 223, *I Sutherland Statutory Construction* Section 274, *Commonwealth vs. Pottsville* 246 Pa. 468, 471.

Even if the definition of the word “engineer” as given in the Engineers Act includes plumbers and the title of the Act is broad enough to give notice of the inclusion of such there is nothing in the Engineers Act to indicate that the Legislature intended that this General Act should repeal the Plumbers Acts (acts directed toward a special class within the general class) and substitute the provisions of the former for those of the latter.

The former Legislature having provided for the particular subject it is presumed that it was not the intent to alter that special provision by the subsequent enactment of the Engineers Act, unless manifest in explicit language. And there is no language manifesting such an intent.

There is no irreconcilable repugnancy between the Plumbers Acts on the one hand and the Engineers Act on the other, the two are not inconsistent but can be construed in harmony. Indeed the system adopted in the Plumbers Acts recognizes a difference in plumbing requirements and practices in communities of different sizes by providing for licenses to be issued by local boards, which

system should not be abandoned for one which fails to recognize such differences unless the intent of the Legislature so to do clearly appears.

Because of the conclusions under part 3 hereof and the grave doubt that plumbers are included in the definition of the word "engineers" and the consequent doubt as to the sufficiency of the title, I am of the opinion that the Legislature did not intend to repeal the Plumbers Acts by the Engineers Act, and to include plumbers within the terms of the Engineers Act. I, therefore, advise you that plumbers are not required to be licensed by your Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*



## OPINIONS TO THE STATE EMPLOYEES' RETIREMENT BOARD

*State Employees' Retirement System—Eligibility for membership therein of a certain fish warden—Acts of July 28, 1917, P. L. 1215, June 27, 1923, P. L. 858, Sections 1, 10, 13.*

A certain fish warden employed by the Fish Commission of the Commonwealth is qualified for membership in the State Employees' Retirement System and is entitled to prior-service credit for retirement purposes during the time he was employed as a fish warden on a yearly or monthly basis, but not so entitled for his time of service while employed as a *special* fish warden on a *per-diem* compensation.

March 6, 1924.

Honorable Clyde L. King, Chairman of the State Employees' Retirement Board, Harrisburg, Pa.

Sir: Your recent communication to this Department contains the following facts presented to you by the Executive Secretary of the Board of Fish Commissioners of Pennsylvania in a letter to your Board concerning an application for membership in the State Employees' Retirement System:

A certain employe of the Board of Fish Commissioners was regularly commissioned as a fish warden, on a monthly salary basis, in September 1921. Prior thereto since January, 1918, he was at different times appointed a special fish warden and so acted for various periods. For this special service he was paid a per diem compensation, which he received semi-monthly by check from the State Treasurer covering the actual number of days employed.

And you make the following inquiry:

"Whether said employe of the Board of Fish Commissioners if qualified for membership in the State employees' Retirement System is entitled to prior service credit for the length of service while employed on a per diem compensation as a special fish warden?"

The State Employees' Retirement System Act of June 27, 1923, P. L. 858, in Section 10 thereof provides, in part as follows:

"In computing the length of service of a contributor for retirement purposes, under the provisions of this act, full credit shall be given to each original member by the retirement board, for each year of prior service as a State employe, as defined in section one, paragraphs six and thirteen of this act. \* \* \*"

In Section 1, paragraph 6, of this Act it is provided as follows:

“‘State employe’ shall mean any person holding a State office under the Commonwealth of Pennsylvania, or employed by the year or by the month by the State Government of the Commonwealth of Pennsylvania in any capacity whatsoever. But the term ‘State employe’ shall not include judges, and it also shall not include those persons defined as employes in section one, paragraph seven of the act, approved the eighteenth day of July, nineteen hundred seventeen (Pamphlet Laws, one thousand forty-three), entitled ‘An act establishing a public school employes’ retirement system,’ as amended by section one, paragraph seven of the act, approved the twenty-first day of April, nineteen hundred twenty-one (Pamphlet Laws, two hundred fifty-five). In all cases of doubt the retirement board shall determine whether any person is a State employe as defined in this paragraph, and its decision shall be final.”

Paragraph 13 of the same section provides as follows:

“‘Prior service’ shall mean all service completed not later than the thirty-first day of December, nineteen hundred twenty-three.”

This particular employe of the Board of Fish Commissioners employed as a fish warden on a yearly or monthly salary basis, comes within the definition of “State employe” and is, therefore, qualified for membership in the State Employes’ Retirement System and is entitled to prior service credit over that period of service prior to December 31, 1923 during which time he was employed as a fish warden on a yearly or monthly salary basis. The particular basis for this determination is the fact that he comes within the class, during the period of time mentioned, of those persons referred to under the definition of “State employe” who are “employed by the year or by the month by the State Government of the Commonwealth of Pennsylvania in any capacity whatsoever.”

As to his time of service while acting as a special fish warden, an entirely different situation develops. He was then employed on a per diem compensation basis. This was done in accordance with the Act of June 28, 1917, which provides for payment of compensation in this manner and in no other way. In the meaning or definition of “State employe” in the Retirement System Act as above quoted, the line is sharply drawn against those persons who are employed on a per diem compensation basis. An employe of the State Government of the Commonwealth may do the same character of work when paid on a per diem compensation as one who is employed by the State Government and paid on a yearly or monthly compensation basis, but nevertheless the Legislature has drawn the line of demarcation and

it is not for us to express any other policy. The employe of the Board of Fish Commissioners in question is, therefore, not entitled to prior service credit for retirement purposes during the time when he was employed as a special fish warden, unless as a special fish warden he be included in the class of persons holding a State office under the Commonwealth of Pennsylvania, as provided in the remaining part of said definition of State employe in the Retirement Act as above quoted.

By the Act of July 28, 1917, P. L. 1215, the Commissioner of Fisheries could appoint special fish wardens. Their powers were limited to the enforcement of the laws of the Commonwealth relating to fish. They had no special commission issued to them; their term of employment was of the most temporary character, it might be for one day or longer within a certain period of time up to the thirty-first day of May next succeeding their appointment, but no longer. If paid at all, the Act provides that they must be paid a per diem compensation. At most, the special fish wardens are but subordinate agents or officers, and certainly not within the meaning and intentment of the State Employees' Retirement System Act when it refers to a person "holding a State office under the Commonwealth of Pennsylvania".

You are, therefore, advised that the certain fish warden herein referred to employed by the Fish Commissioner of the Commonwealth of Pennsylvania is qualified for membership in the State Employees' Retirement System and entitled to prior service credit for retirement purposes during the time he was employed as said fish warden on a yearly or monthly basis, but is not entitled to prior service credit for his time of service while employed on a per diem compensation basis as a special fish warden.

Yours very truly,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,  
*Deputy Attorney General.*

*State Employees' Retirement System—Absence of a State employee affecting the computation of prior service for Retirement purposes—Act of June 27, 1923, P. L. 858, Sections 1, 10.*

A State employee qualified for membership in said System is entitled to have counted in computing his prior service the entire length of time when absent with part pay, on leave granted by the head of the Department; but is not so entitled, when absent without pay, on leave granted by the head of the Department, unless allowed by the latter official, with the approval of the Retirement Board.

March 6, 1924.

Honorable Clyde L. King, State Employees' Retirement Board, Harrisburg, Pa.

Sir: In your recent communication to this Department in the matter of the application of two persons for membership in the State Employees' Retirement System, I find the following facts which were presented to your Board by the Chief of the Library Extension Division of the State Library:

“\* \* \* One of our staff spent ten months during the war period in camp library work among the enlisted men, doing so on leave of absence granted by the Free Library Commission, with half pay. Another one served for twelve months in similar work over seas on leave of absence without pay. In both of these cases the deficiency in salary was made up by the American Library Association, which was in charge of the Library work among the men.”

And your inquiry resolves itself into two questions as follows:

First, should the length of time that a State employe was absent with leave on part pay be counted in computing his prior services for retirement purposes?

Second, should the length of time that a State employe was absent with leave without pay be counted in computing his prior service for retirement purposes?

The two persons referred to in the statement of facts, who are State employes, are entitled to membership in the State Employees' Retirement System in accordance with the opinion of Special Deputy Attorney General Schnader, rendered to you on February 5, 1924. Persons who were employed in the State Library and Museum on June 15, 1923, when the Administrative Code became effective and were appointed to positions in any other Administrative Departments, Boards or Commissions, are provided for by Section 6 of said Code and entitled to membership in the State Retirement System.

Section 1, paragraph 13, of the Act of June 27, 1923, P. L. 858, known as the State Employees' Retirement System Act, provides as follows:

“‘Prior service’ shall mean all service completed not later than the thirty-first day of December, nineteen hundred and twenty-three.”

Section 10 of said Act provides in part as follows:

“In computing the length of service of a contributor for retirement purposes, under the provisions of this act, full credit shall be given to each original member by the retirement board for each year of prior service as a State employe, as defined in section one, paragraphs six and thirteen of this act. \* \* \* The time during which a State employe is absent without pay shall not be counted in computing the prior service or the average salary of a contributor, unless allowed by the head of the department in which said contributor served at the time said leave of absence was granted, and, further unless said allowance shall be approved by the retirement board.”

In the case before us of the State employe absent with leave in camp library work during the World War on half pay, there must have been a determination made by the Free Library Commission, at or about the time leave was granted, that the particular employe was engaged in service for the State Government and its citizens among the enlisted men as evidenced by the fact that half pay compensation from the State Treasury was allowed. The State Employees' Retirement System Act makes no reference whatsoever to absence of a State employe *with leave on part pay*. It does, however, expressly refer to *absence with leave without pay* in said Section 10, as above referred to. Even in such case the time of absence is counted in computing prior service or the average salary of the contributor if allowed by the Head of the Department in which said contributor served when leave of absence was granted and further approval had by the Retirement Board. Consequently, all the more should time of absence be granted in computing prior service of an employe who is *absent on leave with part pay*. We think it was clearly so intended by the Act.

The main underlying purpose of the State Retirement System is reward for service to the State Government. An excellent illustration in support of the reasonableness of allowing prior service to one engaged in work for the State Government and absent on leave without pay is the situation now before us. In the first case, under the statement of facts as given, the employe of the Free Library Commis-

sion engaged in camp library work among enlisted men while absent on leave is allowed half pay from the State. In the other case, an employe of the same Free Library Commission who is absent with leave and doing exactly the same work over seas is not allowed pay. Nevertheless, in this latter instance—the case of an employe absent on leave without pay, under Section 10 of the Retirement Act, the question whether the time of absence is to be counted as prior service is entirely within the sound discretion of the Head of the Department where he was employed when leave was granted and the further approval of the Retirement Board had thereto.

To grant only part time prior service to one who was absent with leave on part pay and who was doing highly meritorious public service as in this case, would be against the very spirit of the Act. To hold that he must suffer loss of any amount of this service in computing his prior service for retirement purposes would not be equitable or just, nor in keeping with the attitude and desire of the State with reference to its pension policy.

Therefore, in answer to the respective questions you are advised.

First, an employe of the State Government qualified for membership in the State Employees' Retirement System is entitled to have counted in computing said prior service the entire length of time when absent with part pay on leave granted by the Head of the Department in which said contributor served at the time said leave of absence was granted.

Second, an employe of the State Government qualified for membership in the State Retirement System is not entitled, by the express wording of the Act, to have counted in computing said prior service the length of time when absent without pay on leave granted by the Head of the Department in which said contributor served at the time said leave of absence was granted, unless allowed by the Head of the Department in which said contributor served at the time said leave of absence was granted, and the further approval thereof by the Retirement Board.

Respectfully yours,

DEPARTMENT OF JUSTICE,

By PHILIP S. MOYER,

*Deputy Attorney General.*

*State Employees' Retirement Board—Authority to invest moneys in the Retirement Fund in bonds of municipalities of states other than Pennsylvania—Acts of July 18, 1916; April 5, 1917; P. L. 46; June 7, 1917, P. L. 447, Section 41; March 19, 1923, P. L. 23; June 27, 1923, P. L. 858, Section 6; June 29, 1923, P. L. 995; July 11, 1923, P. L. 1059; Act of Congress of July 18, 1916.*

The State Employees' Retirement Board may only invest moneys in the Retirement Fund, "subject to the terms, conditions, limitations, and restrictions imposed by law upon fiduciaries in making investments." Legal investments for fiduciaries are defined in Section 41 of the Act of June 7, 1917, as amended by Acts of March 19, 1923 and June 29, 1923. Trustees have no authority to invest in any other kinds of securities except such as have been enumerated in the acts cited, without having first obtained Court approval, pursuant to the Act of June 7, 1917.

March 10, 1924.

Dr. Clyde L. King, Chairman, State Employees' Retirement Board,  
Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the State Employees Retirement Board may invest moneys in the Retirement Fund in bonds of municipalities of States other than Pennsylvania.

Section 6, Clause (1) of the Act of June 27, 1923, P. L. 858, creating your Board provides that the members of the Board shall be "the trustees of the several funds created by this Act and shall have exclusive control and management of the said funds and full power to invest the same; subject, however, to all the terms, conditions, limitations and restrictions imposed by this Act upon the making of investments, and subject, also, to the terms, conditions, limitations, and restrictions imposed by law upon fiduciaries in making investments  
\* \* \* \*"

Clause (6) of the same section of the Act contains the terms, conditions, limitations and restrictions imposed by the Retirement Act upon the making of investments. In this clause the trustees are prohibited from having any interest, direct or indirect, in the gains or profits of any investments made by the Retirement Board and from borrowing any of the funds or deposits of the Fund or in any manner using the same, except to make such current and necessary payments as are authorized by the Retirement Board. There is a further prohibition against having any trustee become surety or in any manner an obligor for moneys loaned by or borrowed from the Retirement Board.

Nowhere does the Retirement Act itself specify the kind of securities in which the moneys in the Retirement Fund may be invested, except that such investments must be made "subject to the terms, conditions, limitations and restrictions imposed by law upon fiduciaries in making investments."

Legal investments for fiduciaries are defined in Section 41 of the Act of June 7, 1917, P. L. 447. Clause (a) 1 of this section permits fiduciaries to invest trust funds "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." This clause was amended by the Act of March 19, 1923, P. L. 23 so as to make bonds or certificates of debt of poor districts of this Commonwealth legal investments and by the Act of June 29, 1923, P. L. 995, which added to the list of legal investments "bonds of one or more individuals secured by mortgage on real estate in this Commonwealth which may be either a single bond secured by a mortgage or one or more bonds of an issue of bonds secured by mortgage or deed of trust to a Trustee for the benefit of all bond holders."

The Act of April 5, 1917, P. L. 46 as amended by the Act of July 11, 1923, P. L. 1059 permits fiduciaries to invest trust funds in farm loan bonds issued by Federal Land Banks or by Joint Stock Land Banks under the provisions of the Act of Congress of July 18, 1916, its amendments and supplements. However, in an opinion to Honorable Peter G. Cameron, Secretary of Banking, dated August 29, 1923, Deputy Attorney General Brown advised the Department of Banking that the Act of July 11, 1923, P. L. 1059 is unconstitutional insofar as it purports to permit trustees to invest trust funds in farm loan bonds issued by Federal Land Banks or by Joint Stock Land Banks. Accordingly your Board cannot lawfully purchase such bonds.

The provisions of law which we have cited enumerate, subject to the view we have expressed regarding farm loan bonds, the only kinds of securities in which trustees have the right to invest trust funds without having first obtained Court approval.

Section 41 (a) 2 of the Fiduciaries Act of 1917 provides that a fiduciary may present a petition to the Orphans' Court "having jurisdiction of his accounts" for permission to invest trust funds 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. If the Court acts favorably upon such petition investments made as authorized by the Court are "legal investments." However, the Orphans' Court does not, in our opinion, have jurisdiction of the accounts of your Board, so that it would be impossible for you to present a petition under Section 41 (a) 2 of the Act of 1917.



Accordingly you are advised that the only classes of securities in which your Board may lawfully make investments are:

1. The stock or public debt of the United States;
2. The public debt of this Commonwealth;
3. Bonds or certificates of debt of counties, cities, boroughs, townships, poor districts or school districts of this Commonwealth;
4. Mortgages or bonds secured by mortgages on real estate in this Commonwealth; and
5. Ground rents in this Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

By WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*State Employees' Retirement System—Eligibility for membership therein of County Medical Directors, of the Department of Health, who served as part-time employees—Acts of June 7, 1923, P. L. 498, June 27, 1923, P. L. 858, Section 1, Paragraphs 6 and 8.*

County Medical Directors, or Health Officers, of the Department of Health, who are paid on a yearly salary basis by the State Government, are eligible for membership in the State Employees' Retirement System, even though they may be classified by the Executive Board as part-time employees and paid accordingly.

May 1, 1924.

Mr. Leon Henderson, Secretary, State Employees' Retirement System, Harrisburg, Pa.

Sir: In your recent communication to this Department you advise that County Medical Directors of the Department of Health of the State serve as part time employees and their classification is based upon full time service for which \$3600 per year would be paid, and for which the classification of Professional Expert would be assigned; and that one of said County Medical Directors, who is employed at a salary of \$1,000 per year, has made application for membership in the State Employees' Retirement System.

You inquire whether this County Medical Director is eligible to become a member of the State Employees' Retirement System.

Paragraph 8, Section 1, of the State Employees' Retirement System Act, the Act of June 27, 1923, P. L. 858, provides that the word—

“‘Member’ of the retirement association shall mean a State employee who shall be a member of the retirement association established by this act.”

Paragraph 6, of the same section provides that the words—

“‘State employe’ shall mean any person holding a State office under the Commonwealth of Pennsylvania, or employed by the year or by the month by the State Government of the Commonwealth of Pennsylvania in any capacity whatsoever. But the term ‘State employe’ shall not include judges, and it also shall not include those persons defined as employes in section one, paragraph seven of the act, approved the eighteenth day of July, nineteen hundred seventeen (Pamphlet Laws, one thousand forty-three) entitled ‘An act establishing a public school employes’ retirement system, as amended by section one, paragraph seven of the act, approved the twenty-first day of April, nineteen hundred twenty-one (Pamphlet Laws, two hundred fifty-five). \* \* \*”

You advise that the certain County Medical Director, who has applied for membership in the State Employes’ Retirement System, is employed at a salary of \$1,000 per year by the Department of Health of the Commonwealth of Pennsylvania. By the very wording of part of said paragraph 6, Section 1, of the Retirement Act that the term “State employe” shall mean “any person \* \* \* employed *by the year or by the month by the State Government* of the Commonwealth of Pennsylvania *in any capacity whatsoever*,” the County Medical Director in question comes within the clear intent of the Act as a “State employe” entitled to membership in the State employes’ Retirement System. This employe is paid his salary out of the State Treasury and deductions of contributions to the State Employes’ Retirement Fund can, therefore, be made in accordance with the provisions of the Act. Because of the fact that this applicant comes so clearly within the intent of the act, it is unnecessary for us to determine whether he is a “person holding a State office under the Commonwealth of Pennsylvania.”

The difficulty of determination of eligibility for membership in this case by the Retirement Board has probably arisen mainly from the fact that the applicant in this case is classified by the Executive Board of the State, although the same has not yet been fixed as provided by the Administrative Code of 1923, as a part time employe. The Administrative Code of 1923, Section 1805, does not refer in any manner to these “County Medical Directors” or Health Officers as being part time employes. The classification is one determined upon entirely by the Executive Board. The State Employes’ Retirement System makes no distinction whatsoever between full time and part time employes of the State Government. This matter cannot enter into the determination of the question of eligibility for membership in said system.

You are, therefore, advised that a County Medical Director or Health Officer of the Department of Health of the Commonwealth of Pennsylvania paid on a yearly salary basis by the State Government, is eligible for membership in the State Employees' Retirement System, notwithstanding the fact that he may be classified by the Executive Board of the State as a part time employe and paid accordingly.

Very truly yours,

DEPARTMENT OF JUSTICE,

By PHILIP S. MOYER,  
*Deputy Attorney General.*

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*State Employees' Retirement Board—Nature of expenses which may be paid out of the Expense Fund of said Board—Procedure—Act of June 27, 1923, P. L. 858, Sections 6, 8, 9; Article III, Section 16, of the State Constitution.*

Every item of expense incurred in the administration of the Retirement Act of 1923, except only retirement allowances and other benefits, should be paid out of the Expense Fund of the Retirement Board. In the withdrawal of moneys from said fund, the specific directions of the Retirement Act must be literally followed. The warrant of the Board should be drawn by its Chairman, countersigned by its Secretary, and presented to the State Treasurer, whose duty under the Act is to make payments upon such warrant.

June 14, 1924.

Dr. Clyde L. King, Chairman, State Employees' Retirement Board,  
Harrisburg, Pennsylvania.

Sir: You have asked to be advised:

1. What limitations, if any, are imposed upon the nature of the expenses which may be paid out of the Retirement Board Expense Fund; and
2. What procedure is to be followed in requesting payments to be made from this Fund.

The Act of June 27, 1923, P. L. 858, Section 8 (2) creates an Expense Fund which shall consist "of such amounts as shall be paid by the Commonwealth on the basis of estimates submitted by the Retirement Board, to defray the expenses of the administration of this Act, exclusive of the payment of retirement allowances and of the benefits provided for in this Act." In Section 9 of the Act it is provided that "for the biennium beginning June 1, 1923, there is hereby appropriated to the Expense Fund created by Sec-

tion 8 paragraph (2) of this Act, such sum not to exceed fifty thousand dollars (\$50,000) as shall be certified to the State Treasurer by the Retirement Board as necessary to meet the expense of establishing the Retirement System constituted by the provisions of this Act."

Section 6 deals with the management of the several funds created by the Act. In paragraph (3) it is provided that "the State Treasurer shall be the custodian of the several funds created by this Act," and in paragraph (4) that "all payments from the funds created by this Act shall be made by the State Treasurer only, upon warrant signed by the Chairman of the Retirement Board and countersigned by the Secretary of the Retirement Board; and no warrant shall be drawn except by order of the Retirement Board duly entered in the record of its proceedings."

The provisions of the Act to which we have referred leaves no room for doubt as to the Legislature's intention with regard to the use and management of the Expense Fund. It is quite evident that the Legislature intended to have set apart as an expense fund a definite sum of money out of which were to be paid all of the expenses of administering the Retirement Act except retirement allowances and other payments in the nature of benefits. It would be difficult more clearly to express this intention than is done in Section 8, paragraph (2). The Legislature apparently had in mind the desirability of knowing exactly the cost of administering the new Retirement System and the creation of a separate Expense Fund from which was to be paid every item of administrative overhead was the simplest and most direct way of accomplishing this result.

To accomplish its apparent purpose the Legislature appropriated not more than fifty thousand dollars (\$50,000) for the current biennium to the Expense Fund. There being nothing in the Retirement Act to the contrary this appropriation should be withdrawn from the General Fund of the State Treasury in the usual manner, namely, by warrant of the Auditor General upon the State Treasurer. When so withdrawn from the General Fund the Expense Fund is in the possession of the State Treasurer as custodian thereof, under the specific provision contained in Section 6, paragraph (3). The Legislature could have designated any other member of the Retirement Board as the Custodian of the Fund, but it very appropriately provided that the Commonwealth's Treasurer should continue to have custody of this Fund, even after the money in it had been withdrawn from the State Treasury as such.

Having made provision for the withdrawal from the State Treasury and the payment into a separate fund of the money necessary for the overhead administration of the Act the Legislature specifically provides how the money in the Expense Fund should be with-

drawn and in making provision for this step it departed from the prevailing practice employed in withdrawing money from the State Treasury generally. It provided that the money should be paid on the warrant not of the Auditor General, but of the Retirement Board itself, and that such warrants should be signed by the Chairman of the Retirement Board and countersigned by its Secretary. Here again the Legislature's intention was plainly expressed and there is no room for doubt as to what was intended.

Accordingly you are advised that out of the Expense Fund of the Retirement Board should be paid every item of expense incurred in the administration of the Retirement Act except only retirement allowances and other benefits; and that the specific directions of the Retirement Act should be literally followed in the withdrawal of moneys from the Expense Fund. The warrant of the Retirement Board should be drawn by its Chairman countersigned by its Secretary and presented to the State Treasury whose duty under the Act is to make payments upon such warrants.

The only possible reason which might be suggested for advising you to depart from the very definite provisions of the Act with regard to the procedure to be followed in withdrawing money from the Expense Fund would be that warrants can be drawn upon the State Treasurer only by the Auditor General of the Commonwealth. It is our opinion that such an objection would not be tenable for the reasons (1) that the Constitution nowhere specifies what the duties of the Auditor General are, thus leaving it to the Legislature to define those duties; and (2) that it is specifically provided in Article III, Section 16 of the Constitution that no money shall be paid out of the Treasury, except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof. This constitutional provision plainly permits the Legislature to designate by law the officer who is to draw the warrant upon the State Treasurer in any particular case. It may further be answered, as has already been indicated, that the withdrawal of expense money from the State Treasury takes place when the amount appropriated is set aside into a separate Expense Fund; and that thereafter moneys are withdrawn not from the State Treasury as such but from the Expense Fund which is in the possession of the State Treasurer as statutory custodian thereof, and not as the constitutional custodian of the general funds of the Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

By WM. A. SCHNADER,

*Special Deputy Attorney General.*

*State Employees' Retirement System—Procedure in the payment of the expenses of the Board. (Acts of April 29, 1909, P. L. 281; June 7, 1923, P. L. 498, Section 223; June 27, 1923, P. L. 858).*

There is a conflict between Section 223 of the Act of June 7, 1923, and the Act of June 27, 1923; warrants should be drawn by the Chairman of the Retirement Board and countersigned by the Secretary of the Board. While unnecessary, it is desirable to have the Auditor General countersign said warrants.

June 26, 1924.

Dr. Clyde L. King, Chairman, State Employees' Retirement Board,  
Harrisburg, Pennsylvania.

Sir: We have your request of recent date making further inquiries with regard to the subject matter of our opinion of June 14th with reference to the procedure to be followed in making payments from the Expense Fund set apart for the use of your Board. You desire to know whether warrants for payments out of this fund should not be countersigned by the Auditor General as well as by the Secretary of your Board, and whether there is not a conflict between Section 223 of the Administrative Code and the provisions of the Retirement Act of June 27, 1923, P. L. 858.

The Act of April 29, 1909, P. L. 281 provides as follows:

"That on and after the first day of June, one thousand nine hundred and nine, every warrant drawn by the Auditor General upon the State Treasurer shall be transmitted by the Auditor General to the State Treasurer, who shall, thereupon make payment to the person, persons, firm or corporation named as payee or payees in the warrant; and said warrant shall be retained by the State Treasurer, to be filed by him as a voucher in the office of the Auditor General. And every warrant drawn by any other officer of the Commonwealth, who now is, or may hereafter be, by law, authorized to draw warrants upon the State Treasurer, shall first be transmitted to the Auditor General, for his counter-signature; and shall thereafter be paid by the State Treasurer, in the same manner as hereinbefore prescribed in the case of warrants drawn by the Auditor General."

As we pointed out in our opinion of June 14th the Retirement Act of 1923 provides that warrants against the various funds of the Board shall be drawn by the Chairman of the Board and that they shall be countersigned by its Secretary. Under the Retirement Act the officer who is authorized to draw warrants against the various funds of the Board is the Chairman of the Board. If the Retirement Act had gone no further than to provide what officer shall draw

these warrants there would have been no inconsistency whatever between the Act of 1909 and the Retirement Act. The Retirement Act, however, provides not only for the drawing of the warrants but also for their countersignature and the officer who is to countersign them is not the Auditor General, but the Secretary of the Retirement Board. We do not believe that it was the intention of the Legislature when the Retirement Act was passed to require two countersignatures on warrants drawn against the various funds set apart for the use of the Board.

The Act of 1909 being a statute and not a constitutional provision is subject to modification or repeal in whole or in part by action of subsequent sessions of the Legislature. The 1923 Legislature could, therefore, and in our opinion did, provide that the Act of 1909 should not be applicable to warrants drawn against the various funds of the Retirement Board.

We understand from your letter, however, that regardless of any legal requirement to do so good fiscal practice renders it desirable that the Auditor General should have a record of all payments made by the various funds of your Board. To this there can be no objection and an additional countersignature on the warrants in question, even though unnecessary, cannot invalidate the warrants or cause any legal complications whatsoever. If, therefore, you are disposed to submit these warrants to the State Treasurer through the Auditor General, having him countersign them so as to signify that they have passed through his hands, there can be no objection to such a course.

Coming to the question whether there is a conflict between Section 223 of the Administrative Code and the provisions of the Retirement Act you are advised that there undoubtedly is such a conflict. Under Section 22 of the Retirement Act your Board is designated as a departmental administrative board subject in all respects to the laws of the Commonwealth "limiting the powers of departmental administrative boards with regard to the expenditure of money \* \* \*." Section 223 of the Administrative Code provides that all warrants for disbursements of or for departmental administrative boards shall be drawn by the Auditor General upon requisition of the respective department heads with which such departmental administrative boards are connected. This provision is not reconcilable with the provision of the Retirement Act that warrants shall be drawn by the Chairman of the Board. Under these circumstances the Retirement Act having been approved at a date later than the date of the approval of the Administrative Code effect must be given to the provisions of the Retirement Act and not to the inconsistent provisions of the Administrative Code.

You are accordingly advised that warrants should be drawn by the Chairman of the Retirement Board as stated in our opinion of June 14, 1924.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*State Institutions—Warren State Hospital—Eligibility of nurses for membership in the State Employees' Retirement Association—Computation of prior-service credit of said nurses during the year of absence in service at a general hospital. (Act of June 27, 1923, P. L. 858.)*

Student nurses at the Warren State Hospital, employed by the month in said institution, are eligible for membership in the State Employees' Retirement Association; such nurses who become members of said association are not entitled to a year's prior-service credit for the year when they are in service at a general hospital, unless said year of absence without pay is allowed by the Department of Welfare and approved by the Retirement Board.

November 12, 1924.

Leon Henderson, Secretary, State Employees' Retirement Board,  
Harrisburg, Pennsylvania.

Sir: In a letter to you from the Superintendent of the Warren State Hospital, attached to your memorandum to this Department, you were advised that said hospital conducts a training school for nurses, which nurses are expected to sign a contract for a three year period of service, two of which are spent in service at said hospital, and the remaining year is required to be spent in service at a general hospital, for which latter year of service these nurses do not receive pay from the Warren State Hospital. These nurses while they are serving at the Warren State Hospital are paid regularly by the month. The Superintendent of the Warren State Hospital has inquired whether these nurses during the year of service in the general hospitals shall be treated as in the employ of the Warren State Hospital, or as "absent on leave without pay." You inquire, in addition thereto, as to the eligibility of said nurses for membership in the State Employees' Retirement Association.

I shall consider your question of eligibility first. The Act of June 27, 1923, P. L. 858, under which the State Employees' Retirement System has been established provides in part in Section 1, paragraph 6, as follows:



“‘State employe’ shall mean any person holding a State office under the Commonwealth of Pennsylvania, or employed by the year or by the month by the State Government of the Commonwealth of Pennsylvania in any capacity whatsoever. But the term ‘State employe’ shall not include judges, and it also shall not include those persons defined as employes in section one, paragraph seven of the act, approved the eighteenth day of July, nineteen hundred seventeen (Pamphlet laws, one thousand forty-three), entitled ‘An act establishing a public school employes’ retirement system,’ as amended by section one, paragraph seven of the act, approved the twenty-first day of April, nineteen hundred twenty-one (Pamphlet laws, two hundred fifty-five).”

Do these student nurses come within the meaning of “State Employe” as here quoted? In the first place we find that they are employed by the month by the Board of Trustees of the Warren State Hospital, which under the Administrative Code is a departmental administrative board in the Department of Welfare of the State Government. This Board is an agency of the State Government. Accordingly these nurses are “employed \* \* \* by the month by the State Government of the Commonwealth of Pennsylvania” and are State Employes within the meaning of the term as used in said Act unless the fact that they are “*Student*” nurses changes their status. This fact can not affect their status under the Act because there could be no proper justification for their monthly salary from the State unless while in training they were doing some service of employment at said hospital for the State. Furthermore, within the meaning itself of the term “State employe” as above quoted we find that the term applies to any person employed by the year or by the month by the State Government “*in any capacity whatsoever.*” You are, therefore, advised that the student nurses at the Warren State Hospital employed by the month by said State institution are eligible for membership in the State Employes’ Retirement Association.

Some question may arise as to the manner of securing from the pay-rolls the deductions of the contributions which these nurses as members of the Retirement Association are required to make for the retirement funds in the hands of the State Treasurer because of the fact that the employes of the various State hospitals do not receive their salaries directly from the State Treasury. This, however, is an administrative matter and can readily be met by the State Employes’ Retirement Board under its authority to establish rules and regulations for the administration of the funds created by the Act. If the Board were not authorized to establish rules to provide for the deduction and collection of the contributions from the employes of the various State Institutions who are eligible to membership in

said Association and who are not paid their salaries directly from the State Treasury the Act would be unworkable as to them and a grave injustice would fall upon a large body of State employes, which injustice certainly was never intended by the State Legislature.

As to the question raised by the Superintendent of said hospital we presume it was raised for the purpose of computing the prior service credit of said nurses as the same might become necessary for your Board under the State Employes' Retirement Act of June 27, 1923, P. L. 858. During the year of absence in service at a general hospital these certain nurses were not on the payroll of said State institution, nor were they doing any work at or for said State institution. The nurses in question can most certainly not be considered in the employ of the Warren State Hospital during this year when in service of a general hospital, and on the payroll of said general hospital. It is entirely true that said year of service at a general hospital is for the purpose of better equipping these certain nurses for their future service at said State institution, and it is apparently true that the year of service spent by said nurses at a general hospital is a loss to them in the matter of salary, as indicated by said Superintendent in his letter. However, there may be ample justification for allowance of credit being given to these certain nurses for said year of service in the general hospitals, but whether said year of absence without pay shall be allowed to be counted in computing prior service for retirement purposes is for the sound discretion of the head of the department in which said contributor served at the time of said leave-of-absence was granted, and the approval, in addition, of the State Employes' Retirement Board, as provided in Section 10 of said Retirement Act.

Therefore, as to the inquiry made of your Board by the Superintendent of the Warren State Hospital, you are advised that student nurses of said hospital who become members of the State Employes' Retirement Association are not entitled to a year prior service credit for retirement purposes for the year when they are in service at a general hospital, unless said year of absence without pay is allowed to be credited by the head of the department in which said contributor served at the time said leave was granted, which in this case is the Department of Welfare, and further, unless said allowance shall be approved by the Retirement Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,

*Deputy Attorney General.*

## OPINION TO STATE BOARD OF VETERINARY MEDICAL EXAMINERS

*United States Inspectors—Bureau of Animal Industry—Official Federal Duties—Registration—Acts of May 5, 1915, P. L. 248, and of May 8, 1919, P. L. 135.*

Veterinary inspectors of the Bureau of Animal Industry of the United States Department of Agriculture while engaged solely in the performance of their Federal official duties as veterinarians in the Commonwealth of Pennsylvania are not amenable to the provisions of the Act of May 5, 1915, P. L. 248, as amended by the Act of May 8, 1919, P. L. 135. Should they practice as veterinarians otherwise than in the performance of their official duties as employees of the United States Government, these acts would apply and they would be required to register.

December 18, 1924.

Doctor F. H. McCarthy, Chairman, State Board of Veterinary Medical Examiners, Pottsville, Penna.

Sir: My attention has been called to the opinion of Honorable William I. Swoope, Deputy Attorney General of Pennsylvania, dated February 23, 1922, and the opinion of Honorable A. T. Seymour, Acting Attorney General of the United States, dated April 3, 1923, both opinions being on the subject of the right of veterinary surgeons, in the employ of the United States and working solely for the United States under that employment in Pennsylvania, to be allowed to perform such work without registering with the Board.

The fact that the United States Department of Justice has given an opinion to the effect that these veterinary surgeons in the employ of the United States may as far as performance of their official duties under such employment is concerned, perform those duties in the State of Pennsylvania without being amenable to the provisions of the Pennsylvania Act of May 5, 1915, P. L. 248, as amended by Act of May 8, 1919, P. L. 135, makes it mandatory upon the Pennsylvania Department of Justice to review the opinion of Deputy Attorney General William I. Swoope, in order that, if possible, all conflict, or seeming conflict, between that opinion and the opinion of the United States Department of Justice may be cleared up.

The State is not bound by the opinions of the United States Attorney General, but when those opinions, as in this case, have solely to do with a Federal question arising in conflict with demands of officers of the Commonwealth of Pennsylvania, the opinion should be given the most full and careful consideration and every doubt resolved in favor of the full and free functioning of the Federal Government in the performance of its duties and functions.

It is all the more necessary to review the opinion of this Department because the opinion of the Attorney General of the United

States was given at a later date with, I am sure, full cognizance of the previous opinion of this Department.

However, it is comparatively easy to dispose of this seeming conflict because the United States Department of Justice calls attention in its opinion to several clear-cut pronouncements of the United States Supreme Court which apparently were not considered by the Pennsylvania Department of Justice in its opinion; and in this line it should be remembered that any contest with regard to this matter is one which can, and undoubtedly would be, carried to the Supreme Court of the United States, either by appeal from the Pennsylvania Supreme Court or by initiation and process through the Federal Courts.

If we could not establish that the laws creating the Federal Bureau of Animal Industry and the laws providing for work by veterinary surgeons employed by that Bureau, are unconstitutional, we would be ruled out by the opinion of the United States Supreme Court in the cases discussed by the Attorney General of the United States in his opinion of April 3, 1923, namely: *McCullough v. Maryland* (4 Wheaton 432); *Osborn v. Bank of United States*, (9 Wheaton 728, 867); *Weston v. Charleston* (2 Peters 448, 466); *Henderson et al. v. Mayor of New York et al.*, (92 U. S. 259, 271); and *McCullough v. Maryland* upheld in *Tennessee v. Davis*, (100 U. S. 257, 263).

The words of the Supreme Court of the United States in the last named case are conclusive provided that the Federal laws creating the Federal Bureau of Animal Industry and providing for its powers, functions and duties are constitutional. The Court says:

"No state government can exclude it (the federal government) from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

The United States Attorney General also draws attention to the following Supreme Court cases: *In re Neagle*, 135 U. S. 1; *in re Debs Petitioner* (158 U. S. 564, 599); *M. K. & T. Rwy. Co. vs. Haber* (169 U. S. 613, 626); *Ohio vs. Thomas* (173 U. S. 276); *Johnson v. Maryland* (254 U. S. 51).

In view of the heavy task which would be assumed in attacking the constitutionality of the Federal laws concerning the Federal Bureau of Animal Industry and its powers and duties, and also in view of the value to the agricultural interests of this and other states wrapped up in the continuance of a Federal Bureau of Animal Industry, I feel it would be out of place to attack the constitutionality of those Federal laws, because of the conflict between rulings of State and Federal agencies.

Therefore, we have reached the following conclusion and opinion:

1. The Pennsylvania Department of Justice does not dispute the constitutionality of the Federal laws creating and imposing powers and duties upon the Federal Bureau of Animal Industry.

2. That being the case, the opinion of Deputy Attorney General Swoope, which was given without consideration of the Federal cases discussed by the Attorney General of the United States and cited herein, is hereby reviewed and, on the strength of said decision of the United States Supreme Court, the Pennsylvania State Board of Veterinary Medical Examiners is advised that the following is the opinion of this Department:

(a) The Veterinary Inspectors of the Bureau of Animal Industry of the United States Department of Agriculture while engaged solely in the performance of their Federal official duties as veterinarians in the Commonwealth of Pennsylvania, are not amenable to the provisions of the Act of May 5, 1915, P. L. 248, as amended by the Act of May 8, 1919, P. L. 35.

(b) Said Veterinary Inspectors of the United States Board of Animal Industry, however, would be, as probably intended by Deputy Attorney General Swoope in his opinion, obliged to register under said laws of the Commonwealth of Pennsylvania, if they should desire to practice as veterinarians otherwise than in performance of their official duties as employes of the United States. The opinion of the Attorney General of the United States indicates this by the use of the words "while engaged in the performance of their *official* duties as veterinarians."

Yours very truly,

DEPARTMENT OF JUSTICE,

By GEORGE W. WOODRUFF,

*Attorney General.*

## OPINION TO COUNTY SOLICITOR OF NORTHAMPTON COUNTY

*Department of Justice—Opinions—To whom opinions may be given.*

1. Although the Administrative Code of June 8, 1923, P. L. 498, limits the furnishings of opinions by the Department of Justice to certain State officials, such opinions may, in certain circumstances, and where a State matter is involved, be furnished to a county official..

*Penitentiaries—County—Prisons—Transfer of prisoners—Cost of maintenance—Act of July 11, 1923.*

2. Under the Act of July 11, 1923, P. L. 1044, the cost of keeping prisoners transferred from a penitentiary to the county in which they were convicted must be paid by such county, although the *per diem* cost in the county prison may be in excess of the *per diem* cost in the penitentiary.

July 31, 1924.

Thomas D. Danner, Esquire, County Solicitor of Northampton County, 613½ East Fourth Street, Bethlehem, Pennsylvania.

Sir: This Department is in receipt of your letter of the 22nd instant, in which you state that certain prisoners were duly transferred from the Eastern State Penitentiary to the Northampton County Prison, under the provisions of the Act of July 11, 1923, P. L. 1044; that said prisoners have been kept and maintained in the Northampton County Prison at the expense of the County of Northampton; that statements of the cost to the County of Northampton of the keeping of said prisoners have been presented for payment to the various counties from which these prisoners were originally sentenced; and that the county commissioners in certain cases have refused to make payment, alleging that the *per diem* cost in the Northampton prison is greater than the *per diem* cost of maintaining prisoners in the Eastern Penitentiary, and that their liability under the Act of 1923 for the keeping of such transferred prisoners was limited to the *per diem* cost of keeping prisoners in the Eastern Penitentiary.

Because the collection of the money which you contend is owing to the County of Northampton will involve the bringing of actions for the collection thereof in a number of different counties and because this question is involved in the matter of the maintenance of prisoners in a number of other counties who were transferred there to under the provisions of the said Act of 1923, you request that an opinion may be rendered by this Department on the following question:

In the case of a prisoner transferred from the Eastern State Penitentiary to a county prison by virtue of the provisions of the Act of July 11, 1923, P. L. 1044, is the liability of the county in which such

prisoner was convicted to the county to which so transferred for his keeping, limited by the per diem cost of keeping prisoners in said penitentiary during said period of time?

Although the power and duty of this Department in the matter of furnishing legal advice is limited to the furnishing of the same "to the Governor and to all administrative departments, boards, commissions and officers of the state government concerning any matter or thing arising in connection with the exercise of the official powers or the performance of the official duties of the governor or such administrative departments, boards, commissions or officers" (Art. IX, Sect. 902, Administrative Code), and although it is the policy to avoid formal opinions in cases in which a disputed matter has been submitted to the courts or is about to be submitted, for decisions, we shall in this case render our opinion upon the question you raise, for the reasons you have given and also for the reason that these prisoners are in a large sense wards of the State.

Section 9 of the Act of April 23, 1829, P. L. 341, provides that the expense of the keeping of convicts in the Eastern and the Western Penitentiaries shall be borne by the respective counties in which they shall be convicted.

The Act of July 11, 1923, P. L. 1044, authorizes the transfer of prisoners from certain penal institutions, including the Eastern State Penitentiary, to certain other penal institutions, including the Northampton County Prison, and provides the procedure therefor, including, in Section 2, a provision for notice of any such proposed transfer to the county commissioners of the county from which the prisoner was committed, and, in Section 5, a provision for notice to said county commissioners of the completion of such transfer.

Section 3 requires those in authority over the institution to which such transfer shall be made, to accept and receive such prisoners and thereafter in safe custody to keep and provide for them until the expiration of their term of imprisonment.

Section 4 provides as follows: "The expense of transferring, retransferring, and keeping such prisoners so transferred or retransferred shall continue to be borne by the county in which such prisoner was convicted and the same shall be paid to the authorities having charge of the transferred or retransferred prisoner by the said county from time to time as bills are rendered."

For a hundred years the State has undertaken in its sovereign capacity to provide facilities for the incarceration of those criminals convicted of the more serious crimes against society. It has provided the necessary penal institutions, the necessary cost of administration thereof, and the proper food and clothing for the inmates. During all that time it has assessed the cost of keeping such prisoners upon the counties in which they were convicted.

During recent years the state penal institutions became overcrowded, resulting in sanitary and disciplinary evils. A survey showed that there were many penal institutions owned and operated by various counties, in which there were adequate facilities for the care of additional prisoners. For these reasons the aforesaid Act of 1923 was passed and approved, and under its authority many transfers were made.

It would have been manifestly unfair to place either the whole or any part of the cost of keeping such transferred prisoners upon the county to which they happened to be transferred. Any such plan would have penalized the county which had been far-sighted enough to build a large prison; or the county which, because of its adequate police protection, or the high character of its citizenship, had fewer prisoners in its own prison than could be accommodated. Or, I might add, that it would have penalized those counties which, having the facilities for caring for additional prisoners, showed enough interest in the welfare of the inmates of the Penitentiaries to willingly accept additional prisoners, which attitude was conspicuously absent on the part of many county commissioners at the hearings held in Philadelphia in September, 1923, at which time these transfers were made.

It appears to me that the provisions of this Act of 1923 with reference to the assessment of the cost of keeping transferred prisoners upon the counties from which they came, could not have been made clearer.

The act does not specifically limit these expenses to the amount that it would have cost had such transferred prisoners been maintained in the penitentiary. If any such provision had been in the mind of the legislature, it would have seen the unfairness of placing any additional cost upon the county to which transferred and would have likely placed that additional cost upon the State. It did not do so.

If under the act the county from which such a prisoner was sentenced was to be assessed upon the per diem cost of keeping prisoners in the penitentiary, the rule would apply equally to cases in which the cost of maintenance in the local county prison is less than the cost in the penitentiary, as well as to cases in which the former is greater than the latter. If such be the case, to whom would such surplus be payable?

The fact that the average cost of keeping fifty or a hundred prisoners is greater than the average cost of keeping two thousand, furnishes no argument for the interpretation contended for by these debtor counties. The legislature is presumed to have considered that such would likely be the case and, if it had intended to limit this cost to such counties, would have inserted such a limitation.



I am clearly of the opinion that the provisions of Section 4 of said Act of 1923 require the payment of the proper cost of keeping such transferred prisoners to the county within which they are maintained by the county in which they are convicted.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

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