

Commonwealth of Pennsylvania

**OFFICIAL OPINIONS**

OF THE

**ATTORNEY GENERAL**

OF

**PENNSYLVANIA**

FOR THE YEARS

**1925 and 1926**

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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

*Taxation—Reimbursement of license tax mistakenly paid—Dog law.*

Where a license fee for a dog has been paid under a mistake of fact and the same has been turned into the State Treasury, there is no authority in law for reimbursing the person who has mistakenly paid it.

Department of Justice,  
Harrisburg, Pa., March 20, 1925.

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

Dear Sir:

This Department has your request of the 6th instant for an opinion as to whether or not there is authority to reimburse a party who has paid a license fee for a dog under some mistake of fact.

The instances which you cite are: (1) Where more than one license has been issued for the same dog to two different members of a family, neither knowing that the other has made application, the proper fee having been paid for each license; and (2) where an application for a license for a spayed female dog describes the same as a female dog and the license has been issued for a dog thus described upon the payment of \$2.00, the fee prescribed for such a dog, whereas, the fee for a spayed female dog is \$1.00.

You also state that by the time the error is discovered by the owner of the dog, the money paid for the license has been forwarded by the County Treasurer to the State Treasurer, and there deposited to the credit of the "Dog Fund."

I am of the opinion that reimbursement under circumstances of this kind can not be made, first, because it is contrary to public policy; and second, because there is no specific appropriation for that purpose.

First:

"In the absence of express statutory provision to the contrary, the recovery back of a license-tax which was voluntarily paid will not be tolerated." *25 Cyc. of Law and Procedure. Page 631.*

The license fee to which you refer was voluntarily paid, as shown by the following situations:

"The very word used to describe an involuntary payment imports a payment made against the will of the person who pays. It implies that there is some fact or circumstance which overcomes the will and imposes a necessity of payment in order to escape further ills." *21 R. C. L. page 146.*

The payment of a tax to prevent seizure of property is not an involuntary payment, unless it appears that an attempt has been made by the officer to seize and sell the property. *21 R. C. L. page 160.*

The Legislature has not by statute modified the above cited rules with respect to the fee for a dog license.

Second: *Section 1 of the Act of May 11, 1909, P. L. 519 (West Penna. Stat., Sec. 8172)* provides that:

“It shall be unlawful for any officer of this Commonwealth to authorize the payment of any money, by warrant or otherwise, out of the State Treasury, or for the State Treasurer 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 \* \* \* \* \*”

No appropriation has been made under which refunds may be made to those who have paid the fee for a dog license under any mistake of law or fact.

I, therefore, advise that no such refund may be made.

Yours very truly,

JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

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*Inspection of automobiles—Uniform and badge of officers stopping automobiles—  
Department of Agriculture—Statutes—Acts of June 30, 1919, July 2, 1923, and  
April 27, 1925.*

The Act of June 30, 1919, P. L. 678, as amended by the Act of April 27, 1925, P. L. 254, requiring certain officers to be in uniform and to exhibit badges of authority when stopping motor-vehicles, for inspection, does not apply to officers of the Department of Agriculture who are authorized to stop vehicles under the Act of July 2, 1923, P. L. 991, to enforce the Japanese beetle quarantine.

Department of Justice,  
Harrisburg, Pa., May 23, 1925.

Hon. F. P. Willits,  
Secretary of Agriculture,  
Harrisburgh, Penna.

Sir:

We have your request for an opinion as to whether or not the Secretary of Agriculture and his authorized agents are required to be in uniform and to exhibit a badge or other sign of authority in order that they may stop motor vehicles on the highways of the State for inspection in the performance of their duty in enforcing the Japanese beetle quarantine.

Section 2 of the Act of July 2, 1923, P. L. 991, provides, *inter alia*, as follows:

"The Secretary of Agriculture may also establish quarantines and quarantine restrictions in affected areas (affected by Japanese beetle) and areas adjacent thereto, and adopt, issue, and enforce rules and regulations relative to such quarantine and for the control and limitation of this pest. Under such quarantines the Secretary of Agriculture, or his authorized agents, may prohibit and prevent the movement, without inspection, or the shipment or transportation of any agricultural, horticultural, or any other material of any character whatsoever capable of carrying this pest in any state of its development; and, further, he may, under such quarantine, intercept, stop, and detain, for official inspection, any person, car, vessel, truck, automobile, wagon, or other vehicle suspected or known to carry any material in violation of any quarantine, or any official rules or regulations thereunder, established by authority of this act."

Your inquiry is suggested by the approval on April 27, 1925, of Act No. 160, which further amends Section 26 of the Act of June 30, 1919, P. L. 678.

Said Section 26, as last amended prior to 1925, by the Act of June 14, 1923, P. L. 718, provided, *inter alia*, as follows:

"The operator of any motor vehicle shall stop upon request or signal of any constable, police officer, or member of the State Police Force, or designated officer of the State Highway Department, who shall be in uniform or shall exhibit his badge or other sign of authority, and shall, upon request, exhibit his registration certificate or license, and shall write his name in the presence of such officer, if so required, for the purpose of establishing his identity. He shall also furnish, to any legally constituted authority, any information in his possession as to the identity of the operator or owner of any motor vehicle.

"Any constable or police officer or member of the State Police Force or designated officer of the State Highway Department, who shall be in uniform or shall exhibit his badge or other sign of authority, shall have the right to stop any motor vehicle, upon request or signal, for the purpose of inspecting the said motor vehicle as to its equipment and operation, or manufacturer's number or motor number or weight, and securing such other information as may be necessary."

Said Section 26 is re-enacted by Act No. 160, Session of 1925, as above quoted, changing the sentence "who shall be in uniform

or shall exhibit his badge or other sign of authority," to read "who shall be in uniform and shall exhibit his badge or other sign of authority." This change being made in the two places where the above quoted sentence appears. Thus the intent of the amendment is that the authority in the officers therein specified to stop a motor vehicle upon the highway is limited to those instances in which such officers are in uniform and exhibit their badge or other sign of authority.

The question then is—does the provision of Act No. 160 of 1925, amending the Motor Vehicle Act by limiting the requirement that operators of motor vehicles shall stop upon signal from the officers therein named, and by limiting the right of such officers to stop a motor vehicle upon the highway, to those instances in which such officer is in uniform and exhibits his badge or other sign of authority, apply to the Japanese Beetle Act so as to require the Secretary of Agriculture, or his authorized agent, to be in uniform and exhibit his badge or other sign of authority as a prerequisite of his right to stop the vehicles therein enumerated.

Both the Motor Vehicle Act of 1919 and the Japanese Beetle Act of 1923 authorized the stoppage of a motor vehicle travelling upon the highway by the representatives of the Commonwealth therein designated for the purposes therein set forth. They were unrelated acts, independent one of the other, and contained different provisions. Each designated different officers as those to whom such authority was delegated from those designated in the other; each specified different reasons for the exercise of such authority and different purposes to be accomplished thereby from those reasons and purposes specified in the other; the one required as a condition of the right to exercise the authority given that the representative of the Commonwealth be in uniform or exhibit his badge or other sign of authority, while the other contained no such limitation or requirement; the Motor Vehicle Act contains no limit as to the time or place where such authority may be exercised, while in the Japanese Beetle Act the right to stop vehicles is limited to the places in which a quarantine has been declared and to the time within which such quarantine is effective. Either one could be repealed without affecting the other.

I see no reason why this amendment to the motor vehicle law requiring the officers therein named to be in uniform when stopping a motor vehicle should be construed as affecting the right given under the Japanese Beetle Act to other officers to stop motor vehicles for an entirely different purpose.

Act No. 160 of 1925 is not an independent Act repealing all inconsistent provisions of other Acts, but is an amendment to a specific

act. There is no notice contained in its title that it affects the Japanese Beetle Act, and so for that reason also its provisions must be confined to the Motor Vehicle Act.

This conclusion is further strengthened by the fact that the authority contained in the Act of 1919, and the limitation thereof in the Act of April 27, 1925, is confined to the stoppage of motor vehicles, while the authority contained in the Japanese Beetle Act of 1923, applies to individuals, cars, vessels, trucks and wagons as well as to motor vehicles.

Your inquiry is therefore answered in the negative. It may be added that you and your agents when exercising the right granted you to stop vehicles must show your authority so to do, and it is advisable that such authority be made apparent to the operator or driver of such vehicle by distinctive uniform or badge, or both.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

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*Carbonated beverages—Ginger ale—Registration of—Act of May 14, 1925.*

Ginger ale may be lawfully registered under the Act of May 14, 1925 (Act No. 399), without reference to the ingredients which it contains, if the Secretary of Agriculture is satisfied that it does not contain any added poisonous or deleterious substances; the Act of May 14, 1925, does not repeal the Act of March 11, 1909, P. L. 15.

Department of Justice,  
Harrisburg, Pa., July 8, 1925.

Honorable F. P. Willets, Secretary of Agriculture, Harrisburg, Pennsylvania.

Sir: We have your request for an opinion with respect to the construction to be placed upon sections 5 and 22 of Act No. 399 of the 1925 Session, approved May 14, 1925, when read in conjunction with section 4 of the Act of March 11, 1909, P. L. 15, insofar as these statutory provisions affect the sale of ginger ale in Pennsylvania.

Section 5 of the Act of May 14, 1925 provides:

“No carbonated beverages or still drinks shall be made except from syrup containing pure cane or beet sugar and pure flavoring materials with or without added fruit acids and with or without added color. Such carbonated beverages or still drinks shall contain not less than eight per centum sugar by weight. \* \* \* \* \*

Carbonated beverages or still drinks not in compliance with this section shall be deemed adulterated."

Section 22 of the Act of May 14, 1925 provides:

"This Act does not repeal or in any wise affect \* \* \* any of the provisions of the Act approved the eleventh day of March, one thousand nine hundred and nine (Pamphlet Laws, fifteen) entitled 'An Act relating to non-alcoholic drinks; \* \* \*'"

Section 4 of the Act of March 11, 1909, P. L. 15 contains the following proviso:

"\* \* \* Provided, That any non-alcoholic drink which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded under the following conditions;

"A. In the case of mixtures or compounds which may be now, or from time to time hereafter, known as non-alcoholic beverages under their own distinctive names, and not an imitation of, or offered for sale under the name of, another article."

We understand that your inquiry arises under the following facts:

The manufacturer of a nationally known brand of ginger ale has demanded registration under the Act of May 14, 1925 of the ginger ale manufactured by it, notwithstanding the fact that such ginger ale contains less than eight per centum sugar by weight. Since the passage of the Act of March 11, 1909 ginger ale has become recognized as the distinctive name of an article of non-alcoholic beverage. It is defined for the purposes of the enforcement of the Federal Food and Drug Laws in Food Inspection Decision of the United States Department of Agriculture, No. 185, issued December 18, 1922 as follows:

"Ginger Ale is the carbonated beverage prepared from ginger ale flavor, sugar (sucrose) sirup, harmless organic acid, potable water, and caramel color."

We understand that your Department concedes that at the present time ginger ale is known as a non-alcoholic beverage under its own distinctive name, thus concurring in the recognition which has been given to ginger ale by the United States Department of Agriculture.

Except for the clear expression of legislative intent in section 22 of the Act of May 14, 1923 that the Act of 1925 does not repeal or *in any wise affect* any of the provisions of the act of March 11, 1909, P. L. 15, there would be no question but that in order to be deemed unadulterated under the Act of 1925 it would be necessary for ginger ale to contain at least eight per centum sugar by weight; and your Department could not lawfully register a beverage under the provisions of section 3 of the Act of 1925 knowing that the beverage for which registration was demanded was an adulterated beverage.

However, in view of the provision contained in section 22 of the Act of 1925 as previously quoted it is necessary to read the Act of March 11, 1909 and the Act of May 14, 1925 together and for purposes of interpretation to construe them as if they were one Act approved on the same day.

When the Act of 1909 was enacted ginger ale was apparently not regarded as a non-alcoholic drink known under its own distinctive name for in section 2 ginger ale was specifically mentioned as one of the articles to be comprehended within the term "non-alcoholic drink" as used in that act; but in section 4 of the Act of 1909 the Legislature not only provided that a mixture or compound which in 1909 was known as a non-alcoholic beverage under its own distinctive name should not be deemed adulterated if it contained no added poisonous or deleterious ingredients, but it also provided that any mixture or compound which might in the future become known as a non-alcoholic beverage under its own distinctive name should be deemed non-adulterated unless it contained added poisonous or deleterious ingredients.

Accordingly the Legislature evidenced its definite intention to exempt from the provisions of law specifying the ingredients to be or not to be contained in non-alcoholic beverages any mixtures or compounds which might at any time in the future attain recognition as non-alcoholic beverages under their own distinctive names, provided only, that such beverages contain no added poisonous or deleterious substances.

In view of the fact that section 22 of the Act of 1925 provides that the Act of 1925 shall in no wise effect any of the provisions of the Act of 1909, section 4 of the Act of 1909 must be read and interpreted as if the Act of 1925 had never been enacted.

Under Section 4 of the Act of 1909 a non-alcoholic beverage, if it is a mixture or compound known as a non-alcoholic beverage under its own distinctive name, can be deemed adulterated only if it contains added poisonous or deleterious ingredients.

As your Department recognizes ginger ale as a mixture or compound known as a non-alcoholic beverage under its own distinctive name we are clearly of the opinion that Section 5 of the Act of 1925 has no application to the manufacture of this article.

You are advised that you may lawfully register ginger ale under the Act of May 14, 1925 without any reference to the ingredients which it contains if you are satisfied that it does not contain any added poisonous or deleterious substances.

Very truly yours,  
DEPARTMENT OF JUSTICE,  
WM. A. SCHNADER,  
*Special Deputy Attorney General.*

*Department of Agriculture—Authority to order the destruction of potato plants which are within the area quarantined against the potato wart disease—Acts of April 6, 1921, P. L. 112, April 18, 1919, P. L. 71.*

The Secretary of Agriculture or his agents have the legal right to require the owner or the person in control of the land involved to destroy such forbidden or non-permitted potato plants. If the person refuses to destroy them then the Secretary or his agents have the right to destroy the plants and the person thus refusing is subject to prosecution for refusal to obey such order as he was in the first instance for planting the plants in question and allowing them to grow.

Department of Justice,  
Harrisburg, Pa., July 25, 1925.

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

Dear Secretary Willits: I am in receipt of your request for an opinion concerning your rights in general under the Act of April 18, 1919, P. L. 71, as amended by the Act of April 6, 1921, P. L. 112, and in particular as to the right of your agents to order the destruction of potato plants which are within an area quarantined against the potato wart disease pursuant to the authority of the above mentioned Acts, and are of a variety not specifically allowed by the permit obtained from the Department of Agriculture for the planting of potatoes within such quarantined area.

In general, the law specifically gives you the power and imposes upon you the duty of establishing a quarantine and quarantine restrictions in areas affected by the potato wart disease and areas adjacent thereto. The grant of this power and the imposition of this duty is a valid exercise of the police power of the legislature, and is therefore, effective as far as your rights and duties are concerned.

The legislature also gives you the power and imposes upon you the duty "to adopt, issue and enforce rules and regulations relative to such quarantine and for the control and eradication of such disease."

The law also provides that the violation of any provision of the act or of any of your rules and regulations adopted under authority of the Act are to be punished by summary process "before any mayor, burgess, magistrate, alderman or justice of the peace."

Your first care should be to make your rules and regulations entirely explicit in order that the magistrate may have something definite upon which to base his consideration of the complaint.

Having clearly established a quarantine upon any area which is either affected with the disease, or adjacent to an affected area having also clearly determined upon the quarantine restrictions which would mean the adoption and issuance of "rules and regulations relative to such quarantine,"—and having also adopted and issued general rules and regulations "for the control and eradication

of such disease", you and your agents have the power and it is your duty to proceed vigorously to enforce the law and the rules and regulations.

Specifically in answer to the question as to what you or your agents may do when a variety of potato plant is found growing within a quarantine area, which has been forbidden by your rules or regulations, or not authorized by permit, it is clear to me that you and your agents have the legal right, either before or after the conviction of the person upon whose land within the quarantine area such potato plant or plants are growing, to require (if your rules and regulations so state) the owner or the person in control of the land involved to destroy such forbidden or non-permitted potato plants; and if the person refuses to destroy them, then you or your agents have the right to destroy the plants yourselves, and the person thus refusing is in my opinion as subject to prosecution for refusal to obey the order to destroy the plants as he was in the first instance for planting the plants in question and allowing them to grow.

If the owner, or person in control, will not permit your agents to go upon the premises for the purpose of inspection and removal of such forbidden or non-permitted potato plants, he is in the wrong legally, and every act to prevent you or your agents to perform your duties will be either an illegal threat on his part, or an assault as the case may be, making him liable to arrest for either threatening or obstructing an officer in the performance of his duty, or assault and battery, as the case may be. Naturally, you will not want your agents to go to extremes or endanger themselves if the resident should be violent. In such case it would be better for the agents to resort to legal steps.

Further, it would be wise to ask the magistrate, as you are doing, not only for the conviction of the accused person, but also have an order upon him to destroy the plants existing contrary to the quarantine.

Anything which the Department of Justice can do to help the enforcement of the above law will be done gladly upon request.

Yours very truly,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF.

*Attorney General.*

*Department of Agriculture—Unsanitary Conditions—Control Act of 1915, P. L. 587, and Administrative Code of 1923.*

In the interest of public health, the Department of Agriculture has the power to control as well as prosecute any one preparing meat and meat-food products in places where such products are liable to be contaminated or unwholesome for human consumption.

Department of Justice,  
Harrisburg, Pa., August 25, 1925.

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

Sir: I reply to your memorandum dated July 30, 1925, inquiring whether the Bureau of Animal Industry has jurisdiction to interfere with the practice of itinerant butchers in killings on farms.

The places objected to by you are those where, as stated in your memorandum, the animals are killed and dressed over the manure pile for convenience in disposing of the offals or under dirty wagon-sheds and other outlying or equally undesirable places. Such places come under the third classification found in Section 3 of the Act of 1915, P. L. 587, which section provides:

"The word 'establishment' as used in this act, shall include \* \* \* (3) any place or any vehicle where meat or meat-food products are prepared, manufactured, stored, sold, offered for sale, exposed for sale, or transported by land or by water."

Section 16 of the said Act provides:

"If, upon examination, it is found that any establishment, or any part of an establishment, \* \* \* is in an unclean or insanitary condition, or is being conducted or used in such a manner as to make it probable that the meat or meat-food products therein or produced therein may be rendered unwholesome, or is being conducted or used in violation of this act, the agent making such examination shall report the unlawful condition to the board, \* \* \*."

Section 2 of the said Act provides that the term "unwholesome" referred to in Section 16—

"\* \* \* shall be understood to include all meats or meat-food products which are diseased, contaminated, putrid, unsound, unhealthful or unfit for food."

Section 9 of the said Act, as amended by the Act of 1917, P. L. 682, provides:

"It is unlawful in an establishment to expose any meat or meat-food product in such manner or place that it may be touched or handled by any person other than the owner, lessee, or manager of an establishment, or other than the agent or employe of such owner, les-

see, or manager, or to expose any meat or meat-food product to insects, animals, or fowl."

Section 20 of the said Act provides:

"This act shall be enforced by the board. To that end it may adopt and promulgate such rules and regulations as it may deem necessary. \* \* \*"

Section 22 of the said Act provides:

"Any duties imposed upon or power given to the board by this act, may be done or exercised as the board may, by standing or special order, direct."

The purpose of this Act as set forth in the title is, "To protect the public health by regulating the manufacture, \* \* \* handling, \* \* \* and possession of meat and meat-food products; \* \* \*."

After careful study of the entire Act, I advise you as follows:

1. Under Section 3 such places as those described in your memorandum are establishments under the control and supervision of the State Livestock Sanitary Board.

2. Under Section 16 of the Act the State Livestock Sanitary Board has the right and authority to close any such establishment if, after examination, it determines that such establishment is being conducted in violation of the terms of such section. The Board has the power to prosecute the person or persons conducting such an establishment even after the closing thereof. The language of this section is very broad, giving to the Board the power to close any establishment being conducted in "such a manner as to make it *probable* that the meat or meat-food products \* \* \* produced therein may be rendered *unwholesome*". (See Section 2 for definition of "unwholesome".)

3. The preparing of meats and meat-food products in such places as described in your letter is in violation of Section 9 of the said Act, as amended, if in such places meats are exposed to the handling of others than those mentioned in the section, and if in such places meats are exposed to insects, animals or fowls.

4. Section 20 and 22 grant authority to the Board to adopt and promulgate rules. Such rules may prohibit the killing of animals under the control of your Board in places where the said meat or meat-food products are exposed to the handling of others than those mentioned in Section 9, as amended, and to insects, animals or fowls. Failure on the part of any one to comply with the rules adopted by the Board makes such a person liable to prosecution under the terms of Section 21 of said Act, which provides that—

"Any person who shall violate any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not exceeding one year, or both. \* \* \*"

Under Act No. 101 of 1919 all the powers and duties of the State Livestock Sanitary Board were transferred to the Bureau of Animal Industry, and all these powers invested in the Bureau of Animal Industry were transferred to the Department of Agriculture in accordance with Section 1501 of the Administrative Code, further specified in Section 1502.

Yours very truly,  
DEPARTMENT OF JUSTICE,  
FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*Animals—Registration of bovine animals—Acts of May 19, 1887, P. L. 130, July 22, 1913, P. L. 928, and May 28, 1915, P. L. 587.*

1. The Department of Agriculture, for determining whether or not an animal condemned by the State was or was not a pure-blood bovine, is not limited to such registry associations as were in existence before the date of the passage of the Act of July 22, 1913, P. L. 928.

2. If an association established since the date of the Act of 1913 submits records which, upon investigation, are deemed honest and as reasonably accurate, at least as the registration of an older association, for determining whether an animal condemned was or was not a pure-breed bovine, the department should recognize such association and make payments on the certificates furnished by it to the same extent as it would accept the record of registration in an older association.

Department of Justice,  
Harrisburg, Pa., January 30, 1926.

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

Sir: The Attorney General has referred to me your request for an opinion as to whether your Department should recognize the registration of bovine animals as made by a new Association called the Holstein-Friesian Registry Association, Incorporated, (under the laws of Delaware) of which Association Howard C. Reynolds is Secretary.

You state that all registration of Holstein cattle has heretofore been made by means of the Herd Book of the Holstein-Friesian Association of America, of which Association Ex-Governor Frank C. Loudon of Illinois is President, and that to date no other breed of bovine cattle has more than one registry association. The only direct reference to registration of bovines is found in the Pennsylvania Act

of July 22, 1913, P. L. 928 (supplied by the Act of 1915, P. L. 667) which provides that the amount paid by the State shall in no case exceed \* \* \* for a registered bovine animal the sum of \$70.00, and in the Act of 1887, P. L. 130, providing that every person who by any false pretense shall obtain from any club, association, etc., for improving the breed of cattle \* \* \* the registration of any animal in the Herd Registry of such Association, club, \* \* \* shall upon conviction be punished by imprisonment, etc.

The question is whether your Department should recognize only the registration in such organizations as were in existence at the time of the passage of the Act of 1915. The matter is one of great importance to the breeders of cattle throughout the country.

The old Holstein Association, now the only one recognized by the State has spent thousands of dollars gathering progeny records which are regularly published in Herd Book form. This book can be obtained by any member of the Association.

In this manner the new Association has access to the records of the Holstein-Friesian Association of America, in so far as they are published in the Herd Book. The officers of the new Association claim they do not and will not register any animal in its Herd Book which has not been registered by the old Association, either in its Herd Book or by certificate for any record subsequent to the publication of the Herd Book, or animals which are progeny of cattle thus doubly registered or certified. The certificate they claim makes the record complete up to the time when registration is made by the new Association.

By adopting this system the new Association alleges that the certificate issued by them shows as accurate a progeny record as that issued by the old Association, and is as good evidence of the pure breed nature of animals thus registered by it.

Section 21 of the Act of 1913, P. L. 928 provides as follows:

“ \* \* \* The amount paid by the State shall in no case exceed \* \* \* for a non-registered bovine animal the sum of forty dollars; for a registered bovine animal the sum of seventy dollars. \* \* \* The amount paid by the State, together with the estimated value of the carcass, hide and offal, shall not exceed ninety per centum of the fair market value of the animal \* \* \*.”

This Section of the Act pertains to the payment of money for animals condemned by the State because they are diseased. It provides the means by which the Department can determine the amount to be paid, i. e. not more than \$40.00 for a non-registered animal and not more than \$70.00 for a registered animal. The difference in cost to the State may be \$30.00 in each case. So it is readily seen that under Section 21 the question to be determined is whether the progeny

report as submitted to your Department by an owner whose animal has been condemned is an accurate record which will prove that the condemned animal was a pure bred bovine, and which record therefore, can be relied upon for the purpose of paying out an additional \$30.00 of the State's money.

The Section of the Act relating to registration is intended to fix the amount the State shall pay for non-registered bovine animals and the amount which shall be paid for registered bovine animals. This registration by an Association is in effect legally constituted *prima facie* proof that the animal is a pure bred in its class, and if pure bred, the State is bound to pay the larger sum of money, provided always that the registration is of a nature and surrounded with safeguards, such that it is *prima facie* as good evidence in new Associations as in the original old one.

But there is nothing contained in the Act of 1913, P. L. 923, or its amendments, which provides that only the Registry Association which was in existence at the time of the passage of the Act should be recognized. The State is interested in the registration, as far as the provisions of this Section of the Act are concerned, only because it pays out a larger sum of money on a certificate and needs therefore reliable evidence in the line of dependable registration.

Because the interest of the State is monetary it is your duty to protect its funds and to be certain that the registry recognized by your Department is an accurate and efficient record.

Therefore, I am of the opinion that your Department should recognize for the purposes of payment by the State, only those registry Associations, whether one or more for each pure breed, which can furnish certificates which will enable you to assume, so far as it is possible to depend on any register, whether the animal condemned by the State was a pure bred bovine.

If the Holstein-Friesian Association (the new Association) submits records which upon investigation are decreed by you thoroughly honest and as reasonably accurate at least as the registration of the old Association, for determining whether the animal condemned by the State was or was not a pure bred bovine, your Department should recognize such Association and make payments on the certificates furnished by it, to the same extent as you take registration in the old Association as acceptable. In other words, the purpose of this particular law was to raise the maximum thirty dollars for pure breed bovine animals as determined by highly reliable registration such as the Legislature believed to be provided by the old Association, and the burden is on the Department of Agriculture to determine whether any new registering Association for any pure breed bovines can be relied on with substantially as much certainty as the reliance put

on pure breed Associations in existence at the time of the passage of the Act. This is a question of fact and must be investigated and ruled on by you.

Yours very truly,

DEPARTMENT OF JUSTICE

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*Secretary of Agriculture—Lard Substitutes—Oleomargarine—"Higgins Nut Product"*  
—Acts of 1909, P. L. 17; 1901, P. L. 327.

The product known as "Higgins Nut Product" comes within the intent and meaning of Section 1 of the Act of 1901, P. L. 327 and its amendments, as a product defined therein, which cannot be sold in Pennsylvania until compliance is had with the provisions of said Act of 1901 as amended.

Department of Justice,  
Harrisburg, Pa., April 16, 1926.

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

Sir: You have asked this department for an opinion as to whether a certain product known as "Higgins Nut Product", prepared by the Higgins Manufacturing Company of Providence, Rhode Island, should be classed in Pennsylvania as a "lard substitute" within the meaning of the Act of March 11, 1909, P. L. 17, or as "oleomargarine" within the meaning of the Act of May 29, 1901, P. L. 327, and its amendments.

At a hearing held in my office, when you, Deputy Secretary McKee, Director of the Bureau of Foods and Chemistry Kellogg, Chemists of said Bureau and Attorneys representing said Higgins Manufacturing Company were present, certain facts were submitted to me concerning the nature and character of the aforementioned product. Dr. Charles H. LaWall, an expert chemist, who made an analysis and examination of the product in question for your department, submitted to me the results arrived at, and was examined by attorneys for the Higgins Manufacturing Company.

It is contended that during March, 1925, upon the representations then made by said Higgins Manufacturing Company to James Foust, Director of the Bureau of Foods and Chemistry, that Mr. Foust stated that the product in question would not be "oleomargarine" under the Oleomargarine Law of Pennsylvania. It is further contended by counsel for said company that Director Foust suggested that said company bring its product into Pennsylvania under the Lard Substitute Act of 1909. Whereupon, the company in question prepared a large number of one pound pasteboard cartons for ship-

ping said product into Pennsylvania. It also appears from all the facts and copies of correspondence submitted to me that Director Foust did not have any knowledge of the character of the product in question, excepting what had been represented to him by said company and its agents. In the case of a product called "Veroc", on April 7, 1925 he wrote the Mayfair Margarin Company of Providence, Rhode Island, that this product which was represented to contain coconut oil, cottonseed oil and common salt, and which was white and used for cooking and baking, would not be oleomargarine. However, Mr. Foust in said letter reserved the right to the Bureau to change its position at any time should the product be artificially colored or sold to be used in any way as a butter substitute. This letter has been referred to by attorneys for the Higgins Manufacturing Company. Whatsoever might be predicated on this letter by the Higgins Manufacturing Company, it conclusively indicates that Director Foust was depending entirely upon the statement of the company for the character of the product in question, and this is likewise what is contended for by the Bureau of Foods and Chemistry in the case of the product here in question, "Higgins Nut Product". Shortly thereafter Director Foust sent samples of said "Higgins Nut Product", as well as samples of said "Veroc" product to Dr. LaWall in Philadelphia for analysis. It appears to us to be quite plain that the only reason Director Foust sent samples of both of said products to Dr. LaWall, the chemist, to have them analyzed was because of the fact that he was uncertain about the contents and character of the product in question, and up to that time was depending entirely upon the representations made by the companies that manufactured said products.

On April 20, 1925 Dr. LaWall submitted a report of his analysis and examination of said Higgins Nut Product, and advised that the product was not a lard substitute but a butter substitute coming under the provisions of the Oleomargarine Law of Pennsylvania. Director Foust on April 21, 1925 advised the Higgins Manufacturing Company that said Higgins Nut Product was barred from sale in Pennsylvania unless sold under the provisions of the Oleomargarine Law of Pennsylvania. On June 15, 1925 Mr. Foust was succeeded as Director of the Bureau of Foods and Chemistry by James W. Kellogg. The Higgins Manufacturing Company presented their claims to Director Kellogg, and Director Kellogg took the same position as his predecessor. Later a hearing was requested and held before you. Finally the matter was presented to this department in the nature of a hearing before me as previously stated. In addition to the testimony of Dr. LaWall and other data submitted by your department, the attorneys for the Higgins Manufacturing Company have submitted data concerning the character of the product in question, including affi-

davits and copy of Plaintiff's Brief in the case of Higgins Manufacturing Company vs. Frank A. Page, Collector of Internal Revenue, in the District Court of United States for the District of Rhode Island, 297 Fed. 644, and samples of certain food prepared in "Higgins Nut Product", which food requires deep fat frying.

It would appear from the facts presented to me that "Higgins Nut Product" contains the following: peanut oil, cocoanut oil, moisture and salt. No animal fats of any kind are used. Neither milk nor butter form any part in its preparation. Likewise, no coloring matter is used in the product shipped into Pennsylvania. The product is white in color. All these facts appear to be admitted by the representatives of Higgins Manufacturing Company.

The analysis made by Dr. Charles H. LaWall, chemist for the Bureau of Foods and Chemistry, shows that the sample of the product submitted to him contained, among other things, 12.34% of moisture and 1.70% of salt. According to a letter of August 6, 1925 of Attorney Winslow, representing said company, the product contains 10.20% of moisture. It is contended by Mr. LaWall and Director Kellogg that the product in question is similar in its character to butter, that it is made in imitation of butter without coloring matter, that its moisture and salt contents, texture and main uses are similar to butter. It is accordingly contended by the Bureau of Foods and Chemistry that Higgins Nut Product is "oleomargarine" within the meaning of Section 1 of the Act of May 29, 1901, P. L. 327 as amended. It is contended on the other hand by the Higgins Manufacturing Company that this product is not "oleomargarine" within the meaning of said Act, but that it is a "lard substitute" within the meaning of the Act of March 11, 1909, P. L. 17.

Section 1 of the Act of May 29, 1901, P. L. 327, as amended by the Act of June 5, 1913, P. L. 412, provides in part as follows:

"That no person, firm or corporation shall \* \* \* sell \* \* \* oleomargarine, butterine, or any similar substance, article, product, or compound, made wholly or partly out of any fats, oils, or oleaginous substances, or compound thereof, not produced from pure, unadulterated milk, or cream from the same, without the admixture or addition of any fat foreign to the said milk or cream, and which shall be in imitation of yellow butter, produced from pure, unadulterated milk, or cream of the same, with or without coloring matter, unless such person, firm, or corporation shall have first obtained a license and paid a license fee as hereinafter provided; nor unless the said article, product, or compound, \* \* \* shall be made and kept free from all coloration or ingredients causing it to look like butter of any shade of yellow, as hereinafter described; nor unless the same

shall be kept and presented in a separate and distinct form, and in such manner as will advise the purchaser and consumer of its real character; nor unless such person, firm, or corporation shall, in all other respects, comply with and observe the provisions of this act. For the purposes of this act, oleomargarine, butterine, or similar substance, shall be deemed to look like, be in resemblance of, or in imitation of butter of a shade of yellow, when it has a tint or shade containing more than one and sixth-tenths degrees of yellow, or of yellow and red collectively, but with an excess of yellow over red, as measured in the terms of the Lovibond tintometer scale, or its equivalent."

It was said by Judge Henderson, in construing said Act of May 29, 1901, P. L. 327, in the case of *Commonwealth vs. Clewell*, 49 Pa. Super. Ct. 389, 394:

"The whole history of the legislation on this subject shows that what was aimed at is the prevention of fraud on the consumers by the sale to them of another substance as and for butter".

One of the principal objects of the Statute as was stated by President Judge Rice in *Commonwealth vs. Mellet*, 27 Pa. Super. Ct. 41, 50 was "to prevent the sale of oleomargarine which, by reason of the addition of coloring matter, or of the selection or treatment or combination of its component parts, is made to resemble and be in imitation of yellow butter."

Under Section 1 of said Act of May 29, 1901, P. L. 327 as amended, the products therein referred to are defined as "oleomargarine, butterine, or any similar substance, article, product or compound, made wholly or partly out of any fats, oils, or oleaginous substances or compound thereof, not produced from pure, unadulterated milk, or cream from the same, \* \* \* and which shall be in imitation of yellow butter, produced from pure, unadulterated milk or cream of the same, with or without coloring matter, \* \* \* nor unless the said article, product or compound \* \* \* shall be made and kept free from all coloration or ingredients causing it to look like butter of any shade of yellow, as hereinafter described". And under said Act, by license as therein provided, said article, products and compounds are to be sold under the name of "Oleomargarine".

Does Higgins Nut Product come within the meaning of the articles, products and compounds referred to in said Section 1 of the Act of May 29, 1901, P. L. 327 as amended? From the analysis of said product by Dr. LaWall, who for many years has been particularly engaged as an analytical chemist in food work, and since 1905 as an expert chemist for your Bureau of Foods and Chemistry, during part of which time he has been consulting chemist for the United States

Department of Agriculture, as well as from an examination of said product by the Director of the Bureau of Foods and Chemistry, James W. Kellogg, it appears that this product is made partly out of "oils, or oleaginous substances, or compound thereof, not produced from pure, unadulterated milk, or cream from the same", in imitation of butter without coloring matter.

Dr. LaWall stated at the hearing before me, previously referred to, that "cream is an emulsion, an emulsion in which oil is suspended in water or an aqueous solution. Butter is also an emulsion, in which the conditions are reversed; that is, water is suspended in oil. Oleomargarine, which is an imitation of butter, may be of either of the two types of emulsification; oil in water, or water in oil; but the essential likeness between oleomargarine and butter lies in the fact that they are emulsions that hold water and oil in an endless state of combination." Dr. LaWall's analysis of Higgins Nut Product indicates a moisture content in said product of 12.34%, which he stated made it quite similar to butter in this respect. The moisture content of butter, I find, rarely exceeds 15%, and the average is about what is found in this product. For this same reason he insisted that the product could not be used for deep fat frying, in which case the water separating and going to the bottom would cause sputtering and a degree of disturbance of the liquid which would make it unsuitable for such frying. His analysis showed 1.70% of salt content therein, and in this respect it was also quite similar to butter. He insisted that the moisture and salt contents of any such product is the main difference in distinguishing it as a butter or lard substitute.

Both Dr. LaWall and Director Kellogg further contended that the product in question had the same uses in cooking, shortening and frying as butter. This fact is quite well borne out by the recipes contained in a cook book showing the uses of said "Higgins Nut Product", which cook book is prepared by said Higgins Manufacturing Company and was submitted to me by your department. From the recipes given for creamed chipped beef, butter frosting, hard pudding sauce, chocolate caramels, oyster stew, creamed potatoes, macaroni and cheese, milk toast, cream of pea soup, cream of tomato soup, bread pudding, etc., it is quite plain that Higgins Nut Product replaced the butter which would always be used in making these preparations. What housewife or chef, for instance, would for a moment consider using lard or lard substitute in an oyster stew or milk toast, or, in fact, in any of the recipes just referred to?

Counsel for the Higgins Manufacturing Company stated at the hearing that it was not correct that this product could not be used for deep fat frying, as contended for by the chemists of your department. In support thereof they submitted to me samples of dough-

nuts and french fried potatoes, which they stated were prepared in Higgins Nut Product. The recipe for preparing doughnuts as given on page 5 of said cook book prepared by this company, would in itself appear to support the contention of your department. In this recipe near the end thereof, we find this: "Cut with a doughnut cutter, *fry in deep fat* and drain on brown paper." Why should the Higgins Manufacturing Company in preparing a cook book to advise the public as to the various uses of this product in cooking, refer to the fact that doughnuts should be fried in "*deep fat*", if Higgins Nut Product could reasonably be used for this purpose?

I have examined the Opinion of the Court in the case of Higgins Manufacturing vs. Page, collector, 297 Fed. Rep. 644 as well as the Briefs filed by counsel in connection therewith. Counsel for the Higgins Manufacturing Company laid considerable stress on this case. This was an action to recover tax paid under protest, under the Act of Congress of August 2, 1886 (Comp. St. Sec. 6215 Et. Seq.) imposing a tax on "oleomargarine", defined in Section 2 of said Act. The tax was imposed on a product known as "Nut-Z-All", manufactured by a predecessor to the Higgins Manufacturing Company. Counsel for the company advised me that "Nut-Z-All" is exactly the same as the product here in question, excepting that "Nut-Z-All" contained artificial coloring matter which gave it a shade of yellow. The Court held that "Nut-Z-All" was not "oleomargarine" as defined in said Act.

A careful study of the Opinion of the court in this case of Higgins Manufacturing Company vs. Page, collector, *supra*, reveals the fact that the Court laid great stress upon the taste of the product. The Court took the position that "oleomargarine" under Section 2 of said Act of Congress of August 2, 1886 must be exactly the same in taste as butter, and inasmuch as there was some difference in the taste of "Nut-Z-All" from that of butter, according to the testimony of a chemist for the Higgins Manufacturing Company, which testimony was believed, the product did not come within the meaning of "oleomargarine" as defined in said Act. Although this interpretation of said Act of Congress may be correct, I do not find that Section 2 of said Act of Congress of August 2, 1886 defining "oleomargarine" is the same as the definition of "oleomargarine" as found in the Pennsylvania Act of Assembly here in question, the Act of May 29, 1901, P. L. 327 as amended. It is unnecessary for our purpose here to attempt to determine all the differences between said Federal Act of 1886 and the Pennsylvania Act of 1901. Sufficient is it to note the fact that under the part of Section 2 of said Act of Congress of August 2, 1886 in question before the Court in said case of Higgins Manufacturing Company vs. Page, collector, *supra*, the product called "oleomargarine" could be "made, calculated or intended to be

sold as *butter or for butter*". This is certainly not true under said Pennsylvania Act of 1901. One of the most important provisions of said Act of 1901 is the prevention of the use of coloring matter in the oleomargarine "causing it to look like butter of any shade of yellow" as defined in said Act. In the case of *Commonwealth vs. McDermott*, 37 Pa. Sup. Ct., 1, 4, the Court said: "It is very clear, we think that the Act of May 29, 1901 is an act intended, not to prohibit the sale of oleomargarine or butterine, but to regulate the sale of the same and to prevent fraud upon the consumers by prohibiting the coloring of the article so that it will resemble yellow butter produced from pure unadulterated milk, or cream of the same, with or without coloring matter." Furthermore, in the Opinion in said case of Higgins Manufacturing Company vs. Page, collector, supra, in support of the position taken by the Court that the taste of the oleomargarine must be the same as that of butter, the Court said on page 648: "Oleomargarine as known in the market is ordinarily imitative of butter in taste and contains *butter or milk fat*". This fact is very plainly not true in the case of "oleomargarine" as defined in the Pennsylvania Act of Assembly of 1901. Under said Act of 1901 "oleomargarine" is a product defined as: "Oleomargarine, butterine, or any similar substances, article, product, or fats, oils or oleaginous substances, or compound thereof, *not produced from pure unadulterated milk, or cream from the same*, without the admixture or addition of any fat foreign to the said milk or cream, etc.," In other words, under said Act of 1901, it clearly appears that "oleomargarine" in Pennsylvania may be made entirely of "fats oils or oleaginous substances, or compound thereof" which are not milk, cream or butter fats. Certain oils, oleaginous substances which may be used in making the product will not have the same taste as butter or milk fats. This being true it cannot be said that oleomargarine made within the provisions of said Act of 1901 would always have the same taste as butter. However, as to the product in question, which is the same product without coloring matter as the product "Nut-Z-All", which was in question in said case of Higgins Manufacturing Company vs. Page, collector, supra, I find that W. D. Linder, Chief Chemist of the United States Bureau of Internal Revenue, testified as to the taste of the product (p. 649) as follows:

"Well it resembles butter substitutes; it didn't taste like pure, June butter, but it has the butter flavor, so much so that I am of the opinion that it could be used as a butter substitute".

Mr. Byer, a Government chemist, also testified to like effect concerning the taste of this product. Consequently, it would appear that the product in question, although it may not have exactly the same taste as butter, has the butter flavor.

Furthermore, in the Opinion of the Court in said case of Higgins Manufacturing Company vs. Page, collector, supra, I find that nothing whatsoever is predicated on the similarity of the product in question in moisture and salt contents with that of butter. This phase of the case is not discussed at all by the Court. Dr. LaWall and Director Kellogg, however, insists that the chief basis in determining whether such product is "oleomargarine" under the Pennsylvania Act of 1901 or a "lard substitute" under the Act of 1909 is the moisture and salt contents thereof, as previously referred to. My investigation leads me to the same conclusion.

Counsel for the Higgins Manufacturing Company contended at the time of the hearing, as previously referred to, that "Higgins Nut Product" is a "lard substitute" within the meaning of the Act of March 11, 1909, P. L. 17. They maintained that inasmuch as said Act of Assembly did not contain a definition of the terms "imitation lard" or "lard substitute", Dr. LaWall had no ground for the basis of his contention that a lard substitute could not contain any moisture beyond a mere trace thereof, nor any salt.

Section 2 of said Act of March 11, 1909, P. L. 17 provides in part as follows:

"Imitation lard and lard substitutes, not containing any lard, may be made and sold, when offered for sale and sold under the distinctive trade-name thereof: Provided, however, That if said imitation lard or lard substitute is offered for sale or sold from a broken package, then the vessel, receptacle, or wrapper receiving the same, at the time of every sale, shall be plainly labeled or marked on the outside thereof, in letters at least one half inch in length and plainly exposed to view, with the words 'Imitation Lard' or 'Lard Substitute', or the distinctive trade-name of the said article or substance: And provided further, That the said imitation lard or lard substitute shall not be composed of, or contain, any article, substance, or ingredient deleterious to health. \* \* \*

I cannot agree with the position taken by counsel for said Company. In the case of *Commonwealth vs. Kiefer*, 78 Pa. Sup. Court 460, where the defendant had been convicted under the Pure Food Act of May 13, 1909, P. L. 520 for selling adulterated butter—butter containing added water beyond the amount recognized by manufacturers and dealers as the maximum amount to be found in butter, Judge Henderson writing the Opinion of the Court said on page 463 as follows:

"The statute does not define the elements of food. It would have been impossible to include in a statute a description and definition of the countless articles entering into the diet of the people of the Commonwealth. The act assumes the existence of a great variety of food substances and operates on those manufacturing and selling them. \* \* \* When the inquiry is made whether there has been adulteration under the act, it may become necessary to ascertain what the thing is which is adulterated. *The law takes notice of the common understanding as to its nature, but it may be expedient to resort to expert evidence to ascertain the composition of the article in question.* When we speak of butter, the popular understanding is that it is a product of the milk of cows. When a question arises as to the mode of manufacture and the constituents of which it is composed, the evidence of men having experience in that subject may be necessary, and when we come to the inquiry, what is butter; what should it be as an article of food, we must appeal to those who are familiar with its composition and know what it is understood to be by those who are dealers in the commodity. The constituents of butter are given in the cyclopedias and are known by experts, but an average jury could not be expected to know what proportions of fat, casein, sugar, and moisture enter into its composition as it is produced by dairymen and sold in the markets. *It was competent therefore, for the Commonwealth to show what proportion of moisture is found in the butter of commerce,* to enable the jury to ascertain whether the defendant's butter contained moisture much in excess of that which is normally present in the product."

Judge Wagner writing the Opinion of the Lower Court in this case, which was affirmed, said as follows:

"The pure food law covers a multitude of foods. It was practically impossible for the legislature to define the content of every specific article of food intended to be covered by the act. The members of the legislature had a standard of these various kinds of food in mind when the law was enacted. *That standard naturally is that which is recognized by the trade at large. If the standard as recognized by the trade is not to be considered the standard in the prosecution of cases under the act, the act is of no effect.* \* \* \* In *Von Bremem et. al, v. United States*, 192 Fed. 904, where the question arose as to the meaning of the word 'salad oil,' it was held (p. 906): 'It was also error to refuse to let large dealers in this salad oil say what the understanding of the trade was as to the meaning of the words 'salad oil.'"

In light of these Opinions, it is entirely proper for the Bureau of Foods and Chemistry to show by its expert chemists the moisture and salt contents of lard and lard substitutes in distinguishing them from butter and butter substitutes.

In the case of the Federal Government, the Bureau of Chemistry under the Department of Internal Revenue, by regulations adopted under the Federal Food and Drugs Act, water found in compounds or other lard substitutes added in any way thereto is regarded as an adulteration, even if the added water is noted on the label.

I have given the inquiry which you have made in this matter very careful study and exhaustive investigation because of the differences which have arisen in the interpretation placed upon the Act of Congress applicable to the subject of "oleomargarine" as aforementioned, and that of the Pennsylvania Act of Assembly of 1901; also because of the fact that various shades of difference, very nicely drawn, have arisen in some of the other States in interpreting their particular Acts of Assembly pertaining to the subject of "oleomargarine." However, as previously stated, the interpretation of what is "oleomargarine" in Pennsylvania must entirely depend upon a construction of Pennsylvania Acts of Assembly applicable thereto. In conclusion, I am of the opinion, and so advise you, that the product known as "Higgins Nut Product" manufactured by the Higgins Manufacturing Company of Providence, Rhode Island, samples of which were examined by the chemist of the Bureau of Foods and Chemistry of your department, comes within the intent and meaning of Section 1 of the Act of May 29, 1901, P. L. 327 and its amendments, as a product defined therein, which cannot be sold in Pennsylvania until compliance is had with the provisions of said Act of 1901 as amended.

Very truly yours,

DEPARTMENT OF JUSTICE

PHILIP S. MOYER,

*Deputy Attorney General.*

*Department of Agriculture—Schools and Colleges—Pure Food—Act of March 26, 1925, P. L. 83.*

Although colleges and schools are bound by all the health laws which require cleanly and healthful service of food, including milk, they are not affected by the Act of 1925, except when and to the extent they maintain a restaurant or lunch room; and, therefore are not required to serve milk to the pupils or students who eat regularly at a regular dining-hall, in the original bottles or similar original containers in which milk is supplied to any such college or school.

Department of Justice,  
Harrisburg, Pa., August 6, 1926.

Honorable James W. Kellogg, Director—Chief Chemist, Bureau of  
Foods and Chemistry, Department of Agriculture, Harrisburg,  
Pennsylvania.

Sir: Supplementing and to some extent clarifying advice to you in the letter of Honorable John W. Brown, Deputy Attorney General, written to you June 30, 1925, I restate the question involved and said advice as follows:

Would a college or school be subject to the requirements of the Milk Container Act (Act of March 26, 1925, P. L. 83) and be required to sell or serve milk in the original bottle or similar original container in which milk is supplied to such institutions under the following two conditions or circumstances:

A. When the milk is supplied by the college or school in a restaurant or lunch room for students where they congregate at their own pleasure and order and pay for their food as is usual in restaurants or lunch rooms?

B. When a college or school has students who live at the college or school in living halls or dormitories, and has a regular dining-room for one or more of such living halls or dormitories in which the students obtain regularly all their meals during the time they are at the college or school?

A. The first question outlined above was very properly answered by Deputy Attorney General Brown in said letter of June 30, 1925, where he gave the opinion of this Department that "A college or school, operating a restaurant or lunch room for pupils or students, would be subject to the provisions of the Act." Mr. Brown's opinion, however, was definitely confined to restaurants or lunch rooms and, therefore, did not contemplate the regular dining-rooms in a college or school where the resident students congregate regularly for all their meals.

B. In the case of the usual and regular dining-hall for resident students, however, the situation in the light of the Milk Container Act is this: The title of the Act confines the matter which can be constitutionally treated in that law to "hotels, restaurants, lunch

rooms, fountains, and dining cars". Colleges and schools are not identified directly or indirectly in the Act, and the only reason why this particular law could apply to them would be because they have and operate what is clearly a restaurant or lunch room; namely, an eating room or place where the students or pupils come at their own pleasure or will, and order, eat and pay for such food as they respectively may desire from time to time. Many schools, and perhaps some colleges, do have such restaurants and lunch rooms for the convenience and care of the pupils. Such restaurants and lunch rooms are subject to the law not because they are connected with colleges or schools, but because they are actually "restaurants" or "lunch rooms".

If the body of the Act in question had attempted to extend its provisions (which it does not) beyond the classes of food-supplying business places set forth in the title, the law would be to that extent unconstitutional.

Therefore, the answer to the second question identified as "B" is that although colleges and schools are bound by all the health laws which require cleanly and healthful service of food, including milk, they are not affected by the Act of March 26, 1925, except when and to the extent they maintain a restaurant or lunch room; and, therefore, are not required to serve milk, to the pupils or students who eat regularly at a regular dining-hall, in the original bottles or similar original containers in which milk is supplied to any such college or school.

Yours very truly,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,  
*Attorney General.*

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*Department of Agriculture—Expenditure of Appropriation made by the Act of 1925, P. L. 190, at p. 201.*

The Secretary of Agriculture may in his discretion utilize an item of \$650,000 appropriated by the Act of 1925, (P. L. 190), for payment of salaries and for the expenses of purchasing exhibits relating to the agricultural industries and interests of the State.

Department of Justice,  
Harrisburg, Pa., October 13, 1926.

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

Sir: I have your request for an opinion on the following question:

Referring to the \$650,000 item to the Department of Agriculture (Appropriation Acts—Sessions of 1925, page 190, at page 201), is it legal for the Department of Agriculture to expend money from said \$650,000 item for

payment of the salaries, wages and expenses of necessary assistants, and for the expenses of purchasing, preparing and maintaining exhibits relating to the agricultural industries and interests of the State, when and where you, as Secretary of Agriculture, deem such exhibits, and instruction in connection therewith, fit and proper to encourage and promote the development of agriculture and kindred industries in the Commonwealth?

The Act of 1895, P. L. 17, creating your Department, as amended by Section 2 of the Act of 1903, P. L. 252, provides as follows

"That it shall be the duty of the Secretary of Agriculture, in such ways *as he may deem fit and proper*, to encourage and promote the development of agriculture, horticulture, forestry and kindred industries; \* \* \*

The Administrative Code of 1923, P. L. 498, Article XV, Section 1504, provides as follows:

"The Department of Agriculture shall have the power and its duty shall be:

"(a) to investigate the subject of marketing farm products, including the cost of marketing, \* \* \* to furnish advice and assistance to the public with reference to the marketing of farm products within this Commonwealth and all matters relevant thereto; \* \* \*

The General Appropriation Act of 1925, Appropriation Acts, Session of 1925, P. L. 190, provides as follows at p. 201:

"For the payment of salaries, wages, or other compensation of such \* \* \* experts, scientists, \* \* \* and other assistants and employees as may be required for the proper conduct of the work of the Department (of Agriculture) \* \* \* for the payment of the expense of collecting, compiling, and publishing facts and statistics relating to the agricultural industries and interests of the State; \* \* \* for the general maintenance of the Department of Agriculture, including such other items of expense as are not specifically provided for, necessary in the enforcement of any and all Acts of Assembly which it is the duty of the Secretary of Agriculture to enforce, \* \* \*."

The Appropriation Act gives the Secretary of Agriculture the right to use part of the \$650,000 item appropriated to him in 1925, in the enforcement of the Acts which it is his duty to enforce. The words "enforce" and "enforcement" in the position found in the above quotation from the Appropriation Act, are not in any wise limited to prosecutions either civil or criminal, in which meaning these words may sometimes properly be used. The word "enforce" is here used in its broad general meaning to make fully effective, to execute and give full force and effect to.

Consequently there is no doubt but that the Secretary of Agriculture may determine, according to the information at his command and his own best judgment, what methods "he may deem fit and proper to encourage and promote the development of agriculture" in this State, and he may also determine what advice and assistance it would be well to furnish "to the public with reference to the marketing of farm products within this Commonwealth". Having determined these questions with regard to any particular opportunities "to encourage and promote the development of agriculture", and to furnish such "advice and assistance" to the public, it is legally proper for him to give force and effect to the above quoted provisions of laws, which it is his duty to enforce, by employing the necessary assistants and purchasing, preparing and maintaining exhibits where he deems it would reasonably be most effective for the promotion of agriculture and the dissemination of information to the public, and to that end may legally and properly utilize any available portion of the item of \$650,000 mentioned above which was appropriated in 1925, for use by the Secretary of Agriculture in the enforcement of laws which it is his duty to enforce.

The choice of opportunities for work of the kind covered by your inquiry, and discussed in this opinion, is within the sound discretion of the Secretary of Agriculture and clearly includes State Farm Products Shows and agricultural meetings held in connection therewith, Agricultural Fairs, Farmers' Community Day Gatherings, and any other activities or exhibitions, like the Sesqui-Centennial Exposition for instance, where farmers and the public consuming agricultural products, either or both, will be reached by the exhibits, and instruction in connection therewith, which you deem fit and proper.

Very truly yours,

DEPARTMENT OF JUSTICE

GEORGE W. WOODRUFF,

*Attorney General.*

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*Pure Food Laws—Adulteration—Viscolization—Prosecution by State Authorities—Statutory Requirements.*

Under the milk and cream law of June 8, 1911, P. L. 712, as amended by the Act of June 2, 1915, P. L. 755, the sale of viscolized milk is not removed from the jurisdiction of the General Pure Food Laws, so that it is the duty of the Secretary of Agriculture to proceed against those manufacturing, selling, offering for sale, exposing for sale, or having in their possession with intent to sell, any kind of milk adulterated by viscolization as he would have in other cases of adulteration of foods.

Department of Justice,  
Harrisburg, Pa., December 29, 1926.

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

Sir: Pursuant to conversation with you and Chief Chemist, James N. Kellogg, of your Department, and letter from Mr. Kellogg dated December 13th, I am taking up a question upon which you desire an opinion from the Department of Justice.

*Statement:*—Viscolized milk is a form of milk product by separating the cream,—breaking up the fat globules of cream into smaller globules under high pressure, thereby causing the cream to occupy a greater volume,—and remixing the cream thus treated with the skimmed milk. The result of this viscolization is that the “cream line” in the resultant mixture stands in the neck of a quart bottle at between four and five inches from the top, whereas if the same milk had not received the above described treatment the “cream line” on the neck of the quart bottle would stand at about one half as high. The actual percentage of butter fat in the full quart bottle after such treatment is not increased at all, and although decreased some is not decreased to a great extent. The effect upon the ordinary observer, however, of two bottles of milk from the same milking of the same cow, one untreated and the other “viscolized”, is to make the viscolized milk appear to contain about twice as much cream (or butter fat and solids) than the untreated milk contains, and, therefore, gives the false impression that the viscolized milk is a much better milk and has much more cream per bottle than the unviscolized milk from the same source. This tends to deceive, and does actually deceive, practically all of those purchasing milk when they have opportunity to chose by sight between “viscolized” and “unviscolized” milk the former showing apparently twice as much cream.

*Question:*—Can those manufacturing and selling “viscolized” milk according to the above described conditions be held responsible under the Pure Food Law of May 13, 1909, P. L. 520, as amended April 26, 1923, P. L. 88

To determine the answer to the above question we must first consider the milk and cream law of June 8, 1911, P. L. 712, as amended June 2, 1915, P. L. 735 to discover whether it removes the above case from the jurisdiction of the General Pure Food Law.

An examination of the milk and cream law shows in Section 6 that it did not repeal all or any part of the General Pure Food Law,

except such parts thereof, if any, as are inconsistent with the provisions of the milk and cream law, and turning to the body of the latter law we do not find any reference whatever to a prohibition or permission directly concerning the mixing or treating of milk and/or cream "so as to deceive or mislead the purchaser" or so as to make it appear better or of greater value than it is". For that reason the milk and cream act does not either amend or modify Section 3 of the General Pure Food Law as far as the adulteration of any form of food, including milk and cream, is concerned.

Therefore the General Pure Food Law of May 13, 1909, P. L. 520 as amended April 26, 1923, P. L. 88, is not modified or repealed so that it fails to apply to milk and cream as fully as to any and all other forms of food.

Section 3 of the General Pure Food Law states that—

"An article of food shall be deemed to be adulterated \* \* \*.

"If it be mixed \* \* \* so as to deceive or mislead the purchaser; or if by any means, it is made to appear better or of greater value than it is."

Section 1 of the same Act very clearly declares it is unlawful to adulterate "any article of food", which, of course, includes milk or cream.

Sections 5 and 7 give you the practical method of prosecuting, and the punishment for adulterating milk by the process of viscolation so that it is made to appear better or of greater value than it is as compared with unviscolized milk from the same source.

It is my opinion that you have the same reason and duty for proceeding against those manufacturing, selling, offering for sale, exposing for sale, or having in possession with intent to sell, any milk adulterated by viscolization as you would have in other cases of adulteration of foods. The crux of the question is not as to whether the viscolized milk is practically as valuable a food as the unviscolized, but as to whether "it is made to appear better or of greater value than it is."

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,  
*Attorney General.*

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**OPINIONS TO THE AUDITOR GENERAL**

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## OPINIONS TO THE AUDITOR GENERAL

*Auditor General—Authority to approve for payment out of the Motor License Fund the purchase of certain office supplies by the Department of Property and Supplies for the use of the Department of Highways—Acts of June 30, 1919, P. L. 678, Section 12—June 14, 1923, P. L. 718, Section 10—General Appropriation Act of 1923, App. Acts p. 35—June 7, 1923, P. L. 498, Sections 507, 709 (f), §1903.*

The Auditor General may lawfully approve requisitions for payment out of the Motor License Fund created by Section 12 of the Act of 1919 as amended by the Act of 1923, if he finds that such purchase was reasonably necessary to effectually carry on the work of that Department and that the purchases were duly made for that Department by the Department of Property and Supplies acting as the purchasing agent.

Department of Justice,  
Harrisburg, Pa., February 13, 1925.

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

Sir: We have your letter of February 6th, asking to be advised with regard to the construction to be placed upon Section 10 of the Act of June 14th, 1923 (P. L. 718), when read in conjunction with the General Appropriation Act of 1923 (Appropriations Acts 1923, Page 35) and certain provisions of the Administrative Code of June 7, 1923 (P. L. 498). You state that there are at the present time in your department a large number of Department of Highways requisitions covering the purchase of office supplies of all kinds. You mention specifically paper, typewriters, stenographers' notebooks, erasers, rubber bands, pencils, photographs, blue print supplies, wicker couches, oak chairs, paper boxes, envelopes, pens, water coolers, photographic plates and supplies, sealing rollers, numbering machines, stamp pads, thermometers, desks, tables, rugs and sundry office fixtures. You do not state against what appropriation requisitions have been presented to you, but we assume that the requisitions have been drawn against the Motor License Fund and that you desire to be advised whether requisitions so drawn may lawfully be paid by you.

Section 10 of the Act of June 14, 1923 (P. L. 718) amended Section 12 of the Motor Vehicle Act approved June 30, 1919 (P. L. 678), by striking out entirely Section 12 as it previously existed, and substituting a new section therefor. Section 12 of the Motor Vehicle Act as thus amended provides that license fees, fines and penalties collected under the Motor Vehicle Act shall be paid by the Department of Highways into the State Treasury and that all such moneys "are hereby specifically appropriated to the State Highway Department for the purpose of assisting in the maintenance, construction,

replacement, re-construction, improvement and repairs of State highways, and 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 State Highway Act, and the amendments and supplements thereto, and to carry out and enforce the provisions of the act to which this is an amendment and all amendments and supplements thereto \*\*\*\*\*”.

If this act were the only statute involved in your inquiry, the only question before us would be whether the appropriation of the Motor License Fund to the Department of Highways for the purpose, *inter alia*, of paying “any and all other expenses necessary to effectually carry on the work” of the department, sufficiently authorized the department to purchase supplies and materials of the kinds mentioned in your communication. To this inquiry we unhesitatingly answer that the power to *pay* expenses impliedly carries with it the power to *incur* expenses and that if office supplies of the kinds mentioned in your letter are necessary to effectually carry on the work of the Department of Highways, that department was authorized by the act in question to purchase such supplies. Whether or not supplies of the kinds specified are necessary to effectually carry on the work of the department is a question of fact upon which it is not the function of this Department to advise you. We do advise you however that in considering the question whether supplies of any kind are necessary to effectually carry on the work of the Department of Highways, the inquiry must be whether such supplies are *reasonably* necessary to carry on the work of the department, rather than, whether such supplies are *absolutely* necessary for that purpose. Any other construction would ignore the meaning and effect of the word “effectually” as employed in the statute.

The view which we have expressed that the power to pay expenses granted by the Act of 1923, necessarily conferred the power to incur expenses, finds sanction in the case of *Commonwealth v. Gregg*, 161 Pa. 582, in which the question was whether an appropriation for the payment of the salaries of clerks in the offices of the Prothonotaries of the Supreme Court for the Eastern and Western Districts was available in the absence of a separate enactment authorizing the employment of such clerks. The Supreme Court in an opinion by Mr. Justice Mitchell reversed the Dauphin County Court which had taken the position that the appropriation was not available, and directed the payment of salaries to the persons employed under the act in question.

Were there any doubt respecting the interpretation to be placed upon the Act of June 14, 1923, of the provisions of the General Appropriation Act of 1923 and of certain pertinent collateral facts would resolve the doubt in favor of the interpretation we have

adopted. By referring to the General Appropriation Act of 1923 it appears that the total appropriation to the Department of Property and Supplies for the purchase of supplies for the entire government for the current biennium was \$620,000,—an amount which, we are informed, is less than the cost of supplies for the Department of Highways alone for the same period. Any construction other than that which we have adopted would therefore render it necessary to conclude that the Legislature intended either that the Department of Highways should operate without supplies during the biennium 1923 to 1925, or that all other activities of the state government should be carried on without supplies, or that all agencies of the state government including the Department of Highways should have supplies for only the first year of the biennium. Any of these three possibilities could be adopted as the legislative intent only if it were impossible to adopt any other reasonable interpretation of the legislation enacted in 1923. As was said by Mr. Justice Brown in *Russ v. the Commonwealth*, 210 Pa. 544, at page 553.

“The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts in *pari materia* are to be taken together as if they were one law \*\*\*\*. If a thing contained in a subsequent statute, be within the reason of the former statute it shall be taken to be within the meaning of that statute \*\*\*\*.”

What we have said answers that part of your letter which inquires whether, the legislature having made an appropriation to the Department of Property and Supplies for the purchase of supplies, it is not necessary for the Department of Highways to obtain all of its supplies by requisition upon the Department of Property and Supplies.

However, in this connection we desire to call your attention to Section 709, (f) of the Administrative Code (Pamphlet Laws Page 543) which directs the Executive Board in allocating to the several departments the appropriation to the Department of Property and Supplies for stationery, fuel, printing and other supplies to take into consideration the right of any department “to pay its necessary expenses \*\*\*\* out of fees and other moneys received by \*\*\*\* it”. This is additional evidence of the fact that the Legislature of 1923 had in mind the purchase by certain departments of their necessary supplies out of special funds and corresponding by reduced amount of the appropriation out of the General Fund for the purchase of supplies for this biennium.

We come now to a consideration of your specific inquiry whether

Sections 507 and 1903 of the Administrative Code do not require us to reach the conclusion that the Department of Highways does not have the right to purchase office supplies and requisition for the payment out of the Motor License Fund.

Section 507 of the Administrative Code deals only with the agencies by which supplies are to be purchased and must be read in conjunction with Section 2103 of the same act. These two sections taken together make the Department of Property and Supplies the sole purchasing agency for supplies for the State government except in certain specific instances. These exceptions permit (a) the Department of Health to make direct purchases of medicines, medical and surgical supplies required by the Department, and furniture, materials and supplies for the maintenance of the tuberculosis sanatoria in charge of the department; (b) the Department of Highways to make direct purchases of materials, supplies and equipment necessary for the construction and repair of highways; and (c) Boards of Trustees of State institutions to make direct purchases of furniture, materials and supplies required by them.

In all other cases the Department of Property and Supplies as purchasing agency must exercise for the respective administrative agencies such powers of purchase as are conferred upon those agencies by other statutes. This is clearly the extent to which Sections 507 and 2103 of the Administrative Code go.

Section 1903 of the Administrative Code must be construed in conjunction with Sections 507 and 2103 to which reference has already been made. The authority conferred upon the Department of Highways by Section 1903 is the authority to make purchases independently of the Department of Property and Supplies, and cannot reasonably be construed to limit the authority to make purchases conferred upon the Department of Highways by another statute enacted at the same session of the Legislature. .

In conclusion we desire to call your attention to an opinion of this Department rendered to the Secretary of Highways on June 25, 1924, a copy of which is herewith enclosed. The opinion rendered to Secretary Wright fully discusses certain other phases of the situation presented by your letter.

You are accordingly advised that if you find that the purchase of the supplies for which requisitions have been presented to you by the Department of Highways was reasonably necessary to effectually carry on the work of that Department and that the purchases were duly made for that department by the Department of Property and Supplies as purchasing agency, you may lawfully approve such requisitions for payment out of the Motor License Fund created

by section 12 of the Motor Vehicle Act as amended by the Act of June 14, 1923.

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General.*

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*Taxation—Exemptions—When companies entitled to exemption under Acts of June 13, 1907, and July 11, 1923—Capital stock—Investment in real estate—Title insurance and trust companies.*

1. Corporations 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, may be entitled to the exemption provided in the Act of 1923, if within sixty days after the date of the settlement of the tax by the Auditor General, they pay the amount thereof to the State Treasurer from their general fund or collect the same from their shareholders and pay the amount thereof over to the State Treasurer.

2. Such tax being an annual tax based upon the actual value of the shares of stock as of Dec. 31st of each year, the exemption allowed by reason of the payment of the tax within the time prescribed for any particular year applies solely to such year for which the tax is paid.

Department of Justice,  
Harrisburg, Pa., February 17, 1925.

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

Sir:

The question asked in your letter of December 5, 1924, and its supplement dated January 13, 1925, is whether or not under the provisions of the Act of July 11, 1923, P. L. 1071, amending the Act of June 13, 1907, P. L. 640, it is mandatory that the tax imposed thereby be paid within sixty days after the date of settlement by the Auditor General in order that, as provided in said Act, “\* \* \* 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.”

In an opinion rendered to you under date of July 22, 1924, upon the question of whether or not companies which are made subject to the tax imposed under and by the provisions of the said Act of June 13, 1907, P. L. 640, as amended by the said 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 said latter Act, I considered the changes in the said Act of June 13, 1907,

P. L. 640, resulting from the said amending Act of July 11, 1923, supra. I therein called attention, inter alia, to the following changes:

"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.

\* \* \* \* \*

"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 is expressly provided in the latter Act as follows:

"\* \* \* After the Auditor General shall have fixed the value of the shares of stock in any such company by the method hereinbefore provided, and settled on account according to law, he shall thereupon transmit to the president, secretary, or treasurer of such company a copy of such settlement, showing the valuation and assessment so made by him and the amount of tax due the Commonwealth on all such shares. \* \* \* *It shall be the duty of every such company, within a period of sixty 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:* Provided, \* \* \*: Provided further, \* \* \*: 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 as hereinbefore provided,—*and pay said tax into the State Treasury, as hereinbefore provided,* 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."

I think the intent of the Legislature is clearly expressed. I find no ambiguity in language. In the case of *Haddock vs. Commonwealth*, 103 Pa. 243, 249, it is said:

"\* \* \* It is to be assumed that the legislature meant just what in the language of this Act is clearly expressed.

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. \* \* \*

See also *City of Pittsburgh vs. Kalchthaler*, 114 Pa. 547, 552.

In the case of *Commonwealth vs. Clairton Steel Co.*, 229 Pa. 246, the question before the Court was the determination of the time within which banks or savings institutions having capital stock are required to make payment of the tax imposed by the Act of July 15, 1897, P. L. 92, in order to gain the exemption from taxation allowed by the said Act of Assembly. The Court below, whose judgment was affirmed, said on page 249;

“\* \* \* By that act (Act of July 15, 1897, P. L. 292) exemptions 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: *Com. v. Clairton Steel Co.*, 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. As we have found, the Union Savings Bank did not comply with this condition. It did not pay the tax on the shares of its stock, or even elect to pay it, until after the statutory time. It was not entitled, therefore, to the exemption, \* \* \*. \* \* \* 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.”

Though there were doubt upon the subject it would have to be resolved in favor of the Commonwealth, as was said in the case of *Commonwealth vs. Lowry-Rodgers Co.*, 279 Pa. 361, 366: “\* \* \* under the rule that language which relieves from taxation must be strictly construed: *Academy of Fine Arts v. Phila. Co.*, 22 Pa. 496; *Com. v. Lackawanna Iron & Coal Co.*, 129 Pa. 346, 356; *Callery's App.*, 272 Pa. 255, 272.”

I am, therefore, of the opinion that in order that companies made subject to the tax imposed by the Act of July 11, 1923, P. L. 1071, may be entitled to the benefit of the exemption provided in such Act, such companies must within sixty days after the date of the settlement of the tax by the Auditor General pay the amount thereof to the State Treasurer from their general fund or collect the same from

their shareholders and pay the amount thereof over to the State Treasurer.

I am also of the opinion that the tax being an annual tax based upon the actual value of the shares of stock as of December thirty-first of each year, the exemption allowed by reason of the payment of the tax within the prescribed time for any particular year, applies solely to such year for which the tax is paid.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN ROBERT JONES,

*Deputy Attorney General.*

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*Auditor General—Contracts—Approval of Requisitions—Act of 1921, App. Acts p. 140; 1911, P. L. 32; 1923, P. L. 498.*

The Auditor General is authorized to approve requisitions of the Department of Welfare for amounts owing to contractors who have furnished materials for the construction of the new Western Penitentiary.

Department of Justice,  
Harrisburg, Pa., February 18, 1925.

Honorable S. S. Lewis, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your letter of February 13th regarding certain requisitions which have been presented to you for payment out of an appropriation made by the Act of May 27th, 1921 (1921 Appropriation Acts page 140) of amounts owing to contractors who have furnished materials for the construction of the new Western Penitentiary at Rockview.

The facts relevant to a consideration of the question raised by your letter are as follows:

The Act of March 30, 1911, (P. L. 32) authorized the Board of Inspectors of the Western Penitentiary to acquire the necessary land and proceed to build a new penitentiary thereon, appropriating three hundred thousand dollars (\$300,000) for the purpose.

The Act of May 27th, 1921 appropriated an additional three hundred thousand dollars (\$300,000) to the Board of Inspectors of the Western Penitentiary to continue the work of erecting, constructing and equipping the new penitentiary at Rockview.

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 for furnishing 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 specified that the contractors should 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." As we understand the situation the materials and supplies for which requisitions are before you have been duly accepted.

On June 15, 1923 the Administrative Code approved June 7, 1923, (P. L. 498) became effective.

Section 2 of the Code abolished the Board of Inspectors of the Western Penitentiary. Section 202 created within the Department of Welfare a new departmental administrative board,—the Board of Trustees of Western State Penitentiary,—which under Section 2019 of the Code was given "general direction and control of the property and management" of the Penitentiary at Rockview.

Section 3 of the Administrative Code provides that:

"All rights, powers and duties which have heretofore been vested in, exercised by, or imposed upon any \* \* \* board \* \* \* 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 \* \* \* board \* \* \*"; and

Section 9 specifically provides that:

"All existing contracts and obligations of the \* \* \* boards \* \* \* 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 \* \* \* boards \* \* \* are transferred.

Finally, Section 223 provides that:

"All warrants for the payment of salaries, compensation or other disbursements of or for departmental administrative boards or commissions \* \* \* shall be drawn upon requisition of the head of the Department with which such departmental administrative boards or commissions \* \* \* are connected."

In the case of Getulio Piccirilli et al. vs. S. S. Lewis et al., recently decided by the Supreme Court of this State, you were authorized to pay the claims of contractors who had performed services and furnished materials in connection with the construction of the Meade Statue at Washington, D. C., under facts virtually identical with those involved in your present inquiry. The Supreme Court definitely recognized the force and validity of Sections 3, 9, and 223 of the

Administrative Code and ruled that you might lawfully pay the claims of the Meade Statue contractors upon requisition of the new Department of Property and Supplies which under the Code was substituted for the old Meade Memorial Commission and that for this purpose an appropriation made to the Meade Memorial Commission prior to the passage of the Administrative Code was available.

The only difference between the two situations is that the Department of Property and Supplies was specifically directed by Section 2102 (g) of the Administrative Code to erect the Meade Statue, whereas the Code does not in express terms direct the Board of Trustees of Western Penitentiary to continue the work of erecting the new penitentiary at Rockview. However, there can be no question but that the rights, powers and duties of the former Board of Inspectors of Western Penitentiary were by the Code transferred in whole or in part to the new Board of Trustees of Western Penitentiary and that under Section 3 of the Code such transfer vested in the new Board of Trustees all rights, powers and duties which had theretofore been vested in, exercised by or imposed upon the Board of Inspectors of Western Penitentiary.

Accordingly you are specifically advised that upon the authority of the Piccirilli Case you may lawfully approve requisitions of the Secretary of Welfare for the payment, out of the appropriation made by the Act of May 27th, 1921, of any amounts due to contractors who have furnished materials or supplies under contracts lawfully entered into by the former Board of Inspectors of Western Penitentiary.

Very truly yours,

DEPARTMENT OF JUSTICE,

W. A. SCHNADER,

*Special Deputy Attorney General.*

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*Auditor General—Secretary of Highways—Supplies and Equipment.*

The Auditor General is justified in presuming that the expenses for which requisitions are presented to him for payment out of the Motor License Fund have been properly incurred and it is not necessary for him to conduct an investigation of the necessity for the purchases made.

Department of Justice,

Harrisburg, Pa., February 18, 1925.

Honorable S. S. Lewis, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your letter of February 14th, calling attention to what you regard as an inconsistency between our opinion of June

25, 1924 addressed to the Secretary of Highways and our opinion of February 13, 1925 addressed to you.

In our opinion of June 25, 1924, we advised the Secretary of Highways that he might purchase through the Department of Property and Supplies as purchasing agency and pay for out of the Motor License Fund certain classes of supplies and equipment to the extent that he considered such classes of supplies and equipment clearly necessary for effectually carrying on the work of the Department of Highways. In our opinion to you dated February 13, 1925 we advised that if you find that the purchase of the supplies to which reference was made in our opinion to the Secretary of Highways "was reasonably necessary to effectually carry on the work of that Department" you may lawfully approve requisitions for payment of such supplies out of the Motor License Fund.

Possibly we should have gone more fully into the relative functions of the head of the Department of Highways and of the Auditor General in our opinion written to you on February 13th last.

The conduct and operation of the Department of Highways is under the supervision and direction of the head of that department. It is he who must determine what classes of supplies are reasonably necessary for effectually carrying on the work of his Department.

When requisitions come to you for the payment of supplies purchased at the direction of the Secretary of Highways either directly by the Department of Highways or through the Department of Property and Supplies as purchasing agency, you are justified in presuming that the supplies purchased were reasonably necessary for effectually carrying on the work of the Department. You do, however, have the right, under the Act of March 30, 1811, (P. L. 145), if for any reason you feel called upon to exercise it, of requiring evidence to be produced before you to satisfy you that the actual facts support the presumption; and it would be your duty to exercise the power given you by the Act of 1811 if you had any reason to believe that there had been gross abuse of discretion on the part of the Secretary of Highways in determining that certain supplies were reasonably necessary for effectually carrying on the work of his Department or if you had any reason to believe that supplies which could not possibly be reasonably necessary for effectually carrying on that work were purchased with the fraudulent purpose of having them paid for out of State funds. Under such circumstances it would clearly be your duty to call upon the head of the Department to produce evidence to justify his requisition, but in the absence of circumstances of this character your full duty is performed when you have audited the requisitions in the usual way.

Accordingly you are specifically advised that in the absence of circumstances pointing to fraud, collusion or gross abuse of dis-

cretion, you are justified in presuming that the expenses for which requisitions are presented to you for payment out of the Motor License Fund have been properly incurred and it is not necessary for you to conduct an investigation of the necessity for the purchases made.

Very truly yours,

DEPARTMENT OF JUSTICE,

W. A. SCHNADER,

*Special Deputy Attorney General.*

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*Auditor General—Contracts—Approval of Requisitions Act of 1923, P. L. 498.*

The Auditor General is authorized to approve requisitions of the Department of Property and Supplies for amounts due to the estate of Arnold W. Brunner and to Miss Violet Oakley.

Department of Justice,  
Harrisburg, Pa., March 2, 1925.

Honorable S. S. Lewis, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your request of February 13th in which you ask to be advised whether you may lawfully approve requisitions of the Department of Property and Supplies for the payment out of appropriations made prior to 1923 of amounts due to the estate of Arnold W. Brunner and to Miss Violet Oakley under contracts executed between the Commonwealth and Mr. Brunner and Miss Oakley respectively by the former Board of Commissioners of Public Grounds and Buildings, prior to the abolition of that body by the Administrative Code, approved June 7th, 1923, (P. L. 498).

We have no difficulty in advising that you may lawfully approve these requisitions. In the recent case of Getulio Piccirilli et al vs. S. S. Lewis et al., the Supreme Court authorized you to approve requisitions of the Department of Property and Supplies presented to you for payments due under almost identical circumstances. In the Piccirilli Case the Supreme Court recognized the validity of Sections 2, 3, 9, 223 and 2101 of the Code and based its ruling upon the effect of these sections. It is unnecessary here to recite the applicable provisions of the sections mentioned or to apply to the question now before us the reasons which moved the Supreme Court to authorize approval of the requisitions in the Piccirilli Case. We do however advise you that under the authority of, and for the reasons set forth in, that case you may lawfully approve the requisitions in question.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

*Constitutional law—Mothers' assistance—Appropriations of public money—Children as public assets—Compensation to mothers for public service—Act of May 28, 1923.*

1. The Mothers' Assistance Act of May 28, 1923, P. L. 459, does not violate section 18, article iii, of the Constitution, forbidding certain appropriations of public moneys, and is constitutional.

2. The Mothers' Assistance Act is clearly separate and distinguished from the Old Age Assistance Act, declared unconstitutional in *Busser v. Snyder*, 282 Pa. 440.

3. The act is justified as providing for payment to those who have performed a valuable service to the Commonwealth by bearing children, and as providing for the maintenance of such children.

Department of Justice,  
Harrisburg, Pa., March 12, 1925.

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

Sir: I have your request for a formal opinion on the question as to whether you may legally, and without personal liability under your bond or otherwise, continue to settle requisitions for the payment of money appropriated under the Act of May 28, 1923, P. L. 459, or any other Acts, to carry into effect the provisions of the Mothers' Assistance Act of July 10, 1919, P. L. 893, as amended?

The occasion for your inquiry is the decision of the Supreme Court in the case of *Clara W. B. Busser, et al. vs. State Treasurer, et al.*, holding the Old Age Assistance Act unconstitutional, said decision having been handed down January 5, 1925.

First of all we must keep in mind the rule laid down by the Supreme Court in said decision:

"In determining whether an act of assembly is unconstitutional certain rules have been laid down for our guidance. It should not be so held unless it is clearly, strongly and imperatively prohibited. 'If the act is within the scope of legislative power, it must stand, and we are bound to make it stand if it will upon any intendment . . . . Nothing but a clear violation of the Constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislature department unconstitutional and void.' Every presumption should be indulged in its favor (*P. R. R. Co. v. Riblet*, 66 Pa. 164, 169), and one who claims an act is unconstitutional must prove his case beyond doubt. *Collins v. Lewis*, 276 Pa. 435, 438; *Sinking Fund Cases*, *Supra*; *Mugler v. Kansas*, 123 U. S. 623.

Words must be understood in their general and popular sense, as the people who voted on the Constitution understood them, and we should not go beyond it unless the language is so ambiguous that we need to ascertain the mischief to be remedied. *Keller v. Scranton*, 200

Pa. 130, 134; *Collins v. State Treasurer*, 271 Pa. 428, 434; *Long v. Cheltenham Twp. School District*, 269 Pa. 472, 475; *Sharpless v. Philadelphia*, 21 Pa. 147, 159, 161. What the State Constitution forbids is not authorized; what is not forbidden is authorized."

If the Supreme Court imposes upon itself the strict rule that it must not hold a law unconstitutional "unless it is clearly, strongly and imperatively prohibited," how much more strongly does this rule apply to the Department of Justice and to all the executive departments, commissions, boards and officers of the Government? The Mothers' Assistance Act being a law clearly separate and well distinguished from the Old Age Assistance Act must be held to be constitutional, and the appropriation to effectuate it must be held valid, unless either overwhelming reasons in the law itself for regarding it unconstitutional can be found, or a further decision of the Court should rule to the contrary.

Nobody has as yet attacked the constitutionality of the Mothers' Assistance Act, and there has been no suggestion that there is any defect in the title or construction of that law. Therefore, for the purpose of this opinion we are confining our attention to the question on which the Old Age Assistance Law was declared unconstitutional; namely, whether the Mothers' Assistance Act and the appropriations to carry it into effect run counter to the constitutional provision of Section 18 of Article 3 of the Constitution which reads:

*"Certain Appropriations Forbidden.* No appropriation, 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."

Is the appropriation whereby money of the Commonwealth, through Boards of Trustees, and other agencies of the Government, is used to assist "poor and dependent mothers of proved character and ability," "in supporting their children in their own homes" when such children are "under the age of 16 years" and the husbands of said mothers "are dead, or permanently confined to institutions for the insane" (Section 6 of the Act of July 10, 1919, P. L. 893), unconstitutional and, therefore, ineffective?

This question has come up and the Mothers' Assistance Acts have been sustained as constitutional in the following cases in other States: *Denver & Rio Grande R. R. vs. Grand County*, 170 Pac. (Utah) 74 (1917); *Re Mrs. Snyder*, 93 Wash. 59 (1916); *County of Sterins vs. Klasen*, 123 Minn. 382 (1913); *Cass Co. vs. Nixon*, 35 N. D. 601 (1917); *Re Rumsey*, 167 N. W. (Neb.) 66, (1918). The only case which we found where the Mothers' Pension Act has been

declared unconstitutional was the case of *State Board, et al. vs. Buckstegge*, 158 Pac. (Ariz.) 836. The decision here rested on the ground that the title was not sufficiently comprehensive to embrace the provisions of the Act. This Act was also in the nature of an old age pension act. But in this respect it was so vague and indefinite as to put it in an entirely different class from the Old Age Pension Acts which are at present operating in several States of this country. In fact its pronounced incompleteness and indefiniteness was one of the grounds upon which it was declared to be unconstitutional. However, nothing is to be found in the opinions in this case which would indicate that old age pension acts were per se unconstitutional. Indeed the opinions, particularly that of the concurring justice, seem to indicate that if the Act had contained sufficient administrative details and more definiteness in its fundamental provisions that it would have been declared valid.

Certainly with such a large number of Supreme Court decisions, even in other States, it is impossible for the Department of Justice to say that appropriations for Mothers' Assistance are "clearly, strongly and imperatively prohibited."

I draw attention to another difference between Old Age Assistance and Mothers' Assistance, which brings the latter very far, if not entirely, outside of the discussion of the Supreme Court in the Old Age Assistance case, concerning which the Supreme Court says

"Relative to the retirement acts to which appellant calls attention, the basis on which these acts are founded is neither charitable or benevolent they are founded on faithful, valuable services actually rendered to the Commonwealth over a long period of years, under a system of classification which the legislation has considered reasonable. These appropriations are for delayed compensation for these years of continued service actually given in the performance of public duties in their respective capacities, with the quality of right and obligation in its concept. It is compensation for the hazard of long continued public employment. Furthermore, in the Judicial Retirement Act, those participating in or partaking of its benefits are required to hold themselves in readiness to perform such work as may be assigned to them, and to act in the several capacities stated in the statute when designated so to do by the court to which they are formerly attached. It is a well known fact that persons receiving the benefits of this act, all of whom were or are of mature age, have not only held themselves open to perform the duties that may be assigned to them, but, since their retirement, have actually performed services to the Commonwealth of the utmost importance, and have continued to do so until within a very few days of their death, and those

who still live are now performing those services; they in effect hold a legislatively created office for which they are being compensated."

Along the line of the discussion, quoted directly above, we should note that whereas the Old Age Assistance Act provided help for those who, in order to qualify, need not show that they had ever done anything of value for the Commonwealth, and certainly the assistance could not be regarded as a reward to them for services to be performed, nevertheless the Mothers' Assistance Act provides for payment to those who have performed the invaluable service of bearing children for the benefit of the population of the State. Moreover these mothers receive the assistance in order that they may use it in serving the State further by caring for, educating and rearing children who are regarded universally by economists as one of the tangible and valuable assets of the State.

Surely our Commonwealth could not exist except through the production and rearing of healthy children. It is certainly far from a quibble, therefore, to urge that the appropriation of the money for Mothers' Assistance is not for charitable or benevolent purposes, but as the Supreme Court hints with regard to Mothers' Assistance, and says with regard to the Retirement Acts in general a compensation for services actually given in a particular and peculiar form of helpfulness to the State, and as was emphasized concerning the Judicial Retirement Act a payment for those who must daily and hourly "hold themselves in readiness to perform such work as may be assigned to them"; namely, in the case of the mothers who receive assistance, the never ending care and upbringing of the children to effectuate which service the appropriation is made.

### CONCLUSION

From the above I find reasons in excess of what might in strictness be required for holding, and so advise you, that legally you have the right to, and should, regard the Mothers' Assistance Acts including the appropriation of money in connection therewith valid and constitutional; and that you should, subject to the usual auditing required of you by your duties as Auditor General, continue to settle the requisition claims filed with you on account of said Mothers' Assistance Act and appropriations; and also that, having audited and settled such claims and drawn the warrants upon the State Treasurer for the payment thereof, you will have only performed your legal duty (unless and until restrained by Court order) as required by law, and will not be in any way liable for so doing upon your official bond or otherwise.

Very truly yours,  
DEPARTMENT OF JUSTICE,  
GEORGE W. WOODRUFF,  
*Attorney General.*

*Auditor General—Authority to approve requisitions by the Board of Game Commissioners for payment of the cost of certain office supplies out of the "game fund"—Acts of May 24, 1923, P. L. 359, Sections 205, 1201, 1202—June 7, 1923, P. L. 498, Sections 216, 223, 2105.*

The Board of Game Commissioners may not purchase furniture out of the game fund but must requisition it from the Department of Property and Supplies. It may at its option purchase equipment or requisition the said Department for the same. Office supplies, the need of which was anticipated prior to the preparation of the annual schedule, may be obtained from the said Department, but the Board may purchase out of the "game fund" office supplies, the need of which was not anticipated and also materials necessary in connection with the printing or the preparation of posters, notices, tags, badges, etc.

The Auditor General in his official action must act accordingly.

Department of Justice,  
Harrisburg, Pa., March 13, 1925.

Honorable S. S. Lewis, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your request of February 13th, asking us to advise you whether you may lawfully approve certain requisitions of the Board of Game Commissioners for the payment out of the "Game Fund" of the cost of certain office supplies. You call our attention particularly to Section 205 of the Act of May 24th, 1923, (P. L. 359) which provides that:

"The Executive Secretary shall \* \* \* be supplied, from time to time, by the Board of Public Grounds and Buildings, such furniture, equipment and office supplies as may be necessary for the use of the Board."

In considering the meaning of this provision it is necessary for us to refer to Section 1201 of the same Act which provides that the Game Fund established by that section shall be applied for the purpose 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.

\* \* \* \* \*

(g) For the purchase and maintenance of equipment.

\* \* \* \* \*

(i) For the payment of all, or any part of, the cost of any printing, posters, notices, tags, badges, buttons and other like materials as, in the opinion of the Board, may be necessary to its work \* \* \* \* \*."

We are informed by the Board of Game Commissioners that the classes of supplies covered by the requisitions before you are push pins, india ink, fire extinguishers for automobiles, desks and paper or cardboard upon which printing is to be done.

Sections 205 and 1201 of the Act of May 24th, 1923 must be con-

strued together harmoniously if possible as both sections are a part of the same act of Assembly.

As furniture is specifically mentioned in Section 205 as something which shall be supplied to the Board of Game Commissioners by the Board of Commissioners of Public Grounds and Buildings, now the Department of Property and Supplies, and as Section 1201 does not authorize the use of the Game Fund for the purchase of furniture we advise you that furniture cannot lawfully be paid out of the Game Fund.

Equipment may, under Section 205, be supplied to the Board of Game Commissioners by the Department of Property and Supplies and under Section 1201 may be purchased by the Board of Game Commissioners and paid for out of the Game Fund. As there is nothing inconsistent about these respective provisions we advise you that the Board of Game Commissioners has the right at its option—either to requisition for equipment from the Department of Property and Supplies or to purchase equipment and pay for the same out of the Game Fund.

Paper or cardboard upon which printing is to be done would not be included within the meaning of “office supplies”. It does come within subsection (i) of Section 1201 and should be paid for out of the Game Fund.

With reference to “office supplies” it seems to have been the intention of the Legislature that ordinarily such supplies should be procured by the Board of Game Commissioners from the Department of Property and Supplies but that “contingent” office supplies might be purchased by the Board and paid for out of the Game Fund. The only question is: What are “contingent” office supplies? In view of the provisions of Section 2105 of the Administrative Code (Act of June 7, 1923, P. L. 498) requiring the various administrative agencies annually to list in advance the supplies which they believe will be needed during the ensuing fiscal year, contingent office expenses would seem to be expenses incurred in the purchase of supplies, the necessity for which was not anticipated at the time of the preparation by the Board of its list of anticipated requirements in the way of office supplies for the ensuing fiscal year. If the office supplies which the Board desires to pay for out of the Game Fund were not listed in the schedule of supplies furnished by the Board to the Department of Property and Supplies in anticipation of the needs of the current fiscal year you are advised that such supplies may lawfully be paid for out of the Game Fund. This interpretation is in conformity with the interpretation almost invariably given to the expression “contingent expenses”, which are defined in 13 Corpus Juris 115 to be “expenses that are possible or liable, but not certain to occur.” See also cases cited in support of this definition.

It is of course true that any purchases of "furniture, materials or supplies" authorized by Section 1201 of the Act of May 24th, 1923 must under Section 307 of the Administrative Code be made through the Department of Property and Supplies as purchasing agency.

In conclusion we note that you state that you have before you for approval requisitions covering the purchase of office supplies. Without now advising you thereon, we call your attention to the question whether under Section 1202 of the Game Code of May 24th, 1923, you are authorized to approve requisitions against the Game Fund for purposes other than advances to the Board of Game Commissioners. Section 223 of the Administrative Code authorizes you to draw your warrant on the State Treasurer for "salaries and other compensation" payable by independent administrative commissions of which the Board of Game Commissioners is one, but does not apply to expenses of any description. Section 216 of the Administrative Code seems to require requisitions for the payment of traveling and other personal expenses of the members of the Game Commission. These sections of the Code supersede any inconsistent provisions of the Game Code of 1923 but do not apply to the payment of the cost of purchases made by the Game Commission.

However, whatever the effect of Section 1202 of the Game Code may be, the advice which you have requested is pertinent in that you are undoubtedly authorized to audit the accounting for moneys expended by the Board of Game Commissioners prior to the issuance of your warrant for additional advances, even if you are not authorized to draw warrants for the payment of creditors of the Game Commission.

To summarize:

The Board of Game Commissioners may not purchase furniture out of the Game Fund but must requisition it from the Department of Property and Supplies. It may at its option purchase equipment or requisition the Department of Property and Supplies to furnish it. It must obtain office supplies, the need of which was anticipated prior to the preparation of the annual schedule from the Department of Property and Supplies but may purchase out of the Game Fund office supplies the need of which was not anticipated. It may not call upon the Department of Property and Supplies to furnish materials necessary in connection with printing or the preparation of posters, notices, tags, badges, etc. Such materials must be purchased out of the Game Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

*Taxation—Returns—Fiscal Year—Power of Auditor General—Act of June 22, 1897, P. L. 178.*

Both in view of the uncertain language of the Act of June 22, 1897, P. L. 178, with reference to the time and manner of making returns for State tax purposes, and in view of the fact that the Act or Acts of Assembly to which it refers in this connection did not provide for the filing of returns on a fiscal year basis, there is no authority for the Auditor General at present to grant to building and loan associations, taxable under said Act, permission to file their returns on a fiscal year basis. If this is desired, relief should be sought from the legislature.

Department of Justice  
Harrisburg, Pa., March 19, 1925.

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

Sir: This Department is in receipt of your letter of February 13, 1925, asking whether the Auditor General has authority to permit building and loan associations to file the returns provided for by the Act of June 22, 1897, P. L. 178, on a fiscal year basis.

The said Act of June 22, 1897, *supra*, or so much of it as is of importance in the determination of this question, reads as follows:

“That upon all full paid, prepaid, and fully matured, or partly matured stock in any building and loan association incorporated under the laws of this State or incorporated under the laws of any other state and doing business within this State, and upon which annual, semi-annual, quarterly or monthly cash dividends or interest shall be paid, there shall be paid a State tax equal to that required to be paid upon money at interest by the general tax laws of this State; and such tax shall be deducted from the cash dividend or interest so provided for by the secretary or treasurer of such corporation, and be paid to the State Treasurer. And every such domestic corporation shall annually make return to the Auditor General, at the time other returns for taxation are required to be made, of the amount of its stock outstanding entitled to receive cash dividends or interest, and every such foreign corporation shall, in the reports required to be made by them to the Banking Department, make report of the amount of its stock held by residents of this State, entitled to receive cash dividends or interest, and said Banking Department shall, at the time other returns for taxation are required to be made, certify to the Auditor General \* \* \*.”

It is certain that the Legislature could have made more definite provision concerning the time for making returns. The Act does not even expressly refer to any other Act of Assembly in providing for and designating the time when the returns are to be made. In this connection Eastman, in Vol. 2 of “Taxation in Pennsylvania”, at page 754, says—

"Reports are to be made under the above provisions 'at the time other returns for taxation are required to be made.' This is uncertain inasmuch as reports for different kind of taxes are made at different times, but as the tax imposed is to be equal to that 'required to be paid on moneys at interest', the tax year for which is the calendar year, the auditor general's department holds that reports should be made under the act for the calendar year and as soon after the thirty-first day of December as circumstances will permit."

We find the following statement to the same general effect in "Taxation of Corporation in Pennsylvania for State Purposes" by Whitworth, at page 214:

"The time of making such returns is quite uncertain; but as it is apparently the intention of the act to treat such stock as liable to taxation in the same manner that moneyed capital, in the hands of an individual is liable, the reports are for the calendar year and ought to be made probably in January."

With further reference to the nature of the tax the writer of this same work, on pages 212 and 213, states:

"The tax is not levied upon the corporation, but upon the stock in the hands of the holder; and the corporation, as in the case of the collection of the tax upon corporate loans, is made the collector of the tax and is required to deduct it from the interest. Doubtless many of the principles relating to the tax on corporate loans are applicable here. The tax imposed upon such stock is to be 'equal to that required to be paid upon money at interest by the general laws of this state'. The general tax law of 1891 imposes upon mortgages, bonds, corporate loans, stocks of corporations, etc., a tax 'at the rate of four mills on each dollar of the value thereof'. The act of 1897 doubtless requires, not only that the rate shall be four mills, but that the tax shall be levied upon the value of the stock. \* \* \*"

It is clear, therefore, that in the opinion of text writers and State taxing officers of the period contemporary with the passage of the Act the Legislature intended to make both the rate and nature of the tax and the time for filing the returns the same as in the case of the tax "required to be paid upon money at interest by the general laws of this state," or, as was stated in an opinion of Deputy Attorney General Reeder to Amos H. Mylin, Auditor General, under date of January 28, 1898, reported in 1 Dauphin 20, "the intention of the Act is to treat this stock as liable for taxation in the same manner that moneyed capital in the hands of an individual is liable."

The Act of June 22, 1897, has never been amended nor has any other Act ever been passed specially giving to building and loan

associations the right to file returns to the Auditor General on a fiscal year basis. The question, therefore, arises as to whether or not the legislative intent as expressed in the wording, “\* \* \* shall annually make return to the Auditor General at the time other returns for taxation are required to be made \* \* \*”, is to subject the class of taxables therein specified to all legislative enactments subsequently passed with reference to taxes “required to be paid upon money at interest” in so far as the time for making the returns is concerned.

This would be a very doubtful conclusion to draw. The Act is admittedly uncertain as to the kind of “other returns” referred to and it is only by reference to the opinions entertained by contemporaries as to its meaning that we are able to conclude that the reference is to tax returns such as were then required to be filed in connection with “money at interest”. However, to accept the view of contemporaries as to the meaning of an Act uncertain in terms appears to be entirely proper. *Commonwealth vs. Paine*, 207 Pa. 45; *Reeves’ Appeal*, 33 Pa. Super. Ct. 196.

In 36 Cyc. 1152 we find the following statement:

“As a rule the adoption of a statute by reference is construed as an adoption of the law as it existed at the time the adoption statute was passed, and therefore, is not affected by any subsequent modification or repeal of the statute adopted.”

*Postal Tel. Cable Co. vs. Southern R. Co.*, 89 Fed. 190; *Culver vs. People*, 161 Ill. 89; 43 N. E. 814.

The Act of July 21, 1919, P. L. 1067, was the first to permit the filing of corporate loans reports on a fiscal year basis, and it follows, therefore, that building and loan associations can not by the general reference contained in the Act of June 22, 1897, obtain the same right to file returns on a fiscal year basis which was granted in 1919 in connection with the filing of corporate loans reports.

The fact is not being overlooked that by the Act of June 2, 1915, P. L. 730, as amended by the Act of July 15, 1919, P. L. 948, the Auditor General was granted authority to permit such corporations as are made taxable under Section 20 of the Act of June 7, 1879, P. L. 112, as amended, to file reports on a fiscal year basis. However, Section 20 of the said Act of June 7, 1879, *supra*, as amended, provides only for the filing of capital stock returns or reports from which duty building and loan associations are expressly exempted by the terms of said Section 20, as amended, and the Legislature could not, therefore, have intended to include building and loan associations in the following proviso of the Act of June 2, 1915, P. L. 730:

“\* \* \* And provided, That if any corporation, company, joint-stock association, or limited partnership shall certify to the Auditor General that its fiscal year closes, not upon the thirty-first day of December, but upon some other date, and that it reports to the United States Government as of such other date, then such corporation may, in the discretion of the Auditor General, be permitted to make the returns herein provided for within sixty days after such date, subject in all other respects to the provisions of this act.\* \* \*”

By the words “the returns herein provided for” capital stock returns or reports only must necessarily have been meant since this Section of the Act has reference to such reports only. This conclusion is strengthened by the fact that on July 21, 1919, the Legislature passed another act expressly granting the similar privilege of filing corporate loans reports on a fiscal year basis. The paragraph of the 1919 Act granting this privilege would have been unnecessary had the Legislature intended by the Act of 1915 to grant authority to the Auditor General to permit the filing of returns generally and in all cases on a fiscal year basis.

I am, therefore, of the opinion that both in view of the uncertain language of the Act of June 22, 1897, with reference to the time and manner of making returns for State tax purposes and in view of the fact that the Act or Acts of Assembly to which it refers in this connection did not then provide for the filing of returns on a fiscal year basis, you have no authority at present to grant to building and loan associations taxable under the said Act of June 22, 1897, permission to file their returns on a fiscal year basis. The building and loan associations interested in filing returns on a fiscal year basis should have little difficulty in securing the passage of an Act of Assembly at this time which would clarify the whole situation.

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General.*

*Auditor General—Department of Public Instruction—Authority under the General Appropriation Act of 1923, App. Acts at p. 41, to purchase drinking cups, paper towels and sundry office supplies—Act of June 7, 1923, P. L. 498, Section 507.*

The language of that portion of the General Appropriation Act which applies to the Department of Public Instruction is broad enough to cover the purchase of drinking cups, paper towels, and sundry office supplies; such purchase, however, must be made through the Department of Property and Supplies acting as the purchasing agent and the Auditor General may lawfully honor requisition covering such purchase.

Department of Justice,  
Harrisburg, Pa., March 26, 1925.

Honorable S. S. Lewis, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether under the General Appropriation Act of 1923 the Department of Public Instruction may purchase and pay out of its appropriation for drinking cups, paper towels and sundry office supplies.

By reference to the General Appropriation Act (Appropriation Acts of June 30, 1923, page 35 at page 41) it will be seen that the appropriation to the Department of Public Instruction is available not only for the payment of salaries of employes of the Department but also "for the general expenses, traveling expenses, equipment, supplies, postage and other incidental expenses of the Department as authorized and approved by the Superintendent of Public Instruction."

This expression is in our opinion sufficiently broad to cover the purchase of drinking cups, paper towels and sundry office supplies. It is of course true that purchases must under Section 507 of the Administrative Code of 1923 be made through the Department of Property and Supplies as purchasing agent.

It is our view that where in the General Appropriation Act the Legislature has specifically authorized a department other than the Department of Property and Supplies to make use of its appropriation for the purchase of supplies the department in question may at its option call upon the Department of Property and Supplies to purchase supplies for it as agent or requisition the Department of Property and Supplies to furnish the supplies needed. The only effect of Section 507 of the Administrative Code is to prevent the purchase of supplies directly by departments other than the Department of Property and Supplies except in the case of certain supplies which the Department of Health may purchase directly and certain supplies which may be directly purchased by the Department of Highways.

Accordingly you are advised that the requisitions about which you have consulted us may be approved for payment out of the appropriation to the Department of Public Instruction.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

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*Auditor General—Department of Public Instruction—Authority to pay for office supplies out of that part of the General Appropriation Act of 1923, App. Acts p. 35 which appropriated to said Department the sum of \$7,500. "for the payment of the expenses of the Pennsylvania Historical Commission.*

The appropriation to the Department of Public Instruction for the expenses of the Historical Commission does not specifically authorize any part of the appropriation to be used for the purchase of supplies. The Auditor General cannot lawfully honor requisitions against the appropriation in question for the purchase of office supplies.

Department of Justice,  
Harrisburg, Pa., March 26, 1925.

Honorable S. S. Lewis, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your request of February 13th asking to be advised whether office supplies may be paid for out of that part of the 1923 General Appropriation Act (Appropriation Acts of June 30, 1923, page 35) which appropriated to the Department of Public Instruction seven thousand five hundred dollars (\$7,500) "for the payment of the expenses of the Pennsylvania Historical Commission."

If this appropriation had not been incorporated in the General Appropriation Act but made the subject of a separate measure we would have no hesitancy in advising that "the payment of expenses" is an expression unlimited in scope and that under an appropriation for this broad purpose the only question would be whether the work of the Pennsylvania Historical Commission properly requires the use of office supplies.

However, by reference to the General Appropriation Act it appears that there is an appropriation to the Department of Property and Supplies for the payment of the cost of general supplies for the State government. It also appears that in the appropriation to many of the agencies to which appropriations were made by the General Appropriation Act of 1923 specific authority is given to purchase supplies. In all of these cases the agencies involved may at their option purchase supplies out of their own appropriations or requisition the Department of Property and Supplies to furnish them with the sup-

plies needed. The purchases out of their own appropriations must of course be made by the Department of Property and Supplies as purchasing agent under Section 507 of the Administrative Code of 1923.

The appropriation to the Department of Public Instruction for the expenses of the Historical Commission does not specifically authorize any part of the appropriation to be used for the purchase of supplies and we are therefore of the opinion that it was the intention of the Legislature that no part of this appropriation should be used for that purpose.

Accordingly you are advised that the appropriation in question cannot be used for the purchase of office supplies.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

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*Auditor General—Authority to approve for payment requisitions drawn against the General Appropriation Act of June 30, 1923, Appropriation Acts p. 35 at page 56 for the purchase of chairs and desks by the Department of Welfare.*

The Legislature having made a large appropriation to the Department of Property and Supplies for the purchase of general supplies including furniture, the purchase of furniture should not be regarded as among the "general expenses" of the Department of Welfare. The appropriation to the latter Department while authorizing the specific purchase of "equipment" did not mention furniture. The Auditor General cannot, therefore, lawfully approve the requisition in question.

Department of Justice,  
Harrisburg, Pa., April 2, 1925.

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

Sir: We have your request to be advised whether you may lawfully approve for payment requisitions drawn against the General Appropriation Act of 1923 (Act of June 30, 1923, Appropriation Acts page 35) for the purchase by the Department of Welfare of chairs and desks.

At page 56 of the Appropriation Acts of 1923 appears the appropriation to the Department of Welfare. The sum of three hundred and twenty-five thousand dollars (\$325,000) was appropriated to the Department for the payment inter alia of "general expenses of the Department, including materials, supplies, postage, telephone, express, traveling expenses, heat, light, power, water, repairs, maintenance, equipment, apparatus, rents, and storage of vehicles, as authorized and approved by the \* \* \* Secretary of Welfare". Standing

alone there could be no question but that this appropriation is sufficiently broad to include the purchase of chairs and desks for use by the Department. However, by reference to page 51 of the 1923 Appropriation Acts it appears that the General Appropriation Act of 1923 appropriated to the Department of Property and Supplies six hundred and twenty thousand dollars (\$620,000) "for the payment of the cost of general supplies including stationery, supplies, furniture, \* \* \* and other matters required by \* \* \* the several departments, boards and commissions of the State Government." The question, therefore, arises whether the Legislature intended that the Department of Welfare should have the option of purchasing furniture out of the appropriation to that Department or of calling upon the Department of Property and Supplies to supply to the Department of Welfare any furniture which might be needed. If so, it would be entirely proper for you to approve requisitions for furniture drawn against the Department of Welfare's appropriation provided the purchase was made through the Department of Property and Supplies as purchasing agency as required by Section 507 of the Administrative Code.

Whether or not the Legislature intended to give to the Department of Welfare this option depends, in our opinion, upon the question whether "general expenses" would include the cost of furniture and if that question be answered in the negative, whether "equipment" includes furniture.

It is our view that both of these questions should be answered in the negative. In view of the fact that the Legislature made a very substantial appropriation to the Department of Property and Supplies for the purchase of general supplies *including furniture* it does not seem reasonable that the purchase of furniture should be regarded as among the "general expenses" of the Department of Welfare. Similarly, the specific mention of "furniture" in the appropriation to the Department of Property and Supplies and the omission of this word in the appropriation to the Department of Welfare would indicate that the Legislature when it authorized the Department of Welfare to purchase "equipment" was not referring to "furniture."

If the appropriation to the Department of Welfare were contained in a separate act of Assembly our interpretation of the language in question might be more liberal, but in view of the fact that the appropriations both to the Department of Property and Supplies and to the Department of Welfare are contained in the same Act we are of the opinion that these a way as to harmonize, if possible, their provisions for the purpose of giving effect to what the Legislature really intended.

Accordingly you are advised that, in our opinion, you cannot lawfully approve the requisitions in question.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*Auditor General—State Employees' Retirement Board—Office Supplies—Act of 1923, P. L. 858.*

Authority of the Auditor General to approve requisitions of the Secretary of the Commonwealth for office furniture and supplies and printing furnished to the State Employees' Retirement Board.

Department of Justice,  
Harrisburg, Pa., April 29, 1925.

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

Sir: We have your request to be advised whether you may lawfully approve requisitions of the Secretary of the Commonwealth covering the purchase of desks, chairs and similar office supplies, and printing furnished to the State Employees' Retirement Board payable out of the expense fund established by Section 9 of the Act of June 27, 1923, P. L. 858.

On June 14, 1924 this Department rendered an opinion to the Secretary of the Commonwealth on the subject a copy of which is herewith enclosed. We find no occasion to modify the opinion then rendered.

Accordingly you are advised that you may lawfully approve for payment out of the said expense fund requisitions of the character to which your communication refers.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

*Public officers—Swearing in of State officers—Judges—Administration of oath by judges not resident of the State capital—Act of June 7, 1923.*

1. The administration of an oath is a ministerial duty, not one involving the exercise of judicial discretion, and may be performed outside of the district in which the officer performing the same is required to reside.

2. Judges are State officers, and they may, although not resident in the capital, administer the oath of office in Harrisburg to the State Treasurer and the Auditor General upon induction into office.

3. The provision of the Administrative Code of June 7, 1923, P. L. 498, authorizing the Secretary of the Commonwealth to administer all oaths to State officers required to be administered in the performance of their duties, is permissive and not obligatory.

Department of Justice  
Harrisburg, Pa., April 29, 1925.

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

Dear Sir: This Department has your request for an opinion as to the authority of the President Judge of the Court of Common Pleas of York County to administer the oath of office to you at Harrisburg upon your assumption of the duties of State Treasurer, to which office you have been elected, and also as to the authority of the Judge of the Orphans' Court of Washington County to administer the oath of office at Harrisburg to Edward Martin on the assumption by him of the office of Auditor General, to which he has been elected.

Article VII Section I of the Constitution provides that all State officers shall, before entering on the duties of their respective offices, take and subscribe an oath or affirmation, the form of which is therein given. It also provides as follows.

"The foregoing oath shall be administered by some person authorized to administer oaths, and in the case of State officers \* \* \* shall be filed in the office of the Secretary of the Commonwealth \* \* \*"

Section 43 of the Act of March 30, 1811 (Pennsylvania Statutes, Section 929) provides that the Auditor General shall, before entering upon the duties of his office, take the oaths or affirmations of office, agreeably to the directions of the Constitution. Section I of the Act of May 9, 1874 (Pennsylvania Statutes, Section 20152) requires the State Treasurer before he enters upon the duties of his office to take the oath or affirmation of office, agreeably to the direction of the Constitution. There is no statutory direction as to how, when or where such oath shall be administered provided it is administered prior to the assumption of the duties of the office, and there is no provision of the statute specifying who shall administer the oath.

Section 703 (a) of the Administrative Code of 1923 authorizes the Secretary of the Commonwealth of administer all oaths to State

officers required to be administered in the performance of their administrative duties. This provision is permissive and not obligatory.

There being no statutory provision directing who shall administer these oaths of office, the constitutional provision that it shall be done by one "authorized to administer oaths" is the only guidance we have in determining that question.

There is no doubt but that a judge is authorized to administer oaths, it is common law prerogative of both Common Pleas and Orphans' Court Judges made statutory, in part, by Section 1 of the Act of March 21, 1772, as amended by the Act of April 3, 1895, P. L. 32.

But is a judge authorized to administer an oath at a place outside of his judicial district unless he is called thereto, in the manner specified by statute, to perform judicial functions?

Judges are State officers (*Buckley vs. Holmes, et al.*, 269 Pa. 176; *Commonwealth ex rel., vs. Hyneman*, 242 Pa. 244; *Commonwealth vs. Peninsula*, 97 Pa. 293; *Leib vs. Commonwealth*, 9 Watt's 300). these oaths are to be administered to officers of the Commonwealth and, in this instance, are to be administered at the State Capitol. The administration of an oath is a ministerial duty, not one involving the exercise of a judicial discretion, and may be performed outside of the district in which the officer performing the same is required to reside. (*Commonwealth vs. Kurz, et al.*, 14 Dist. Sec. 741-744.)

I am, therefore, of the opinion that the President Judge of the Court of Common Pleas of York County and the Judge of the Orphans' Court of Washington County are authorized to administer the oath of office to you as State Treasurer and to Edward Martin as Auditor General, respectively, at the State Capitol in Harrisburg, upon induction into office.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

*Auditor General—State Employees' Retirement Board—Authority to approve requisitions of the Secretary of Commonwealth for the purchase of desks, chairs, office supplies and printing furnished the Board—where payable.*

The Auditor General may lawfully approve for payment out of the expense fund established by Section 9 of the Act of June 27, 1923, P. L. 858, bills for desks, chairs, and similar office supplies and printing furnished the State Employees' Retirement Board.

Department of Justice  
Harrisburg, Pa., April 29, 1925.

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

Sir: We have your request to be advised whether you may lawfully approve requisitions of the Secretary of the Commonwealth covering the purchase of desks, chairs and similar office supplies, and printing furnished to the State Employees' Retirement Board payable out of the expense fund established by Section 9 of the Act of June 27, 1923, P. L. 858.

On June 14, 1924 this Department rendered an opinion to the Secretary of the Commonwealth on the subject a copy of which is herewith enclosed. We find no occasion to modify the opinion then rendered.

Accordingly you are advised that you may lawfully approve for payment out of the said expense fund requisitions of the character to which your communication refers.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

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*Robert Morris Monument Commission—Auditor General—Authority to approve requisitions of the Secretary of Property and Supplies on account of the contract of Paul W. Bartlett with said Commission for the erection of a monument—where payable—Acts of June 14, 1911, P. L. 937—June 7, 1923, P. L. 498, Section 2901.*

The appropriations made by the Act of June 14, 1911, P. L. 937 is available for the purpose of paying the amounts due to persons who entered into contracts with the Robert Morris Monument Commission. In as much as this Commission was abolished by the Act of 1923, supra, the Auditor General may lawfully honor the requisition of the Secretary of Property and Supplies for payment out of the appropriation made by the Act of 1911 of any amounts due Paul W. Bartlett under his contract with the Commission.

Department of Justice  
Harrisburg, Pa., April 29, 1925.

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

Sir: We have your request to be advised whether you may lawfully approve the requisitions of the Secretary of Property and

Supplies in the amount of four thousand dollars (\$4,000) payable to Paul W. Bartlett on account of his contract with the Robert Morris Monument Commission for the erection of a monument to Robert Morris in the City of Philadelphia, this requisition being drawn against an appropriation made by the Act of June 14, 1911, P. L. 937.

We understand that your reason for feeling that the requisition should not be approved is that the Act of June 14, 1911, P. L. 937 was specifically repealed by Section 2901 of the Administrative Code approved June 7, 1923, P. L. 498.

The Act of June 14, 1911, P. L. 937 authorized the Robert Morris Monument Commission 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 with which it should be constructed and to make contracts for its construction and erection. For those purposes the sum of twenty thousand dollars (\$20,000) or so much thereof as might be necessary was specifically appropriated.

Acting under the authority thus vested in them the Robert Morris Monument Commission entered into a contract with Paul W. Bartlett. That contract was made upon the faith of the appropriation contained in the Act of 1911. The Legislature could not under the Constitution of the United State impair the obligation of this contract. *Penrose vs. Erie Canal Co.*, 56 Pa. 46; *Dunn vs. Gorgas*, 41 Pa. 441; *Nelson vs. St. Martin's Parish*, 111 U. S. 716.

Clearly, therefore, that part of the Administrative Code which purports to repeal the Act of June 14, 1911, P. L. 937 is unconstitutional insofar as it would affect the availability of the appropriation contained in that Act. That being so, the appropriation made by the Act of June 14, 1911, P. L. 937 is still available for the purpose of paying amounts due to persons who entered into contracts with the Robert Morris Monument Commission.

In view of the fact that this Commission was abolished by the Administrative Code and the functions thereof transferred to the Department of Property and Supplies the manner in which the appropriation may be requisitioned is covered by the decision of the Supreme Court in *Piccirilli Brothers vs. Lewis*, 253 Pa. 323. Under the authority of that case it is clear that the Secretary of Property and Supplies may issue his requisition for the payment of the amount due Mr. Bartlett.

You are accordingly advised that you may lawfully honor the requisition of the Secretary of Property and Supplies for the payment out of the appropriation made by the Act of June 14, 1911,

of any amount due to Mr. Bartlett under his contract with the Robert Morris Monument Commission.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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*Auditor General—Water Supply Commission of Pennsylvania—Appropriations to, where payable under Section 223 of the Act of June 7, 1923, P. L. 498—Act of June 30, 1923, No. 44A.*

The Secretary of Forest and Waters may in behalf of the Water and Power Resources Board draw requisitions for disbursements out of the State Treasury under the Act of June 30, 1923.

Department of Justice,  
Harrisburg, April 30, 1925.

Honorable S. S. Lewis, Auditor General, Harrisburg, Pennsylvania.

Sir: You have requested to be advised whether you may lawfully honor requisitions of the Department of Forests and Waters drawn against appropriations made to the Water Supply Commission of Pennsylvania prior to the effective date of the Administrative Code of 1923 (Act of June 7, 1923, P. L. 498).

We understand your doubt arises because of your belief that the Administrative Code abolished the Water Supply Commission and created in its stead the Water and Power Resources Board,—a departmental administrative board within the Department of Forests and Waters.

Under date of November 7, 1923 this Department advised the Secretary of Forests and Waters that the appropriation made to the Water Supply Commission by Act No. 42-A of the 1923 Session of the General Assembly was available to the Water and Power Resources Board upon requisition of the Department of Forests and Waters. We are attaching hereto a copy of that opinion. We have no reason at this time to modify the opinion then rendered.

For the reason set forth in our opinion to the Department of Forests and Waters we advise you that you may lawfully approve requisitions for the use by the Water and Power Resources Board of unexpended balances of appropriations made to the Water Supply Commission.

Under Section 223 of the Administrative Code the force and validity of which were recognized in the decision of the Supreme Court in *Piccirilli Brothers vs. Lewis*, 262 Pa. 528, the Secretary of Forests

and Waters is the proper person to draw requisitions for disbursements out of the State Treasury for the Water and Power Resources Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

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*Auditor General—Authority to approve requisitions drawn by the Secretary of Forests and Waters on the appropriation made in 1923, No. 36A, to the Lake Erie and Ohio River Canal Board.*

The Secretary of Forests and Waters may lawfully draw a requisition against the 1923 appropriation to the Lake Erie & Ohio River Canal Board for expenses incurred by said Board.

Department of Justice,  
Harrisburg, Pa., May 21, 1925.

Honorable Edward Martin, Auditor General, Harrisburg, Pennsylvania.

Sir: Your predecessor, Honorable Samuel S. Lewis, requested this Department for an opinion with regard to the legality of certain requisitions drawn against the 1923 appropriation to the Lake Erie and Ohio River Canal Board by the Secretary of Forests and Waters for expenses incurred by the Canal Board. His request was not complied with prior to the end of his term. We understand that you are holding the requisitions pending our compliance with Mr. Lewis' request, and we shall therefore advise you as requested by Mr. Lewis.

On June 23, 1924, this Department addressed a formal opinion to Secretary Stuart of the Department of Forests and Waters answering the same question contained in the Auditor General's request to which reference has been made. A copy of our opinion to Secretary Stuart is hereto attached.

We have no reason to modify in any wise the views expressed in our opinion to Secretary Stuart. Accordingly we advise you that you may lawfully approve requisitions drawn by the Secretary of Forests and Waters on the appropriation made by the Act of 1923 to the Lake Erie and Ohio River Canal Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

*Auditor General—Authority to approve requisitions of the Department of Agriculture to cover the purchase of general office supplies, photographic supplies, telephone rentals and tolls and office rent from the General Appropriation, App. Acts 1923 at p. 46, made to the Department of Agriculture in 1923, and also from the "Dog Fund" appropriated to said Department by the Act of May 11, 1921, P. L. 522 as amended by the Act of March 19, 1923, P. L. 16.*

The Auditor General may lawfully approve requisitions drawn against the "Dog Fund" for expenditures for general office supplies, photographic supplies, telephone rentals and tolls, provided the purchases were made in connection with the enforcement of the laws affecting "Animal Industry" he may also lawfully approve requisitions drawn against the General Appropriation Act of 1923 for supplies purchased for the Department of Agriculture by the Department of Property and Supplies acting as purchasing agent and for rentals for field laboratories but may not approve requisitions against said Appropriation Act for rentals of branch offices used for the general purposes of the Department of Agriculture.

Department of Justice,  
Harrisburg, Pa., May 29, 1925.

Honorable Edward Martin, Auditor General, Harrisburg, Pennsylvania.

Sir: Some time ago your predecessor, Honorable S. S. Lewis, requested this Department to advise him whether the Auditor General might lawfully approve requisitions of the Department of Agriculture to cover the purchase of general office supplies, photographic supplies, telephone rentals and tolls and office rent from the General Appropriation made to the Department of Agriculture in 1923 and also from the Dog Fund appropriated to the Department by the Act of May 11, 1921, P. L. 522 as amended by the Act of March 19, 1923, P. L. 16. We understand that you desire a reply to Mr. Lewis' communication.

On August 21, 1923 and on June 27, 1924 this Department rendered to the Secretary of Agriculture opinions with regard to the purposes for which the Dog Fund may be used under the Act of 1921 as amended. We are enclosing herewith copies of the opinions mentioned. We have no reason to modify the advice given to the Secretary of Agriculture and accordingly now advise you that you may lawfully approve requisitions against the Dog Fund for the payment of telephone and telegraph bills, rentals for branch offices, and bills for supplies and materials of any kind required by the Department of Agriculture in the enforcement of the laws which were, prior to June 15, 1923, chargeable to the Bureau of Animal Industry for enforcement.

In this connection we call your attention to our opinion rendered to the Auditor General on March 26, 1925 with reference to the interpretation to be placed upon the appropriation in the General Appropriation Act of 1923 to the Department of Public Instruction

for the use of the Pennsylvania Historical Commission. As there pointed out an appropriation "for expenses" when contained in an Act of Assembly distinct from the General Appropriation Act is unlimited in scope and must be interpreted in the broadest possible manner, but when, as in the case of the 1923 appropriation for the expenses of the Pennsylvania Historical Commission, an appropriation for "expenses" is contained in the General Appropriation Act which also contains the appropriation to the Department of Property and Supplies for the purchase of supplies to be used by the several departments, boards and commissions of the State government, a narrow, limited construction must be given to the appropriation for "expenses". Unless there is express language duplicating the purposes for which money is appropriated to the Department of Property and Supplies, we are compelled to assume that the Legislature did not intend such duplication of purposes in the same Act.

The Dog Fund was appropriated to the Department of Agriculture by a separate Act of Assembly,—not by the General Appropriation Act. One of the purposes for which the money was appropriated was "the enforcement of the provisions of the several Acts of Assembly charged to the Bureau of Animal Industry." This language gave to the appropriation the widest possible scope. No limitations whatever were imposed upon the manner in which money was to be expended for the enforcement of these Acts. Salaries or other compensation of necessary employes, the purchase of necessary supplies, rentals of branch offices and the payment of telephone and telegraph bills are all embraced within the language used, provided expenditures of these several kinds were necessary for the enforcement of the Acts of Assembly in question.

Coming now to your inquiry whether the Department of Agriculture may lawfully draw requisitions for supplies against the appropriation to that Department as contained in the General Appropriation Act of 1923 (Act of June 30, 1923, Appropriation Acts page 35 at page 46), we call attention to the fact that one of the purposes for which five hundred and sixty-four thousand dollars (\$564,000) was appropriated to this Department was the payment "of supplies". This would undoubtedly permit the Department of Agriculture to purchase through the Department of Property and Supplies as purchasing agency any supplies necessary for the conduct of the work of the Department. We call attention to our opinion rendered to Auditor General Lewis on March 25, 1925, in which we discussed fully a similar question rising under the appropriation to the Department of Public Instruction as contained in the General Appropriation Act of 1923.

With references to rentals we understand that the items in question include rentals for (a) branch offices of the Department of Agriculture generally, (b) branch offices of the Department used in connection with its so-called "animal industry" work, and (c) field laboratories.

It is our opinion that rentals for branch offices maintained in connection with the general work of the Department cannot be paid out of the appropriation to the Department of Agriculture contained in the General Appropriation Act of 1923, but must be paid out of the appropriation made by the same Act to the Department of Property and Supplies "for the payment of the rent of offices and rooms outside of the Capitol Buildings".

Expenditures for this purpose could be made out of the appropriation to the Department of Agriculture only if that appropriation expressly specified office rentals as payable therefrom.

With reference to rentals for offices necessary in connection with the enforcement of the "animal industry" laws, we have already stated that such rentals may, in our opinion, be paid out of the "Dog Fund". They could not be paid out of the appropriation made to the Department by the General Appropriation Act for the same reason that rentals for branch offices used in the general work of the Department cannot be paid out of that appropriation.

With regard to rentals for space occupied by field laboratories, it is our view that when the legislature in the General Appropriation Act of 1923 included in the purposes for which the appropriation might be expended the "cost of maintenance of field laboratories" it intended to include every item of expense which might be incurred in connection with these laboratories; and that rentals paid for field laboratories may, therefore, be paid out of the said appropriation. We are of the opinion that the appropriation to the Department of Property and Supplies "for the payment of the rent of offices and rooms outside of the Capitol Buildings" was not intended to cover rentals for space to be used for field laboratories.

Accordingly, you are advised that:

1. You may lawfully approve requisitions drawn against the "Dog Fund" for expenditures of any of the classes mentioned in your letter of inquiry, provided the purchases were made in connection with the enforcement of the laws affecting "animal industry".

2. You may lawfully approve requisitions drawn against the General Appropriation Act of 1923 for supplies purchased for the Department of Agriculture by the Department of Property and Supplies as purchasing agent; and for rentals for field laboratories; and

3. You may not approve requisitions against the General Appropriation Act of 1923 for rentals of branch offices used for the general purposes of the Department of Agriculture.

Yours very truly,

DEPARTMENT OF JUSTICE,

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

*Auditor General—Authority to approve requisitions of the Superintendent of Public Instruction for aid to certain school districts which maintain vocational schools chargeable against the Act of May 27, 1921, App. Acts, page 33. Acts of April 16, 1919, page 34, at page 42; May 27, 1921, App. Acts, page 33, at page 41.*

The Auditor General may lawfully approve the requisition of the Superintendent of Public Instruction for aid to certain school districts, without requiring the said school districts to show that their vocational schools were established for the training of vocational teachers.

Department of Justice  
Harrisburg, Pa., June 4, 1925.

Honorable Edward Martin, Auditor General, Harrisburg, Penna.

Sir: We have your request to be advised whether you may lawfully approve requisitions of the Superintendent of Public Instruction for aid to certain school districts which maintain vocational schools drawn against that part of the General Appropriation Act of 1921 (Act of May 27, 1921, Appropriation Acts, page 33), which reads as follows:

“For the support of the Public Schools, State Normal Schools, Vocational Schools, Continuation Schools, and other public school agencies in this Commonwealth \* \* \* the sum of thirty-two million dollars (\$32,000,000):

\* \* \* \* \*

“And provided further That out of the amount hereby appropriated there shall be set apart the sum of eight hundred and fifty thousand dollars (\$850,000) to aid school districts which now maintain, or shall cause to be established and maintained, vocational schools or departments, as a part of the Public School System for the training of vocational teachers in such institutions as the State Board of Education may designate, and under such regulations as the State Board of Education may prescribe, and for the payment of salaries and other expenses of the Bureau of Vocational Education \* \* \*.”

We understand that the question which you have in mind is whether the appropriation of eight hundred and fifty thousand dollars (\$850,000)-was intended to be expended for three purposes, namely, (1) to aid school districts maintaining vocational schools or departments as a part of the Public School System, (2) for the training of vocational teachers in institutions designated by the State Board of Education, and (3) for the payment of salaries and other expenses of the Bureau of Vocational Education; or whether it may be expended for but two purposes, namely, (1) to aid school districts maintaining vocational schools or departments as a part of the Public School System, for the training of vocational teachers in such institutions as the Board of Education may designate, and (2) for the payment of the salaries and other expenses of the Bureau of Vocational Education.

If the appropriation may be expended for the three purposes enumerated there can be no question but that you may lawfully approve the requisitions now before you. If on the other hand the Legislature intended that the appropriation should be available for only two purposes then the requisitions before you could be approved only if the school districts in whose favor they are drawn were maintaining as a part of the Public School System vocational schools or departments for the training of vocational teachers in such institutions as the State Board of Education shall have designated.

Before considering the proper interpretation to be placed upon the language of the appropriation there are certain additional facts which have been given to us by the Department of Public Instruction which should be mentioned, as follows:

Prior to the passage of the General Appropriation Act of 1921 there were no school districts which maintained vocational schools or departments for the training of vocational teachers. There were, however, a number of vocational schools in existence as parts of the Public School System. The practice had also been established prior to the passage of the General Appropriation Act of 1921 of training vocational teachers at State expense in certain institutions of higher learning designated by the State Board of Education. There were no school districts prior to 1921 which maintained any "Institutions" as parts of the Public School System.

In the light of these facts it is apparent that an appropriation "to aid school districts which now maintain or cause to be established and maintained, vocational schools or departments, as a part of the public school system for the training of vocational teachers in such institutions as the State Board of Education may designate", regarding all of the language quoted as one expression, would have been utterly meaningless. To thus read the language quoted would render unlawful requisitions for the training of vocational teachers in insti-

tutions of higher learning designated by the State Board of Education unless such institutions were maintained by school districts as a part of the Public School System. Similarly the requisitions now before you would be unlawful unless it could be established that the School districts designated therein maintained vocational schools as a part of the School System for the training of vocational teachers in institutions designated by the State Board of Education. In neither case could the facts essential to the validity of the requisitions be established so that the result of this interpretation would be that the entire eight hundred and fifty thousand dollars (\$850,000) could be used only for the payment of the salaries and other expenses of the Bureau of Vocational Education.

On the other hand to interpret the language as embracing three purposes for which the money might be lawfully expended would give full force and effect to every word employed by the Legislature. There were in 1921 School Districts which maintained vocational schools as a part of the Public School System. It was, therefore, possible for the Legislature to have had in mind subsidizing these districts. There were State supported students in training as vocational teachers in certain institutions of higher learning designated by the State Board of Education. The Legislature could very properly have had in mind supplying funds to continue the education of these students at State expense. There was a Bureau of Vocational Education for the maintenance of which an appropriation was necessary.

Under these circumstances we have no hesitancy in adopting the interpretation which will result in giving effect to the language used by the Legislature and rejecting the interpretation which would render meaningless, in large part, that language.

Accordingly you are advised that you may lawfully approve the requisitions in question without requiring the school districts named therein to show that their vocational schools were established for the training of vocational teachers.

In conclusion we desire to call attention to the fact that the language of the 1921 appropriation is identical with that contained in the General Appropriation Act of 1919, (Act of July 16, 1919, Appropriation Acts, page 34 at page 42) and that the 1919 appropriation was construed both by the Department of Public Instruction and by the fiscal officers of the Commonwealth as we are now construing the Act of 1921.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

*Taxation—Constitutional law—State and Federal Governments—Federal employees—Taxation by State—Exemption from taxation.*

1. The office of an employee of the Federal Government and the salary or income derived therefrom are exempt from taxation by the State on the principle that the State cannot levy a tax on the instrumentalities of the Federal Government. This proposition is not stated in the Constitution, but is implied from the conditions and is necessary in order that our system of dual government may be able to function.

2. The effect of the principle is to exempt a Federal employee from State tax on his occupation or his office or his income. He is still liable to be taxed on his real estate or his personal property and is liable to all the other burdens and duties imposed upon other citizens of the State, unless they are such as would interfere with the performance of his official duties.

3. There is no reason requiring a Federal employee to be exempt from the tax on liquid fuel bought for his own use, and he is liable for such tax.

Department of Justice,  
Harrisburg, Pa., June 25, 1925.

Honorable Edward Martin, Auditor General, Harrisburg, Pa.

Sir: I am in receipt of your request for an opinion on the claim of certain employes of the federal government that their exemption from taxation by the State includes exemption from the taxes on liquid fuels levied by the State of Pennsylvania.

The office of an employe of the federal government and the salary or income derived therefrom are exempt from taxation by the State on the principle that the State cannot levy a tax on the instrumentalities of the federal government. There are no provisions in the Constitution of the United States stating this proposition, but it is implied from the condition and is necessary in order that our system of dual government, each constituent of which is supreme within its defined jurisdiction, may be able to function. The power to tax implies the power to destroy; consequently, if a State were permitted to tax the instrumentalities of the federal government, it might conceivably tax those instrumentalities out of existence. *McCullough v. Maryland*, 4 Wheat. No. 316, *Bobbins v. Commissioners*, 16 Pet. 435, *Louisville First National Bank v. Commonwealth*, 9 Wall. 353, *Collector v. Day*, 11 Wall. 113, 12 *Am. & Eng. Ency. Law* 373.

The effect of the principle is to exempt a federal employe from State tax on his occupation, or his office or his income. He is still liable to be taxed on his real estate or his personal property and is liable to all the other burdens and duties imposed upon other citizens of the State, unless they are such as would interfere with the performance of his official duties. In the absence of such reason, a federal officer, as such, has no special claim to exemption from the taxes paid by other citizens of the State.

In the case of *Finley vs. Philadelphia*, 36 Pa. Ct. 361, an officer of the United States Army temporarily domiciled in Philadelphia claimed that his household goods were exempt from local tax. The Supreme Court of Pennsylvania ruled against such exemption and in the course of its opinion said:

“What is official about the plaintiff here is his surgical and medical function, and that is not taxed. As an owner of household furniture or other property (not being special instruments of his office), he stands on common ground with other residents and citizens and is subjected to corresponding burdens and duties”.

The Supreme Court of the United States in the case of *Louisville First National Bank vs. Commonwealth*, 9 Wall 353, held that the stock of a national bank in the hands of stockholders was liable to a tax levied under an act of the legislature of the State of Kentucky. In an elaborate argument on this question the Court said, *inter alia*:

“The most important agents of the federal government are its officers, but no one will contend that when a man becomes an officer of the government, he ceases to be subject to the laws of the state. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the federal government are only exempted from state legislation so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the powers of the States. The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because these exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the state which affect his family or social relations, or his property, and he is liable for punishment for crime, though that punishment be imprisonment or death.”

There is no reason growing out of this situation that would require a federal employe to be exempt from the tax on liquid fuel bought for his own use. The operation of his automobile or machinery at his home requiring gasoline, cannot be regarded as part of his official character. He could, with as good reason, contend that he should not be required to pay a dog tax, or a license fee for his car, or for a hunting license; and, as these exemptions are reciprocal, an employe of Pennsylvania might contend with equal reason that he should

be exempt from a tariff duty or an excise tax laid by the federal government. Sales of liquid fuels to the United States for actual consumption in the business of the government are exempt from the tax under the present practice of the Auditor General's Department. None of the interferences with the necessary functions of the federal government contemplated by Chief Justice Marshall in his celebrated opinion in *McCullough vs. Maryland* could possibly arise from subjecting a federal employe to the liquid fuels tax. No such exemption is required for the proper safeguarding of the instrumentalities of the federal government and, in the absence of such necessity, I am of the opinion that a federal employe is liable to pay the tax in question.

Respectfully submitted,

GEORGE W. WOODRUFF,

*Attorney General.*

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*Philadelphia-Camden Bridge—Availability of appropriations made by the Legislature for the Commonwealth's share of the cost of construction dependent upon the question whether or not tolls shall be charged for the use of the Bridge—Acts of April 7, 1925, No. 328A, May 11, 1923, Appropriation Acts, p. 18, May 27, 1921, Appropriation Acts, p. 281, July 9, 1919, P. L. 814.*

An examination of the Appropriation Acts above referred to discloses the fact that the availability of the appropriations made by them is not dependent upon the question whether the bridge shall finally be operated as a free bridge or a toll bridge.

Department of Justice,  
Harrisburg, Pa., June 26, 1925.

Honorable Samuel S. Lewis, State Treasurer, Honorable Edward Martin, Auditor General, Harrisburg, Pennsylvania.

Sirs: We have your request to be advised whether the availability of the several appropriations made by the Pennsylvania Legislature for this State's share of the cost of constructing the Philadelphia-Camden Bridge is dependent to any extent upon the question whether tolls be charged for the use of the Bridge.

We understand that your inquiry is prompted by the discussion now current on the question whether the State of New Jersey can and will charge tolls for foot and private vehicular traffic at the Camden end of the Bridge.

Appropriations have been made by the Pennsylvania Legislature for this Commonwealth's share of the cost of the Philadelphia-Camden Bridge by the Acts of July 9, 1919, P. L. 814, May 27, 1921, (Appropriation Acts page 281), May 11, 1923, (Appropriation Acts page 18) and April 7, 1925 (Act No. 136). A careful examination of each of these Acts discloses the fact that the availability of the appro-

priations made by them is not dependent in any way upon the question whether the Bridge shall finally be operated as a free bridge or as a toll bridge.

It is, therefore, not necessary for you as the fiscal officers of the Commonwealth to know in advance of the operation of the Bridge whether New Jersey will insist upon the collection of tolls at the Camden end of the Bridge if such collection be legally possible.

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General.*

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*County Treasurers—Authority to retain State moneys collected by them while acting as agents of the Commonwealth—"Fees" defined—Acts of April 15, 1834, P. L. 537, May 28, 1913, P. L. 356, Article III, Section 11, State Constitution, April 17, 1914, P. L. 85, Act No. 343, P. L. 639, No. 334, P. L. 641, No. 353, P. L. 656, all approved by the Governor on May 13, 1925.*

The word "fees" as used in Act No. 353, of 1925, is not synonymous with the word "commissions" as used in said act.

The purpose of the Legislature was to prevent county treasurers from deducting from moneys collected for fish, hunters and dog licenses, a commission on a percentage basis.

The compensation of county treasurers authorized by Act No. 353 and the expenses which they are permitted to retain must be paid only out of "Commissions" earned under the provisions of the act.

The fees retained for making these collections must be paid into the respective county treasuries without deductions of any kind.

The compensation and expenses authorized to be retained by county treasurers under this act may be paid only from the commissions deductible on a percentage basis.

County treasurers not paid on a salary basis may retain for their own use the cost of the bonds which they are required to furnish to the Commonwealth and their expenses actually incurred for the collection of moneys for the Commonwealth.

This act does not apply to county treasurers who are not paid on a salary basis.

This act does not repeal or in any wise affect that part of Section 309 of the Act of May 24, 1923, P. L. 359, which allows county treasurers to charge a fee of fifty dollars (\$50.00) for issuing a non-resident hunter's license.

It is impossible by interpretation to correct the Legislature's error in specifying the Act of April 17, 1913, P. L. 85, which was superseded and repealed by the Act of May 24, 1923, P. L. 359.

County treasurers may not in making settlement with their respective counties retain out of the commissions deductible under the Act of 1834 expenses incurred in employing assistants to collect game license fees.

It was not the intention of the Legislature by Act No. 353, of 1925, to repeal the act of May 28, 1913, P. L. 356. As between the county treasurer and the county, the county treasurer shall be entitled to retain for his own use any expenses which he has been obliged to incur in the collection of State funds including the compensation of such employees as it has been necessary for him to hire, pro-

vided, however, that the number and compensation of such employees shall have been approved by the Auditor General.

State employees appointed under the Act of 1913 will continue to be paid out of State funds.

The Auditor General must approve the number and compensation of employes engaged to assist in the collection of the various State funds which county treasurers are authorized to collect by the Act of 1834.

The Commissioner of Fisheries must approve the number and compensation of employees engaged by county treasurers to assist in collecting fish license fees under the Act of 1921.

The Secretary of Agriculture must approve the number and compensation of employees engaged by county treasurers to assist in the collection of dog license fees.

After January 1, 1926, the extra ten per cent (10%) fee chargeable by county treasurers to fish licensees for the collection of fish license fees will have to be paid into the county treasuries without deductions of any kind.

Department of Justice  
Harrisburg, Pa., November 20, 1925.

Honorable Edward Martin, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your request to be advised with respect to nine questions which have arisen in connection with the interpretation of Acts Nos. 343, 344 and 353 of the 1925 Session of the General Assembly.

Acts Nos. 343, P. L. 639, 344 P. L. 641 and 353 P. L. 656, were approved by the Governor on May 13, 1925 and were inspired by a desire to correct an unfortunate situation which has existed in a number of the Counties of the State for a period of years.

County treasurers have been required by various acts of assembly to collect moneys due the Commonwealth. The acts of assembly requiring them to make such collections did not specifically provide that they were to be the agents of the Commonwealth for the collection of State funds, but did provide that for collecting State moneys as required by the several acts of assembly they should be entitled to retain certain fees and commissions. The acts did not specifically entitle the county treasurers to retain these fees and commissions for their own use and under Article XIV, Section 5 of the Constitution as interpreted by our Supreme Court in a number of cases, the Legislature having failed to authorize specifically county treasurers to make collections of State funds as agents of the Commonwealth and to retain for their own use the fees and commissions retained, the fees and commissions belonged to the counties it was the duty of the county treasurers to pay them into the county treasuries. *Schuylkill County vs. Wiest*, 257 Pa. 425; *Bachman's Appeal* 274 Pa. 420.

To qualify for collecting State funds, county treasurers have been obliged by law to furnish bonds with satisfactory sureties to protect the Commonwealth. It has also been necessary for them to have clerical and other assistants beyond the assistance specifically authorized for certain counties by the Act of May 28, 1913, P. L. 356. The acts of assembly did not provide any method for reimbursing the county treasurers for the cost of their bonds nor for the extra clerical assistants which they were obliged to employ. In addition county treasurers have felt that because of the added responsibility imposed upon them by the acts of assembly requiring them to collect State funds they were entitled to compensation in addition to that paid by the counties for their services as county treasurers.

These facts induced a large number of county treasurers to retain the fees and commissions on collections of State funds and to withhold them from their respective county treasuries in the hope that the General Assembly would by appropriate legislation authorize them to retain for their own use the whole or a part of the retained fees and commissions; but in indulging this hope they ignored the fact that the General Assembly could not under Article III, Section 11 of the Constitution validly pass a law allowing compensation for past services. As a result of this situation many of the counties had not received moneys to which they were clearly entitled under existing laws and the county treasurers have had in their possession large amounts of fees and commissions to which they were not lawfully entitled, but a part of which, at least, they felt they were morally entitled to retain for their actual expenses in collecting State funds.

We have recited the facts leading to the 1925 legislation because an understanding of these facts will be of assistance in interpreting the provisions of Acts Nos. 343, 344 and 353.

#### A. *Act No. 353*

Act No. 353 amends Section 42 of the Act of April 15, 1834, P. L. 537. It provides that county treasurers of the several counties shall be the agents of the Commonwealth for the collection and transmission of money for the Commonwealth; that each county treasurer shall be entitled to deduct from the gross amount of moneys received by him for the use of Commonwealth commissions on a percentage basis, except that for collecting fish, hunters and dog license they shall be entitled to deduct the fees now prescribed by law, namely, ten cents (10¢) for each license; that out of the commissions deducted under the provisions of the amended section each county treasurer shall be entitled to retain for his own use as compensation for the collection and transmission of money under the Act of 1834 and any other acts of assembly

constituting county treasurers the agents of the Commonwealth for the collection and transmission of money, a sum equal to twenty per centum of the amount of such county treasurer's salary for acting as county treasurer; that in addition to his compensation for acting as the Commonwealth's agent each county treasurer shall be entitled to retain for his own use the amount of the premium or premiums on any bond or bonds which he is required to file in connection with the collection and transmission of moneys under the Act of 1834 or any other acts of assembly; that every county treasurer shall be entitled to retain for his own use any expense including the compensation of necessary employes incurred by him in the collection and transmission of money for the Commonwealth under the provisions of the Act of 1834 and the Act of April 17, 1913, P. L. 85, with a proviso that the number and compensation of such employes shall have been approved by the Auditor General of the Commonwealth; that the compensation to be retained by the county treasurer for acting as the agent of the Commonwealth as provided by this section shall be in full for all services rendered by the county treasurer to the Commonwealth in the collection and transmission of moneys for the Commonwealth under the Act of 1834 and any other acts of assembly; and that county treasurers shall be entitled to retain out of commissions received under Section 42 of the Act of 1834, as amended, "amounts heretofore actually expended for premiums on bonds required by law to be filed for the protection of the Commonwealth and any expense, including the compensation of employes, actually incurred in the collection and transmission of moneys under the provisions of this act"; and finally, that "except as hereinbefore provided all commissions heretofore or hereafter retained under the provisions of this act shall be paid into the respective county treasuries".

You ask the following questions with respect to the interpretation of this act:

1. Is the word "fees" as used in Act No. 353 in reference to fish, hunters' and dog licenses synonymous with the word "commissions" as used in said act?

2. Is the compensation of the county treasurer for acting as agent of the Commonwealth, together with the expenses referred to in the act to be paid out of the "commissions" only?

3. Can the fees of the county treasurer, as provided for by law, in the amount of 25¢ each for issuing mercantile, restaurant and amusement licenses, and \$1.00 each for issuing brokers' and billiard licenses, and the sum of 10¢ each for issuing fishermen's, hunters' and dog licenses, all of which are collected from the licensee in addition to the license fee, (and not deducted

from the moneys collected for the use of the Commonwealth) be applied to the payment of 20% of the county treasurer's salary as compensation for acting as agent of the Commonwealth,—cost of premium of bond,—expenses, including clerk hire, as provided for in Act No. 353—approved May 13, 1925?

4. Since this Act reads "County Treasurers of the several counties" will you please advise me whether this includes County Treasurers not on a salary basis, and, if so, what shall be the basis upon which to compute twenty per cent of their salaries as "full compensation" for all services rendered by them in the collection and transmission of moneys for the Commonwealth under this and any other Acts of Assembly?

5. Does the provision "except fees paid for fish, hunters and dog licenses which shall be the same as now prescribed by law, namely, 10¢ for each license" repeal that part of Section 309 of the Act of May 24, 1923, P. L. 359 which fixes an amount of 50¢ to be paid to the County Treasurer for issuing a Non-Resident Hunter's license?

6. In view of the fact that Act No. 353 authorizes the County Treasurer to retain any expenses incident to the administration of the Act of April 17, 1913, P. L. 85, the original hunters' license act, which was absolutely repealed by Section 1301, Par. 35 of the Act of May 24, 1923, P. L. 359—417, is the County Treasurer entitled to retain any expenses, including clerk hire, that may be approved by the Auditor General, in the administration of the Act, approved May 24, 1923, P. L. 359, the present Game Code?

7. Does Act No. 353, approved May 13, 1925, which authorizes the Auditor General to approve the number and compensation of the clerks in the County Treasurer's office employed in the collection and transmission of the State's moneys and directs their payment "out of the commission deducted under the provisions of this section". repeal the act approved May 28, 1913, P. L. 356, which provides for certain clerks "of the State Department in the office of the County Treasurer in any county of this Commonwealth having a population of one million or over", and fixes the salaries and compensation of such clerks, which clerks are now paid out of money collected for the use of the Commonwealth?

I. In answer to your first question we advise you that the word "fees as used in Act No. 353 of the 1925 Session is not synonymous with the word "commissions" as used in said act. As amended Section 42 of the Act of 1834 provides that:

"Each county treasurer shall be entitled to deduct from the gross amount of moneys received by him for the use of the Commonwealth on each separate

account he is required to keep and settle a 'commission at the rate specified in the act', except fees paid for fish, hunters and dog licenses, which shall be the same as now perscribed by law, namely ten cents for each license."

It is evident that the only purpose of the legislature in excepting "fees paid for fish, hunters and dog licenses" was to make it clear that Section 42 of the Act of 1834 as amended should not be construed in such a way as to permit or require county treasurers to deduct from the moneys collected for fish, hunters and dog licenses, a commission on a percentage basis. This act cannot, therefore, be interpreted as fixing the fee to be retained for collecting fish, hunters and dog licenses, but only as excepting these collections from the provisions of the act entitling county treasurers to a commission on moneys collected for the Commonwealth.

II. With respect to your second question we advise you that the compensation of county treasurers authorized by the act and the expenses which they are permitted to retain must be paid only out of "commissions" earned under the provisions of the act. The compensation and expenses authorized by the Act cannot be deducted by county treasurers out of the fees which they are entitled to retain for collecting fish, hunters and dog licenses. As far as Act No. 353 is concerned the fees retained for making these collections must be paid into the respective county treasurers without deduction of any kind.

III. With respect to your third question we advise you that the compensation payable to county treasurers under Act. No. 353 as well as the expenses for which the county treasurers are entitled to be reimbursed can be paid only out of commissions deductible on a percentage basis as specified in Section 42 of the Act of 1834 as amended. They cannot be paid out of the 25¢ fees chargeable to the licensees for issuing mercantile, restaurant and amusement licenses, the \$1.00 fees chargeable to the licensees for issuing brokers' and billiard licenses or the 10¢ fees chargeable to the licensees for issuing fish, hunters' and dog licenses. As far as Act No. 353 is concerned all of these fees collected from the respective licensees must be paid into the county treasuries. It is only from the commission deductible on a percentage basis as specified in Section 42 of the Act of 1834 as amended that the compensation and expenses authorized to be retained by the county treasurers by Act No. 353 may be paid.

IV. With respect to your fourth question we advise that it is impossible to apply Act No. 353 to county treasurers, who are not paid on a salary basis as far as concerns the payment to county treasurers of compensation at the rate of twenty per cent of their respective salaries for acting as county treasurers. County treas-

urers not paid on a salary basis may retain for their own use the cost of the bonds which they are required to furnish to the Commonwealth and their expenses actually incurred for the collection of moneys for the Commonwealth. This however, is the extent to which they are entitled to the benefits of Act No. 353.

V. With respect to your fifth question we advise you that Act No. 353 of the 1925 Session does not repeal or in any wise effect that part of Section 309 of the Act of May 24, 1923, P. L. 359 which allows county treasurers to charge a fee of fifty cents for issuing a non-resident hunter's license.

VI. With respect to your sixth question we advise you that it is impossible by interpretation to correct the Legislature's error in specifying the Act of April 17, 1913, P. L. 85 which was superseded and repealed by the Act of May 24, 1923, P. L. 359.

It is true that the Legislature probably intended to provide that county treasurers might deduct from the amounts payable by them into their respective county treasuries, expenses incurred with the approval of the Auditor General in the collection of game license fees. It did not, however, so provide, but referred specifically to the Act of April 17, 1913. The courts may correct clerical errors in legislation, which involve mistakes and manifest absurdities apparent on the face of the legislation: *Lancaster County vs. Frey*, 128 Pa. 593; *Lancaster County vs. Lancaster City*, 160 Pa. 411; *Roads vs. Dietz and Dietz*, 80 Pa. Sup. 507; but they have clearly indicated that they will not "correct" an act of assembly. See *Lancaster County vs. Frey*, 128 Pa. at p. 599, where Mr. Justice Clark said:

"In making this correction, we are not to be understood as correcting the act of the legislature. We are enabled to carry out the intention of the legislature, from the plain and obvious meaning of the context, in which the real purpose or intention of the legislature is manifest."

In the present case, the context throws no light upon what the legislature intended. While we might assume that the legislature meant to provide that expenses incurred by county treasurers in employing assistance to collect game license fees, may be retained by the county treasurers from the commissions deductible by them under the Act of 1834, such an assumption would be tantamount to a substitution of the Act of May 24, 1923 for the Act of April 17, 1913, in Act No. 353 of the 1925 Session; it would be legislation, not interpretation.

You are accordingly advised that in our opinion county treasurers may not, in making settlement with their respective counties retain out of the commissions deductible under the Act of 1834 expenses incurred in employing assistants to collect game license fees.

VII. With respect to your seventh question it is our opinion that it was not the intention of the Legislature by Act No. 353 of the 1925 Session to repeal the Act of May 28, 1913, P. L. 356 which Act provided for the compensation to be paid, out of moneys collected for the Commonwealth, to certain State clerks and employes in the offices of county treasurers in counties having population of more than one million (1,000,000) inhabitants. All that Act No. 353 provides is that as between the county treasurer and the county, the county treasurer shall be entitled to retain for his own use any expenses which he has been obliged to incur in the collection of State funds including the compensation of such employes as it has been necessary for him to hire, provided, however, that the number and compensation of such employes shall have been approved by the Auditor General of the Commonwealth. State employes appointed under the Act of 1913 will therefore continue to be paid out of State funds as at present.

VIII. Our answer to your seventh question leads to this general statement with regard to the interpretation of Act No. 353:

The Commonwealth is not affected financially by Act No. 353. Section 42 of the Act of 1834 as amended by Act No. 353 permits county treasurers to retain certain commissions for collecting certain State funds. Except for the deduction of these commissions, the amounts collected must be paid to the State Treasurer. Of the amounts deducted the county treasurers are allowed to retain compensation equal to twenty per centum of their respective salaries as county treasurers which compensation is *in full for all services rendered to the Commonwealth in the collection of funds under the Act of 1834 or any other act of assembly*. County treasurers may not, therefore, retain for their own use any fees, commissions or other compensation whatsoever in addition to the twenty per centum which they are entitled to keep under the provisions of Act No. 353. County treasurers, who because they are not paid on a salary basis, do not receive the benefits of Act No. 353, may retain for their own use any fees County treasurers under previous Acts of Assembly were authorized to retain for their own use; but as to all County treasurers who are paid on a salary basis all previous legislation authorizing the retention for their own use of any fees or commissions for collecting State funds was superseded by Act No. 353. Act No. 353 also permits all county treasurers regardless of the question whether they are paid on a salary basis to retain for their own use out of the commissions allowed by the Act of 1834, certain expenses incurred in the collection of State funds. The balance remaining after the deduction from the commissions allowed by the Act of 1834, of compensation by salaried county treasurers and expenses by all county treasurers must be paid into the county treasuries.

That is the net result of Act No. 353 and the parties financially interested in the interpretation of the act are the county treasurers and their counties.

It should be observed that this opinion has no authoritative weight with any except State officers, and that, in the ultimate analysis, county treasurers must account as to their payments into the County treasuries only to the proper county officers.

#### B. Acts Nos. 343 and 344.

We come now to a consideration of Acts Nos. 343 and 344 of the 1925 Session. The former constitutes county treasurers agents of the Commonwealth for the collection of fish licenses under the Act of May 16, 1921, P. L. 559 and provides that out of the extra ten cent fee which county treasurers are entitled to charge licensees, county treasurers may reimburse themselves for expenses incurred in the collection of fish license fees subject, however, to the proviso that the number and compensation of such employes shall have been approved by the Commissioner of Fisheries.

Act No. 344 contains similar provisions with regard to the collection of dog licenses by county treasurers, except that the number and compensation of employes engaged by county treasurers to assist in the collection of dog license fees must have the approval of the Secretary of Agriculture.

After the deduction of these expenses the balance of the extra ten cent fee collected by county treasurers must be paid into the respective county treasuries.

You asked with respect to these Acts:

1. In view of the fact that Act No. 344, approved May 13, 1925, authorizes the employment of clerks by the County Treasurer, upon the approval of the Secretary of Agriculture, to assist in the collection of the dog licenses; and in view of the fact that Act No. 343 approved May 13, 1925, authorizes the employment of clerks by the County Treasurer, upon the approval of the Commissioner of Fisheries, to assist in the collection of the Resident Fishermen's Licenses; and further, in view of the provision of Act 353, approved May 13, 1925, which authorizes the employment of clerks by the County Treasurer upon the approval of the Auditor General, to assist in the collection and transmission of the moneys of the Commonwealth under the provisions of this Act, will you please advise in whom rests the authority to approve the number and compensation of the employes in the County Treasurer's office provided for in the three Acts just referred to?

2. In view of the fact that Act No. 263 approved May 2, 1925, known as "The Fish Law of 1925" becomes

effective on the 1st day of January 1926, and by Section 292 thereof repeals absolutely the Act of May 16, 1921, P. L. 559, the present fish license law, and further in view of the fact that Act No. 263 does not specifically "constitute" the County Treasurer as the "Agent of the Commonwealth" for the collection and transmission of State moneys collected under the provisions of said Act, will you please advise whether Act No. 343, approved May 13, 1925, which authorizes the Commissioner of Fisheries to approve the number and compensation of the clerks employed by the County Treasurer in the collection and transmission of Resident Fishermen's licenses, will be effective after January 1, 1926, the date on which said Act No. 263, just referred to, goes into effect.

I. We answer your first question by advising that the Auditor General must approve the number and compensation of employes engaged to assist in the collection of the various State funds which county treasurers are authorized to collect by the Act of 1834; that the Commissioner of Fisheries must approve the number and compensation of employes engaged by county treasurers to assist in collecting fish license fees under the Act of 1921; and that the Secretary of Agriculture must approve the number and compensation of employes engaged by county treasurers to assist in the collection of dog license fees. While this arrangement is not necessary, it was doubtless adopted in view of the fact that the salaries of persons employed to assist in collecting fish license fees may be deducted from the extra fees chargeable by county treasurers for collecting fish license fees and the fact that the salaries of persons employed by county treasurers to assist in the collection of dog license fees must be paid out of the extra fees chargeable by county treasurers for collecting dog license fees. The Board of Fish Commissioners is vitally interested in the collection of fish license fees and the Department of Agriculture in the collection of dog license fees, and it is entirely appropriate that the Commissioner of Fisheries and the Secretary of Agriculture should be the officials designated to approve or disapprove the number and compensation of extra help employed to assist in collecting these fees.

II. We answer your second question by advising that in view of the fact that the Act of May 16, 1921, P. L. 559 will be absolutely repealed when Act 263 of the 1925 Session becomes effective, to wit, on January 1, 1926, the provisions of Act No. 343 will cease to have any effect on and after January 1, 1926. After January 1, 1926 the extra ten cent fee chargeable by County treasurers to fish licensees for the collection of fish license fees will have to be paid into the county treasuries without deductions of any kind.

In connection with this statement we are compelled to make the

observation that it is unfortunate that the Legislature did not in one statute cover the ground which it attempted to cover in Acts Nos. 343, 344 and 353. This Legislation as it stands is confusing and incomplete, and it is to be hoped that at the next session of the General Assembly legislation will be enacted completely covering the subject matter of these three acts in such a way as to leave no room for doubt as to the intention of the Legislature.

Very truly yours,

DEPARTMENT OF JUSTICE

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

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*Taxation—Inheritance tax—Refund—Erroneous payment of tax—Estate by entireties—Act of June 20, 1919.*

1. An application for refund of inheritance taxes, alleged to have been erroneously paid to the State, will be refused where the error alleged is one of law.
2. Where a tax on real estate has been assessed against a husband's estate and paid by his executor, and no appeal is taken as provided by the Act of June 20, 1919, P. L. 521, a refund will not be allowed on the ground that the estate in the land was an estate by entireties owned by the decedent and his wife, and surviving to her by operation of law as her absolute property.
3. The construction of the deed, which vested the estate in the decedent and his wife, was a question of law.

Department of Justice,  
Harrisburg, Pa., December 21, 1925.

Honorable Edward Martin, Auditor General, Harrisburg, Pennsylvania.

Sir: In a recent communication to this Department you set forth briefly the facts concerning an application pending in your Department for refund of Inheritance Taxes in the Estate of Harry Dixon, late of Philadelphia County, deceased, as follows:

“The application for refund is based on the grounds that a certain property located at 2848 W. Lehigh Avenue, Philadelphia, was included in the appraisalment made for Inheritance Tax purposes in said estate, whereas the title to said property at the time of decedent's death was in the name of said decedent and his wife, being held by them as tenants by the entireties. No appeal was taken from said appraisalment. The property being held by the husband and wife by entireties, upon his death, the husband left no interest in this property to transmit, either under the Intestate Laws or by Will.”

You inquire whether this case comes within the provisions of Section 40 of the Act of June 20, 1919, P. L. 521, authorizing a refund of Transfer Inheritance Tax "erroneously paid into the Treasury."

I have examined the Petition to the State Treasury in this case, together with the other proofs and affidavits offered, and on file in your Department. From said Petition and Proofs, I have the following additional facts: That the decedent, Harry Dixon, died November 23, 1924, leaving a will which was admitted to probate December 3, 1924; that Letters Testamentary were granted to Carrie Coates Dixon, the petitioner; and that on February 24, 1925 an appraisement of said Estate for Transfer Inheritance Tax purposes, in accordance with the provisions of the Act of June 20, 1919, P. L. 521, was duly made and filed. A tax was imposed in the sum of \$104.28 upon a clear value of the estate subject to such tax in the amount of \$5,214.25. This tax was paid on May 7, 1925. No appeal was taken from said appraisement.

Included in the appraisement just referred to there appears the following item: REAL ESTATE. 1—three story brick house and store, No. 2848 W. Lehigh Avenue, lot 16 x 67, \$25,000 less mortgages \$16,000, making \$9,000.

In paragraph five of said Petition it is stated as follows: "The title to premises No. 2848 W. Lehigh Avenue, Philadelphia, was held in the name of said Harry Dixon and your Petitioner, his wife, being by survivorship or as tenants by the entireties, said deed being recorded in the office for the recording of deeds in and for the county of Philadelphia, in Deed Book J. M. H. No. 1886, page 364, etc. It is contended, therefore, by the Petitioner that said property "was not the property of said decedent, and *became at his death by operation of law*, the absolute property of your petitioner as his surviving wife." The Petitioner further avers that "by an oversight, the said real estate was appraised as the property of said decedent, and tax at the rate of two per centum was paid thereon", and accordingly asks that the total amount of tax paid, to wit, \$104.28 be refunded, adding further that "the debts and expenses exceeded the appraised valuation of the personal estate, and no tax should have been paid in said estate."

I am advised that the Petition in question, which was filed August 22, 1925, was transmitted to you as Auditor General by the State Treasurer for consideration and settlement in the first instance.

Section 40 of the Act of June 20, 1919, P. L. 521, to which your inquiry is directed, provides in part as follows:

"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, etc.  
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It is under this particular provision of the Act of 1919 that the application is made in this case, on the ground that the Transfer Inheritance Tax was “erroneously paid in the Treasury”.

Section 13 of said Act of 1919 provides as follows:

“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.”

Notwithstanding the fact that under said Section 13 anyone not satisfied with the appraisement in question, or any part thereof, could have appealed within thirty days, to the Orphans’ Court, and the court could have determined the question of the liability of the appraised estate for such tax, particularly the tax on the property in question, it appears that no Appeal was taken from the appraisement, and that the executrix of the estate paid the tax without question.

The petitioner contends that she should not have paid the tax in question because by operation of law said real estate was not the property of the decedent at his death. If the petitioner made a mistake and paid the tax on the property in question, her mistake was on a question of law. Petitioner’s contention that the certain real estate in question was not the property of the decedent at the time of his death goes to the construction of the deed of said property. The construction of a deed in which there is no ambiguity is a question of law. *Cox vs. Freedly*, 33 Pa. 124; *Vincent vs. Lessee of Huff*, 8 S. & R. 381.

In an opinion by Attorney General Kirkpatrick to the Auditor General May 2, 1887 construing the word “erroneously” as found in the Act of June 12, 1878, P. L. 206 which 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” it was expressly held that where such error is one of law it is not within the provisions of said Act of 1878.

Likewise in an opinion by John Robert Jones, Deputy Attorney

General, to the State Treasurer on July 28, 1924 construing the meaning of the very term "erroneously" in the same section and Act in question here it was expressly held, among other things, that all questions of 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.

You are, therefore, advised that the State Treasurer is without authority under Section 40 of the Act of June 20, 1919, P. L. 521, to make a refund of the Transfer Inheritance Tax paid into the treasury, in this case. She should have appealed from said appraisement within thirty days to the Orphans' Court as provided in said Section 13 of the Act of 1919. Her only remedy now is an appeal to the State Legislature. A copy of this opinion will also be transmitted to the State Treasurer.

Yours very truly,

DEPARTMENT OF JUSTICE.

PHILIP S. MOYER,  
*Deputy Attorney General.*

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*Judges—Retirement—Term of service—Act of June 12, 1919.*

Under the Act of June 12, 1919, P. L. 461 which provides for the retirement on half salary of judges "who shall have served in judicial office for twenty years or more immediately prior to the date" of resignation or retirement, it is not necessary that the prescribed twenty years' service shall have been continuous immediately prior to retirement.

Department of Justice,  
Harrisburg, Pa., January 25, 1926.

Honorable Edward Martin, Auditor General, Harrisburg, Pa.

Sir: This Department has your request for an opinion as to whether or not the term of service required of a Judge to entitle him to the provisions of Section 2 of the Judges' Retirement Act of June 12, 1919, P. L. 461, must be twenty years continuous service immediately prior to retirement.

The inquiry is prompted by the following facts: In his petition for the benefits of this Retirement Act, at the expiration of his term of service and not because of disability, a Judge of the Court of Common Pleas states that he has served in that capacity for more than twenty years, only ten years of which service was continuous and immediately prior to retirement. The balance was served prior thereto with an intermission of a number of years during which he did not hold a commission.

Section 2 of the said Act of 1919, provides, inter alia as follows:

“Any Judge of the \* \* \* Common Pleas \* \* \* Court who shall have served in judicial office for twenty (20) years or more *immediately prior to the date of* his resignation or retirement may resign or retire.”

and under certain conditions be entitled to one-half salary as specified.

This Act was preceded by the Act of May 11, 1901, P. L. 165, as amended by Act of June 23, 1911, P. L. 1121, and as further amended by Act of June 5, 1917, P. L. 333, all of which deal with the same subject matter and all of which have been repealed by the Act of 1919.

The Act of 1901, which established the Judicial Retirement System, was limited to retirement for disability, and, therefore, required no particular term of prior service as a condition for retirement under the Act.

By the Act of 1911, the Retirement System was extended so as to provide: (1) that Judges who had so retired for disability and had served a certain length of time prior to resignation could receive additional compensation; and (2) that its provisions be extended to certain Judges who retire for other reasons than because of disability.

With reference to No. 1, the wording is (a) any Common Pleas or Orphans' Court Judge so resigning who shall have “*served continuously* in judicial office for twenty-five (25) years or more *immediately prior to the date of resignation*” and shall have reached a certain age; (b) any Supreme and Superior Court Judge so resigning who shall have served *continuously* in judicial office for twenty years or more *immediately prior to the date of resignation*.

With reference to No. 2, the wording of the statute is “any Judge of the Supreme or Superior Court who shall have served *continuously* in judicial office for twenty (20) years or more and any Judge of the Common Pleas or Orphans' Court \* \* \* who shall have reached the age of seventy (70) years, and who shall have served *continuously* in judicial office for twenty-five (25) years or more, etc.”

The aforesaid Act of 1917, which amends the said Act of 1901, as amended in 1911, with reference to that portion designated under (1-a) above, continued the provision requiring *continuous* service *immediately prior to resignation*; with reference to the portion designated under (1-b) above, it eliminated both the word “continuously” and the words “immediately prior” so that all it required was twenty years or more of service in judicial office at the date of resignation.

With reference to the portion considered under (2) above, this Act of 1917, eliminated the word “continuously” with reference to the service of Supreme or Superior Court Judges and left the provision with respect to the Judges of Common Pleas or Orphans' Court

as it was, except that the number of years service required was reduced from twenty-five to twenty.

It thus appears immediately preceding the approval of the Act of 1919 that the statutory requirements, so far as continuity of service and its time with reference to the date of retirement are concerned, were as follows:

Common Pleas or Orphans' Court Judges who resign because of disability and who desire to take advantage of the provision for one-half of salary for the remainder of life shall have served continuously for twenty years immediately prior to the date of resignation; Supreme or Superior Court Judges so resigning, who desire to take advantage of the provision for one-half pay during the remainder of life, shall have served twenty years or more without any requirement that such service shall have been continuous or that it shall have been immediately prior to resignation.

As to Judges who wish to retire for other reasons than for disability and to take advantage of the Retirement Act, such requirements of the statute were as follows:

Any Judge of the Supreme or Superior Court shall have served in judicial office for twenty years without provision that such service shall have been continuous or immediately prior to retirement; any Judge of the Common Pleas or Orphans' Court must have served continuously for twenty years without provision that such service shall have been immediately prior to retirement.

By reference to Section 2 of the Act of 1919, *supra*, it will appear that in that section the term "continuous" was omitted and that the requirement is a service of twenty years immediately prior to the date of resignation or retirement.

It thus appears that the requirement that such service should be continuous was intentionally eliminated and that the words "immediately prior" to resignation or retirement do not mean that the entire twenty years shall have been immediately prior.

It is also to be noticed that in Section 3 of the Act of 1919, neither the word "continuous" nor the words "immediately prior" are used. This section provides that those Judges who had theretofore retired by expiration of term or resignation or otherwise and who had served in judicial office for twenty years or more should be entitled to the benefits of the Act.

You are, therefore, advised that it is not necessary that the prescribed twenty years service shall have been continuous in order that a Judge of the Supreme or Superior Court or of the Common

Pleas or Orphans' Court shall be entitled to the benefits of the Judges' Retirement Act of 1919.

Yours very truly,  
DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

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*Taxation—Mutual insurance companies—Gross premiums—Exemption for portion of year 1925 Act of May 5, 1925.*

A domestic insurance company doing a life insurance business upon the mutual plan without any capital stock is relieved by the Act of May 6, 1925, P. L. 526, from the payment of a tax on its gross premiums and assessments from Jan. 1, 1925, to May 6, 1925.

Department of Justice,  
Harrisburg, Pa., February 25, 1926.

Honorable Edward Martin, Auditor General, Harrisburg, Pa.

Sir: You have advised this Department that an Appeal has been filed with you from the settlement of an account for tax on gross premiums against the Provident Mutual Life Insurance Company of Philadelphia for the four and one-fifth months ending May 6, 1925.

The Provident Mutual Life Insurance Company of Philadelphia is a corporation of the State of Pennsylvania doing a life insurance business upon the mutual plan, without any capital stock, but having an accumulated reserve. Prior to January 1, 1925 this company filed its report in your office semi-annually, setting forth the entire amount of premiums received by it during the preceding six months' period and paid to the Commonwealth of Pennsylvania a tax of eight mills on the dollar upon the gross amount of said premiums, in accordance with the provisions of Section 24 of the Act of June 1, 1889, P. L. 420, as amended by the Act of June 28, 1895, P. L. 408. The report now in question was filed, under protest, after the passage of the Act of May 6, 1925, P. L. 526, in compliance with a demand from you under date of August 4, 1925. The company claimed in said report and in its petition for resettlement, as well as in its Appeal, that it is not liable for any tax on gross premiums for the period from January 1, 1925 to May 6, 1925 on the ground that it is relieved therefrom by said Act of May 6, 1925. The question in this Appeal, therefore, is, is the Provident Mutual Life Insurance Company of Philadelphia relieved from the payment of a tax on its gross premiums and assessments from January 1, 1925 to May 6, 1925 by the provisions of said Act of May 6, 1925?

Said Act of May 6, 1925, which amends Section 24 of the Act of June 1, 1889, P. L. 420, as amended by the Act of June 28, 1895, P. L. 408, provides in part as follows:

"It shall be the duty of the president, secretary or other proper officer of each and every insurance company, association, or exchange, incorporated by or under any law of this Commonwealth, except companies doing business upon the mutual plan without any capital stock, and purely mutual beneficial associations whose funds for the benefit of members, their families or heirs, are made up entirely of the weekly or monthly contributions of their members and the accumulated interest thereon, to make report in writing to the Auditor General, on or before the first day of March in the year one thousand nine hundred and twenty-six in each year thereafter, setting forth the entire amount of premiums, premium deposits, or assessments received by such company, association, or exchange during the year ending with the thirty-first day of December preceding, whether the said premiums, premium deposits, or assessments were received in money or in the form of notes, credits, or any other substitutes for money, and whether the same were collected in this Commonwealth or elsewhere; and every such company, association, or exchange shall pay into the State Treasury on or before the thirty-first day of March following the date for filing such report, in addition to any other taxes to which it may be liable under the first and twenty-first sections of this act, a tax of eight mills on the dollar upon the gross amount of said premiums, premium deposits, and assessments received from business transacted within this Commonwealth. \* \* \*

The Repealing Section of said Act of May 6, 1925 is as follows:

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

This Act of May 6, 1925, made several changes in the law from what it was prior to its passage, under said Act of June 28, 1895, P. L. 408. Among other things, it provided that the Act should not apply to domestic insurance companies, associations or exchanges "doing business upon the mutual plan without any capital stock," whereas the same provision in question, prior to the amendment, read: "doing business upon the *purely* mutual plan without any capital stock or *accumulated reserve*."

It also made a change in the time for making reports so that instead of requiring reports to the Auditor General semi-annually upon the first days of July and January of each year, setting forth the entire amount of premiums and assessments received from such company or association during the preceding six months, there is but one report now required to the Auditor General, to wit, "on or before the first

day of March in the year one thousand nine hundred and twenty-six in each year thereafter, setting forth the entire amount of premiums, premium deposits, or assessments received from such company, association or exchange during the year ending with the thirty-first day of December preceding." The time for making the payment of the tax is also changed. It made other changes allowing certain deductions from premiums and assessments which have no immediate bearing on the question at issue.

The company in question is a life insurance company upon the mutual plan without any capital stock. The reason that said company paid the gross premiums tax in previous years was because of the fact that it had an "accumulated reserve". Inasmuch as that part of said Act of June 28, 1895 which refers to "accumulated reserve" has been omitted by amendment, as previously referred to, this company accordingly comes within the exception provided in said Act of May 6, 1925; but the question at issue arises, whether the company is relieved from the payment of the gross premiums tax from January 1, 1925 to May 6, 1925, the date of the approval of said Act.

The Repealing section, as previously quoted, is without a saving clause. Justice Elkin, writing the opinion of the court in the case of *Commonwealth vs. Mortgage Trust Company of Pennsylvania*, 227 Pa. 163, 182, said:

"No doubt the general rule is that when a statute is repealed without a saving clause, it is to be considered as though it had never existed except as to transactions past and closed. The rule, however, like any other legal principle of general application must be understood and applied, if at all, so as to give effect to the legislative intention. It is not so much what the general rule of construction is as what did the legislature intend by repealing all acts or parts of acts inconsistent with the new law. \* \* \*"

Statutes purporting to grant exemptions from taxation are to be construed most strictly against the taxpayer. *Commonwealth vs. Westinghouse Airbrake Co.*, 151 Pa. 276; *Commonwealth vs. Dillworth, Porter & Company, Ltd.*, 242 Pa. 194; *Commonwealth vs. Lack. I & C. Company*, 129 Pa. 346.

For these reasons it is very important that we determine the Legislative intention in this Act as to the question at issue. Did the Legislature intend that companies such as the *Provident Mutual Life Insurance Company of Philadelphia* who paid a gross premiums tax under the law as it stood prior to said Act of May 6, 1925, but who were relieved by this Act from paying such tax, should be relieved from paying such tax for the period from January 1, 1925 to the date of the approval of the Act, to wit, May 6, 1925? In the latter part

of Section 1 of said Act of May 6, 1925, we find that the Legislature has inserted the following provision as a further amendment of said Section 24 of the Act of June 1, 1889, P. L. 420, as amended by the Act of June 28, 1895, P. L. 408:

“Insurance companies, associations, or exchanges incorporated by or under any law of this Commonwealth shall, in making payment of tax hereunder on or before the thirty-first day of March, one thousand nine hundred and twenty-six, upon premiums, premium deposits, and assessments received in the year ending on the thirty-first day of December preceding, be entitled to credit for the amount theretofore paid by them into the State treasury or settled against them by the fiscal officers of the Commonwealth as tax on premiums and assessments received by them during any part of said year.”

This provision allowing certain credits obviously applies to the tax on those premiums and assessments upon which a deduction has been expressly allowed or an exemption created by this Act. To say that it can only apply to those deductions expressly referred to and not to the exemption created by this Act in the case of insurance companies and associations doing business upon the mutual plan without any capital stock, which companies and associations were previously taxable because they had an “accumulated reserve” but were no longer so taxable under the provisions of this Act, is to give to it a restricted meaning which the words themselves do not purport. Why did the Legislature provide that these insurance companies and associations should be entitled to certain credits on such tax paid by them or settled against them by the fiscal officers *during any part of the year ending December 31, 1925?* The domestic insurance companies and associations who were required under the law as it stood prior to this Act of May 6, 1925 to make a report to the Auditor General, were required to do so semi-annually upon the first days of July and January of each year. Certainly it was not known just when the Act in question would be approved. The next report of these insurance companies and associations to the Auditor General was due July 1, 1925. The proposed Act now the Act of May 6, 1925 here in question, changed the time of making these reports from semi-annually to annually on or before the first day of March, 1926 in each year thereafter. To save any confusion which might arise and to grant to these companies and associations the benefit of the deductions and exemption referred to during the year 1925, the Legislature expressly provided that such companies should “be entitled to credit for the amount theretofore paid by them into the State Treasury or settled against them by the fiscal officers of the Commonwealth as tax on premiums and assessments received by them *during any part of said year*”, the year ending December 31, 1925. Accordingly, it

appearing from the plain intent and meaning of this provision as to credits, that domestic insurance companies, associations and exchanges are to be entitled to credit, in the matter of the deductions and exemption referred to in said Act, for the amount theretofore paid by them into the State Treasury or settled against them by the fiscal officers for any part of the year 1925, and it further appearing that said Act of May 6, 1925 repeals the prior Act of Assembly on gross premiums tax without a saving clause, and that said Provident Mutual Life Insurance Company of Philadelphia comes within the exception provided in this Act because of being a domestic insurance company doing a life insurance business upon the mutual plan without any capital stock, it follows that this company was relieved from the payment of tax on its gross premiums and assessments from January 1, 1925 to May 6, 1925, the date of the approval of said Act of May 6, 1925, P. L. 526.

I am, therefore, of the opinion, and so advise you, that the settlement for the gross premiums tax in question for the period from January 1, 1925 to May 6, 1925, was erroneously made, and that it should be resettled and stricken off.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,  
*Deputy Attorney General.*

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*Tax liens—Power of Auditor General—Acts of March 30, 1811, and June 15, 1911.*

There is nothing in the Acts of March 30, 1811, 5 Sm. Laws, 228, and June 15, 1911, P. L. 955, relating to the powers and duties of the Auditor General or any other statute granting him power to release portions of the land of a taxpayer from the lien of taxes duly settled, even though the taxpayer may have very large holdings amply sufficient to protect the State.

Department of Justice.

Harrisburg, Pa., August 30, 1926.

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

Sir: You have advised this department that on various occasions requests have been made of the Auditor General to release portions of land from the lien of taxes duly settled in your department, in cases where the taxpayer had other large holdings amply sufficient to protect the State. You ask for an opinion as to the right of the Auditor General to release lands of a taxpayer from a lien of taxes under such circumstances.

In determining this question, it is necessary to look to the powers and duties of the Auditor General under the Constitution and the Statutory Laws of this Commonwealth. The Supreme Court said in

*Commonwealth ex rel. Bell vs. Powell*, 249 Pa. 144, 158, in relation to both the Auditor General and State Treasurer: "That while these officers are named in the Constitution, yet their duties are not therein defined. That was left to the Legislature. That body did define the duties of these officers, prior to the present Constitution, in the Act of March 30, 1811, 5 Sm. L. 228, and it is suggested that in adopting the present Constitution the continuance of those duties was contemplated. It must be admitted, however, that, as the Legislature originally prescribed those duties, it has power to alter them; and an act making such alteration cannot for that reason be held to be unconstitutional." As stated by the Supreme Court in *Commonwealth ex rel. vs. Lewis*, 282 Pa. 306, the general language in the first sentence above quoted must be limited to classes of cases not within the purview of Article III, Section 12 of the Constitution, where express duties are imposed upon both these officers so far as concern certain contracts, which particular matters have no application here. Consequently, if there is power within the Auditor General to release portions of land from the lien of taxes duly settled in his department, it must be derived from the statutes of the Commonwealth. If the Statutes do not confer the power, it does not exist.

The Act of March 30, 1811, 5 Sm. L. 228, relates to the powers and duties of the Auditor General and State Treasurer in the settlement of public accounts and the payment of public moneys. In Section 12 thereof, it is provided that the amount or balance of every account settled according to the provisions of this Act, due to the Commonwealth "shall be deemed and adjudged to be a lien from the date of the settlement of such account on *all* of the real estate of the person or persons indebted, and on his or their securities throughout this Commonwealth."

Section 1 of the Act of June 15, 1911, P. L. 955 provides, *inter alia*, that "All State taxes imposed under the authority of any law of this Commonwealth now existing or that may hereafter be enacted, and unpaid bonus, interest, penalties, and all public accounts settled against any corporation, company, association, joint-stock association, or limited partnership, shall be a first lien upon the franchises and property, both real and personal, of such corporation, company, association, joint-stock association, or limited partnership, from the date when they are settled by the Auditor General and approved by the State Treasurer \* \* \*." The lien thus provided to the Commonwealth is clearly upon *all* the property, both real and personal, of the corporation, company, association, joint-stock association, or limited partnership against which the accounts are settled. I find nothing in these Statutes or in any Statutes of the Commonwealth granting power to the Auditor General or State Treasurer to release portions of land from the lien of taxes duly settled in your department. You

are accordingly advised that the Auditor General is without power to release portions of land from the lien of taxes duly settled in your department, even though the taxpayer may have, as you have stated, very large holdings amply sufficient to protect the State.

Yours very truly,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,  
*Deputy Attorney General.*

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*State Funds—Appropriations to Institutions—Depositories—Board of Finance and Revenue—Commissions—State Treasurer—Interest. Acts of 1915 (P. L. 726). 1923 (P. L. 498).*

State funds advanced out of appropriations to State institutions must be deposited in banks selected by the Board of Finance and Revenue and such depositories must pay interest of not less than two per cent on active balances and not less than three per cent on non-active accounts. This interest is to be paid into the State Treasury instead of being added to the respective accounts. Funds of which the State treasurer is made the custodian to be administered by boards or commissions, unless specifically required by the statute, need not be deposited in a State depository and the interest accruing on such funds is credited to the respective funds instead of being paid into the State treasury.

Department of Justice,  
Harrisburg, Pa., September 9, 1926.

Honorable J. Lord Rigby, Revenue Deputy, Department of the  
Auditor General, Harrisburg, Pennsylvania.

Dear Mr. Rigby: We have your request to be advised whether the moneys in the hands of State institutions must be deposited in State depositories selected by the Board of Finance and Revenue and whether the daily balances in bank of such institutions are subject to the payment by the depository banks of interest at the same rates which State depositories are obliged to pay on moneys deposited therein by the State Treasurer.

In answering your inquiry we shall discuss separately the situation respecting moneys advanced to State institutions under the Act of June 2, 1915, P. L. 726 and the situation respecting any other moneys which may be in the hands of such institutions.

The Act of June 2, 1915, P. L. 726 permits the Auditor General under certain circumstances to draw his warrant upon the State Treasurer to advance to departments, boards and commissions of the State government such part of their respective appropriations as in the discretion of the Auditor General shall appear necessary to enable

such departments, boards, or commissions to meet expenses of such a nature as render it impractical for the respective departments, boards or commissions to file with the Auditor General itemized receipts or vouchers prior to the payment by the Commonwealth's accounting officers of such expenses.

After authorizing advances to be made the Act provides that all balances in the hands of any such department, board or commission to which advances have been made shall be returned to the State Treasurer at the end of the appropriation period before any advance may be made out of any succeeding appropriation for the same purpose, and further that:

“\* \* \* the funds so advanced shall be deposited in the name of the Commonwealth of Pennsylvania, by the officer or institution to whom or which said advancement is made, in a depository approved by the Board of Revenue Commissioners, and the name of such bank or depository certified to the State Treasurer.”

By the Administrative Code of 1923 (Act of June 7, 1923, P. L. 498) the Board of Revenue Commissioners was consolidated with several other boards into the Board of Finance and Revenue and the duty of selecting State depositories was imposed upon this new Board.

Under the provisions of Section 1102 (c) 3 of the Code all banks, banking institutions or trust companies selected by the Board of Finance and Revenue as State depositories must agree prior to their selection to pay interest upon all State deposits at the rate of not less than two per centum per annum upon active deposits and not less than three per centum per annum upon non-active deposits; and by Section 1102 (d) the same provision is rendered applicable to private banking institutions which the Board of Finance and Revenue selects as State depositories.

If, therefore, any department, board, or commission of the Commonwealth has received out of the State Treasury an advance against its appropriation this advance when deposited in a State depository as required by the Act of 1915 automatically becomes subject to the agreement between such State depository and the Board of Finance and Revenue that the depository will pay interest at the rate of not less than two per centum per annum on active accounts and of not less than three per centum per annum on non-active accounts.

The remaining question is whether the interest which State depositories are required to pay in such cases must be paid into the State Treasury or may be consumed by the department, board or commission to which the advance has been made.

It is our opinion that all interest paid by State depositories on advances must be paid into the State Treasury. The Act of June 2, 1915 contemplated merely a method for accommodating the necessities and convenience of departments, boards and commissions by permit-

ting them to receive parts of their respective appropriations in certain cases before accounting to the fiscal officers of the Commonwealth for the use made of the money. It was not contemplated by the Act that the amounts of the appropriations to the respective departments, boards and commissions should be increased through its operation. If, however, departments, boards or commissions receiving advances were permitted to expend the interest received from State depositories on deposits of such advances, they would be spending amounts in excess of their respective appropriations, and to a corresponding degree the general fund of the State Treasury would be receiving less interest on State deposits than if the advances had not been made.

Accordingly you are advised that all advances to departments, boards and commissions against their appropriations must be placed in State depositories under the same terms and conditions applicable to deposits of State moneys made by the State Treasurer and that all interest payable by State depositories on such deposits must be paid into the State Treasury.

With reference to any moneys in the possession of departments, boards or commissions which have not been advanced to them out of their appropriations there is no general act applicable to all departments, boards or commissions specifying where and how such moneys shall be deposited. In certain cases in which the State Treasurer is made the custodian of funds administered by boards or commissions the statutes specifically provide where and how the money is to be deposited, but if there is no act specifically dealing with the subject the department, board or commission having the money in its possession is not required to deposit the money in a State depository nor do the provisions governing the payment of interest by State depositories apply. In these cases the departments, boards or commissions having the moneys in their custody are responsible for the same to the same extent to which any person having the custody of moneys belonging to another person is responsible. Good business and self-interest would seem to dictate to any departments, boards or commissions that in depositing any moneys in their possession they employ methods at least as careful as those which the law requires the State Treasurer to employ in depositing moneys belonging to the State Treasury. They ought to require a bond and they ought to insist upon the payments of interest at rates not less than those payable on regular State deposits. Such interest does not, however, have to be paid into the State Treasury but may be added to the funds on deposit.

Very truly yours,  
DEPARTMENT OF JUSTICE,  
WM. A. SCHNADER,  
*Special Deputy Attorney General.*

*Taxation—Settlement of anthracite coal tax—10 per centum penalty—Act of May 11, 1921.*

Under paragraph 3, section 2, of the Act of May 11, 1921, P. L. 479, the 10 per centum penalty may be added in the tax settlement if a corporation, partnership or individual engaged in preparing anthracite coal for the market does not file the Anthracite Coal Tax Report on or before January 31st following the year for which the report is made and no estimated settlement has been made prior to the filing of the report.

Department of Justice,  
Harrisburg, Pa., September 17, 1926.

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

Sir: You have inquired of this department whether under Paragraph 3 of Section 2 of the Act of May 11, 1921, P. L. 479, the ten per centum penalty may be added in the tax settlement, if a corporation, partnership or individual engaged in preparing anthracite coal for market, does not file the Anthracite Coal Tax Report on or before January 31, following the year for which the report is made, and no estimated settlement has been made prior to the filing of the report.

You direct our attention to the following part of paragraph 3, Section 2 of said Act of May 11, 1921:

"If any individual, superintendent, or other officer of any firm, corporation, limited partnership, or joint stock association, or any other owner, partner, or lessee of any mine, mines, washery, or screening operation, shall neglect or refuse to furnish the Auditor General, on or before the fifteenth day of January of each and every year, with the assessment and report as aforesaid, as required by law, or cause the same to be done, or make or cause to be made any false report, it shall be the duty of the accounting officers of the Commonwealth to add ten per centum to said tax for each and every year for which assessment and report were not so furnished, which percentage shall be settled and collected with the said tax in the usual manner of settling accounts and collecting such taxes."

In the determination of the question raised, we find it necessary not only to consider the part of Section 2 of said Act of 1921, just quoted, but to consider the various other provisions of said Act concerning the report required to be made to the Auditor General for taxation purposes under the Act.

In the first paragraph of said Section 2 of said Act of 1921, it is made the duty of the individual, superintendent, or other officer in charge of any anthracite coal mine or mines, washery or screening operation to "*annually, on or before the first day of February for the calendar year next preceding,*" report in writing to the Auditor Gen-

eral the number of gross tons made taxable under the Act, and the assessed value thereof during the calendar year covered by the report, and the amount of tax assessed thereon.

In the second paragraph of said Section 2 it is provided:

“In the event of the failure, neglect, or refusal of the individual, superintendent, or other officer in charge of any mine, mines, washery, or screening operation to make the report and valuation to the Auditor General as hereinbefore provided, on or before the first day of February in each and every year, it shall be the duty of the Auditor General to estimate an assessment and valuation of the coal prepared for market by any person, firm, corporation, owner, or operator, as aforesaid, and settle an account for taxes, penalty, and interest thereon, from which settlement there shall be no right of appeal.”

At the beginning of the third paragraph of said Section, it is provided that every person, firm or corporation, from which a report is required by the Act, shall pay the amount of tax imposed, within sixty days from date of settlement, “plus a penalty of ten per centum for every failure to assess said tax and *to make report as required by this Act.*” Following this, in the same paragraph, we find the provision referred to by you, and previously quoted herein, where it is provided that if any individual or officer of any corporation, firm, owner or lessee of any mine, mines, washery, or screening operation, “shall neglect or refuse to furnish on or before the fifteenth day of January of each and every year, with the assessment and report as aforesaid, *as required by law*, \*\*\* it shall be the duty of the accounting officers of the Commonwealth to add ten per centum to said tax for each and every year for which assessment and report *were not so furnished.*”

Because of the fact that this latter provision refers to a neglect or refusal to furnish a report to the Auditor General “on or before the fifteenth day of January of each and every year”, and thereby appears to be in conflict with previous provisions which refer to the time of annually filing reports as “on or before the first day of February for the calendar year next preceeding”, it is necessary to harmonize this provision with the other passages of the Act to get the true intent and meaning. It is clear that the Legislature intended to impose a penalty on those individuals, firms and corporations engaged in preparing anthracite coal for market, who refuse or neglect to assess the tax and to file returns as required; and it was made the duty of the accounting officers of the Commonwealth to impose the penalty where the reports were not filed at the time required, unless the time of filing was extended as provided.

In the first paragraph of said Section 2 of the Act of May 11, 1921

the duty is imposed upon individuals, superintendents or other officers in charge of mines or other operations preparing anthracite coal for market, to annually report to the Auditor General, "on or before the first day of February for the calendar year next preceeding", the gross tons of coal taxable. In the second paragraph of said section the same time is also referred to for making the report, as indicated by the provision from this paragraph previously quoted herein. It is to be further noted that in the part of said paragraph 3 to which you direct our attention, although it refers to the duty of imposing the penalty in event there shall be a neglect or refusal to file the report "on or before the fifteenth day of January of each and every year", we nevertheless find this expression immediately followed by the expression: "as required by law". Consequently, we are of the opinion that the true purpose and intent of the Legislature in this provision imposing a penalty was to refer to the time previously designated and definitely fixed for the filing of the reports to wit, "on or before the first day of February". Therefore, if the person, officer or firm designated in the Act shall neglect or refuse to furnish the Auditor General on or before the first day of February with said report, as required by the Act, it is made the duty of the accounting officers of the Commonwealth to add ten per centum to the Anthracite Coal Tax for each and every year for which assessment and report "were not so furnished."

Penalties are prescribed in many of our Statutes for delinquencies in filing tax reports and in the payment of taxes. These penalties are part of the machinery by which the Government is enabled to compel payment of its taxes. The power to impose the penalty attaches as a necessary incident of the right to collect taxes. The amount of such penalty to be imposed is in the discretion of the Legislature. *Western Union Telegraph Company vs. State of Indiana*, 165 U. S. 304; 41 L. Ed. 725. In the case of *Commonwealth vs. Coal and Iron Company*, 145 Pa. 283, where an account has been settled by the accounting officers of the Commonwealth against a corporation for taxes on corporate indebtedness, the Supreme Court said in construing the expression in Section 4 of the Act of June 30, 1885, P. L. 194, viz., "And for every failure to assess and pay said tax, and make report as aforesaid, the Auditor General shall add ten per centum as a penalty, to the amount of the tax", as follows:

"This penalty, it is plain, is meant to enforce the performance of the duties which the statute casts upon the corporation treasurer in reference to the tax. It has no relevancy to questions that may arise between the corporation and the state officers, in the settlement of the amount and items of its accounts, or to any delay that may be incident to the proceedings according to law, by appeal or otherwise."

The Supreme Court in the first argument of this case (137 Pa. 481) entered judgment for the penalty, notwithstanding the failure of the officers of the Commonwealth to claim it and the Court below to pass upon it; and in its opinion on the reargument sustained its action in so doing.

You are, therefore, advised that if any individual, superintendent, or other officer of any firm, corporation, limited partnership, or joint stock association, or any other owner, partner, or leasee of any mine, mines, washery, or screening operation, engaged in preparing anthracite coal for market, shall neglect or refuse to furnish the Auditor General annually on or before the first day of February for the calendar year next preceding, or cause the same to be done, a report in writing, stating specifically the number of gross tons of anthracite coal made taxable under the Act of May 11, 1921, P. L. 479 and the assessed value thereof as required by said Act, it shall be the duty of the accounting officers of the Commonwealth to add ten per centum to the anthracite coal tax for each and every year for which assessment and report were not so furnished, i. e., on or before the first day of February for the calendar year next preceding, even though no estimated settlement had been made prior to the filing of any report.

Yours very truly,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,

*Deputy Attorney General.*

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*Taxation—Writs—Sci. fa. to revive—Liens on premiums due to State Workmen's Insurance Fund—Acts of April 6, 1830, and June 2, 1915.*

1. Neither the writ to revive a judgment nor the judgment entered thereon are subject to the State tax provided by the Act of April 6, 1830, P. L. 272.

2. The lien filed in the prothonotary's office for a premium due the State Workmen's Insurance Fund by a subscriber under the Acts of June 2, 1915, P. L. 762, and June 15, 1911, P. L. 955, is not taxable under the Act of April 6, 1830, P. L. 272.

Department of Justice,  
Harrisburg, Pa., December 30, 1926.

Honorable Edward Martin, Auditor General, Harrisburg, Pa.

Sir: This Department is in receipt of your request for an opinion as to whether or not the State tax on writs provided for in Section 3 of the Act of April 6, 1830, P. L. 272, is due.

1. In case of revival of a judgment on a scire facias, either amicable or adverse:

2. Upon the filing in the Prothonotary's office of liens for unpaid

premiums due the State Workmen's Insurance Fund by its subscribers, under the provisions of Section 18 of the Act of June 2, 1915, P. L. 762-766.

Section 3 of the said Act of 1830 provides

"That the prothonotary of the Courts of Common Pleas \* \* \* shall demand and receive on every original writ issued out of said Courts (except the writ of Habeas Corpus), and on the entry of every amicable action, the sum of fifty cents; on every writ of certiorari issued to remove the proceedings of a justice or justices of the peace or aldermen, the sum of fifty cents; on every entry of a judgment by confession or otherwise, where suit has not been previously commenced, the sum of fifty cents; and on every transcript of a judgment of a justice of the peace or alderman, the sum of twenty-five cents."

1. Tax on revival of a judgment upon a writ of scire facias.

Deputy Attorney General Hargest in an opinion to the Auditor General dated June 27, 1916 reported in 45 Pa. County Court Reports 108, held that a scire facias to revive a judgment is not an original writ within the meaning of the above quoted Section of the Act of 1830 and is not taxable.

That opinion is supported by citations of authorities from other jurisdictions to which may be added our own cases of *Edward's Appeal*, 66 Pa. 89, 90, in which it is held that the writ of scire facias to revive a judgment is not original process requiring a revenue stamp, and of *Henry v. Heilman*, 114 Pa. 496, 498 where it is held that such writ is not an original action.

The opinion of Judge Hargest has never been overruled or set aside and we are in complete accord with its conclusions and we understand that it has been followed throughout the Commonwealth.

The question, however, has arisen as to whether or not this tax is due on the entry of judgment on an amicable scire facias to revive and continue the lien of a judgment. This question, while not specifically covered by Judge Hargest's opinion, seems to be governed by it and, it appears, the general practice over the Commonwealth has been not to assess the State tax on judgments so entered.

The clear intent of Section 3 of the Act of 1830 is that the State tax shall be paid on every proceeding in the Common Pleas Court, except Habeas Corpus, but that the tax shall be paid but once on each such proceedings.

After providing for the tax on proceedings commenced by the issuance of an original writ, by amicable action or by writ of certiorari to a justice of the peace or alderman, it provides for its assessment on those proceedings which are commenced by the entry of a judg-

ment, i. e. on a transcript of a judgment of a justice of the peace or alderman, and on the "entry of a judgment by confession or otherwise *where suit has not been previously commenced.*"

The scire facias to revive a judgment is not an original or new proceeding, but a continuation of a pending suit.

Prior to the passage of the Act of April, 1798, 3 Sm. L. 331, a judgment was a perpetual lien upon real estate. That Act is one of limitation as to the lien providing that a judgment not revived by scire facias within five years from its date ceases to be a lien upon real estate (*Mellon's Appeal*, 96 Pa. 475, 477-8), and the lien of a judgment obtained during the life of a decedent continues indefinitely as against his heirs and devisees. (*Collins v. Philadelphia*, 236 Pa. 386, 392; *Aurand's Appeal*, 34 Pa. 151; *Shearer v. Brinley*, 76 Pa. 300; *McCahan v. Elliott*, 103 Pa. 634).

"It (amicable scire facias to revive a judgment) is but a process to continue the lien of the judgment in the original action." *Edward's Appeal*, 66 Pa. 89, 90.

"The scire facias is a proceeding upon the judgment, as such; the purpose of a writ of scire facias, upon a judgment either to remove (revive) it, the defendant being required by the terms of the writ to show cause why execution ought not to issue, or to make some third person a party thereto and chargeable therewith, as terre tenant or otherwise, who was not a party to the original suit; in either case, however, the purpose of the writ is simply to continue a former suit to execution. It is therefore not an original action, but the continuation of a pending suit, and the specific cause of action is the judgment." *Henry v. Heilman Bros.* 114 Pa. 496, 498.

So far as the question under discussion is concerned, there is no distinction between the proceedings on an amicable scire facias sur judgment and that on an adverse scire facias sur judgment. (*Workman's Appeal*, 110 Pa. 25; *Edward's Appeal supra*).

Upon the revival of a judgment upon scire facias, including an amicable scire facias, a note thereof must be made on the record of the original judgment under the provisions of the Act of March 29, 1827, 9 Sm. L. 319 (*Mellon's Appeal*, 96 Pa. 475).

We are of opinion then that the entry of a judgment on a scire facias to revive and continue the lien of a judgment is not the "entry of a judgment \* \* \* where suit has not been previously commenced," but is the continuation of a pending suit and constitutes the entry of a judgment *where suit has been previously commenced*, and is therefore exempt from the tax under the specific terms of Section 3 of the Act of 1830.

You are therefore advised that neither the scire facias to revive a

judgment nor the judgment entered thereon, whether the proceedings be adverse or amicable, is taxable under the Act of April 6, 1830.

2. Tax on lien filed for premium due the State Workmen's Insurance Fund.

Section 18 of the Act of June 2, 1915, P. L. 762 creating the State Workmen's Insurance Fund, provides that at a time specified each subscriber to that Fund shall submit his pay-roll for the preceding year to the Workmen's Insurance Board which Board shall thereupon

"state the account of such subscriber for such calendar year \* \* \* and shall render a copy of such statement to the subscriber; \* \* \* and, if the amount shown by said statement exceed the amount of the premium theretofore paid by such subscriber, the excess shall be forthwith due and payable by the subscriber into the Fund and, until paid, shall be a lien, as State taxes are a lien, upon the real and personal property of the subscriber; and, if unpaid, shall be collectible as State taxes are now collectible \* \* \*."

Section 2 of the Act of June 15, 1911, P. L. 955 provides:

"The Auditor General may at any time transmit to the prothonotaries of the respective counties of the Commonwealth, to be by them entered of record, certified copies of all liens for State taxes, unpaid bonus, interest, and penalties, which may now exist or hereafter arise by virtue of any law of this Commonwealth; upon which record it shall be lawful for writs of scire facias to issue, and be prosecuted to judgment and execution, in the same manner as such writs are ordinarily employed."

It is under the provisions of Section 2 of the Act of 1911 that the premiums, determined to be due under Section 18 of the Act of 1915, are filed as liens in the Prothonotary's office.

We think that such statement so filed does not constitute an "original writ issued out of said court", an "amicable action" or the "entry of a judgment by confession or otherwise" under the provisions of the Act of 1830, and that it is therefore not taxable.

It is not a writ or process to compel the appearance or bring the party into court or to require the defendant to do something therein mentioned, nor is it the first process or initiatory step taken in prosecuting a suit (Opinions Deputy Attorney General Hargest, 37 Pa. County Court Report 522, 525, and 45 Pa. County Court Report 108, 109), these functions are performed by the writ of scire facias issued upon such record, the issuance of which is provided for in the Act of 1911; it does not call for an answer nor may a plea be entered thereto.

Such a statement of account is in no sense an amicable action nor is it a judgment. The fact that it is indexed "in the judgment index does not make it a judgment in the accepted sense of the term or

within the meaning of the Act of 1830." (Opinion of First Deputy Attorney General Keller, 45 Pa. County Court Report 92, 93).

It is to be classed with mechanics' and municipal liens and the recording of conditional sales contracts which, when filed in the Prothonotary's office, have been held not taxable under Section 3 of the Act of 1830. (Opinion of Deputy Attorney General Cunningham, Opinions of the Attorney General 1907-08 page 85, 86, and opinion of First Deputy Attorney General Keller, 45 Pa. County Court Rep. 92).

On liens of such character the scire facias, when issued thereon, constitutes the original writ which is taxable. (Edward's Appeal, 66 Pa. 89, 91; United States v. Payne, 147 U. S. 687-690; opinion of Deputy Attorney General Hargest, 37 Pa. County Court Report 522, 525, citing opinion of Attorney General McCormick).

You are therefore advised that the lien filed in the Prothonotary's office for premium due the State Workmen's Insurance Fund by its subscriber under the provisions of Section 18 of the Act of June 2, 1915, P. L. 762 and of Section 2 of the Act of June 15, 1911, P. L. 955, is not taxable under the Act of April 6, 1830.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

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*Taxation—Corporations—Capital stock—Water companies—Stock held as charitable trust—Act of June 1, 1889.*

1. With the exception of the corporations specifically exempt from the provisions of sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, every corporation from whom a report is required under section 20 of the act is subject to the capital stock tax.

2. The stock of a water company, all of which is held by a city for a charitable use under a will, is subject to the capital stock tax.

Department of Justice

Harrisburg, Pa., December 20, 1926.

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

Sir: You have advised the Attorney General that the Girard Water Company, which was chartered under the laws of this Commonwealth on August 29, 1883, and has been taxed on the value of its capital stock since that date, having regularly filed its annual reports, now claims that it is exempt from said tax on its capital stock for the reason that all said stock is owned by the City of

Philadelphia as Trustee under the will of Stephen Girard, deceased, which organized and operates such corporation for the benefit of the said City of Philadelphia, Trustee, and that the entire net income from the Girard Water Company is devoted by said Trustee for the maintenance and support of Girard College, a public charity for poor, white, male orphans. In other words, the corporation contends that the capital stock of a Pennsylvania corporation which might otherwise be taxable is exempt from taxation when said stock is wholly owned by a charitable corporation. You advise that a settlement for capital stock tax for the year 1925 was duly made against this corporation by the Auditor General and approved by the State Treasurer, and you inquire whether the State taxing officers were right in making such settlement against this corporation for capital stock tax under the circumstances aforementioned.

The Girard Water Company was incorporated under the provisions of the Act of April 29, 1874, P. L. 73 for the purpose, as expressed in its charter, as follows: "Supplying water to the public in the Township of West Mahanoy in the County of Schuylkill, State of Pennsylvania, and to persons, partnerships and corporations residing therein and adjacent thereto, as may desire the same, etc."

Section 21 of the Act of June 1, 1889, P. L. 420, as amended by the Acts of June 8, 1891, P. L. 229, June 8, 1893, P. L. 353, June 7, 1907, P. L. 430, June 7, 1911, P. L. 673 and July 22, 1913, P. L. 903, provides, inter alia, as follows:

"That every corporation, joint-stock association, limited partnership, and company whatsoever, from which a report is required under the Twentieth section hereof, shall be subject to, and pay into the Treasury of the Commonwealth annually, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special, and preferred, as ascertained in the manner prescribed in said Twentieth section \* \* \*."

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

"That hereafter, except in the case of banks, savings institutions, title insurance or trust companies, building and loan associations, and foreign insurance companies, it shall be the duty of the president, vice-president, secretary or treasurer of every corporation having capital stock, every joint-stock association, limited partnership, and every company whatsoever, \* \* \* to make annually, on or before the last day of February, for the calendar year next preceding, a report in writ-

ing to the Auditor General, \* \* \* stating specifically:  
First, the amount of its capital stock, \* \* \*."

With the exception of the corporation specifically exempt by the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, every corporation "from whom a report is required under the Twentieth Section" is subject to the capital stock tax. It is entirely unnecessary to discuss here in detail the various exemptions from the capital stock tax.

In a brief filed in your department by the corporation in furtherance of its contention that it is exempt from the capital stock tax in question, reference is made to the Opinion of Deputy Attorney General Hull to Auditor General Lewis, July 13, 1922, (2 D. & C. 366), from which Opinion the following quotation is made:

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

Reference is also made by the corporation to various decisions, among which are the important cases of *General Assembly vs. Gratz*, 139 Pa. 497 and *Mattern vs. Canevin*, 213 Pa. 588, in the first of which cases it was held and again declared in the latter case: "That, inasmuch as it had been the settled custom and policy from the foundation of our Commonwealth to abstain from the taxation of property held for charitable and religious purposes, such taxation would not be presumed to have been intended by the legislature in the absence of express language clearly showing that such taxation was intended."

However, these cases cited, and the quotation from the Opinion of Deputy Attorney General Hull aforementioned, do not have immediate application to the instant case because here we are dealing with the trustee of a public charity that has gone beyond its business of operating the charitable institution in question and has incorporated a corporation, to wit, the Girard Water Company, to engage in a business or trade for the purpose of increasing its revenue. The law has recognized a distinction between that which is purely a public charity and that which is commercial in its character. The mere ownership of capital stock by a public charity,

as in this case, is not the test to determine exemption from taxation.

As was said by Mr. Justice Dean in the case of Sunday School Union, App. vs. Philadelphia, et al., 161 Pa. 307, 315:

"In all cases of this kind the tendency naturally is to an excessively liberal construction of the constitutional exemption, a construction not warranted, perhaps, by its plain restriction. The people knew what they meant, when in 1874 they said, by an overwhelming majority, 'The General Assembly may by its general laws exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity.' They meant nothing else should be exempt from taxation. By no judicial rule of construction can these words be made to mean that a commercial enterprise is exempt because the whole profit of it goes into the treasury of, and it is carried on by, a purely public charity. In so far as the institution is charitable, and its revenues are derived from the contributions of the charitable, it is protected by the constitution. But if such institution sees fit to engage in trade for the purpose of increasing its revenue, or making any part of its business 'self-supporting', the trade part of its business can be taxed, and ought to be."

In the case of Episcopal Academy v. Philadelphia, 150 Pa. 565, (1893), Mr. Justice Williams, referring to the decision in the case of Philadelphia v. Women's Christian Association, 125 Pa. 572, said:

"We are now disposed to go further, and say that an institution that is in its nature and purposes a public charity does not lose its character as such under the tax laws if it receives a revenue from the recipients of its bounty sufficient to keep it in operation. It must not go beyond self support. *When a charity embarks in business for profit it is liable to taxation like any other business establishment, \* \* \**"

So in the instant case, although the City of Philadelphia, Trustee of the trust estate of Stephen Girard, deceased, may have incorporated the Girard Water Company for the purpose of protecting certain interests of said trust estate and owns all the stock of said corporation, and although all the net income from said water company may be devoted by said trustee to the support and maintenance of Girard College, a recognized public charity, nevertheless, the corporation itself, by its purpose clearly expressed in its charter, is engaged in the business of supplying water to the public for profit, and has thereby become liable for the capital stock tax.

You are accordingly advised that under the facts of this case, as you have detailed them, the Girard Water Company for the year ending December 31, 1925 is liable for the Pennsylvania Capital Stock Tax.

Yours very truly,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,  
*Deputy Attorney General.*

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**OPINIONS TO THE DEPARTMENT OF BANKING**

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## OPINIONS TO THE DEPARTMENT OF BANKING

*Corporations—Trust companies—Double liability of stockholders—Acts of April 29, 1874; May 11, 1874, and May 9, 1923.*

1. The Act of May 11, 1874, P. L. 135, imposing a double liability on stockholders of trust companies, applies only to such trust companies as were created prior to the adoption of the new Constitution, and which were given the right to engage in a banking business by discounting notes. It does not apply to companies incorporated under the General Corporation Act of April 29, 1874, P. L. 73, and its supplements.

2. The Act of May 9, 1923, P. L. 173, authorizing trust companies to engage in a banking business by discounting notes, does not of itself bring the stockholders within the liability imposed by the Act of May 11, 1874, P. L. 135.

3. It is only where trust companies have accepted the provisions of the Act of 1923 that the stockholders become liable to double the amount of their stock.

Department of Justice,  
Harrisburg, Pa., February 5, 1926.

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

Sir: This department has received your letter asking whether or not the stockholders of the Carnegie Trust Company come under the provisions of the Act of May 11, 1874, P. L. 135, which imposes a double liability on "all stockholders in banks, banking companies, savings fund institutions, trust companies, and all other incorporated companies doing the business of banks or loaning and discounting moneys as such in this Commonwealth," and asking if it is your duty to proceed to undertake to collect from such stockholders.

Prior to the passage of the Act of May 9, 1923, P. L. 173, the question of the liability of stockholders such as those of the Carnegie Trust Company has been passed upon and definitely decided.

The Act of May 11, 1874, P. L. 135, entitled "An Act fixing the liability of stockholders of banks and banking companies and other banking institutions in this Commonwealth." provides:

"That from and after the passage of this Act, all stockholders in banks, banking companies, saving fund institutions, trust companies, and all other incorporated companies doing the business of banks or loaning or discounting moneys as such in this Commonwealth, shall be personally liable for all debts and deposits in their individual capacity to double the amount of the capital stock held and owned by each."

The Carnegie Trust Company was not, however, incorporated at the time of the passage of the Act of 1874, but was incorporated under the provisions of the General Corporation Act of April 29, 1874, P. L. 73, and its supplements, and one of those supplements, namely, the Act of May 9, 1889, P. L. 159, specifically declares that "nothing

herein contained shall authorize said companies to engage in the business of banking.”

The question of the liability of stockholders under the Act of 1874, as is here raised, came before the Supreme Court in the case of *DeHaven vs. Pratt*, 223 Pa. 633. The Union Surety & Guaranty Company of the City of Philadelphia became insolvent and Alexander M. DeHaven was appointed Receiver. He filed his bill against the stockholders to charge them with double the par value of the stock in addition to the regular payment of its par value on the ground that the funds so to be raised were needed for the payment of the company's debts. The case having come on for hearing in the court below, the bill was dismissed and an appeal was thereupon taken to the Supreme Court. That Court, speaking through Mr. Justice Elkin, in delivering the opinion held:

“There is but a single question to be determined on this appeal, and it is an interesting and important one. Does the Act of May 11, 1874, P. L. 135, which imposes a double liability upon the stockholders of banks, banking companies and other banking institutions, apply to trust companies incorporated under the general corporation act of 1874 and the supplements thereto? \* \* \* In our state the privileges, powers and liabilities of banks and banking institutions have been cautiously conferred and carefully imposed. Our courts have frequently defined what a bank, or banking institution is, within the meaning of the law, and what is meant by the legislative expressions ‘doing a banking business,’ or ‘to engage in the business of banking,’ but in no instance has it been held that a trust company, deriving its power under a special act of assembly passed prior to the adoption of the new constitution, which did not, in express terms, confer banking privileges, or which was incorporated under the general corporation Act of April 29, 1874, P. L. 73, and the supplements thereto which, in equally express terms, denied the right of such company to engage in the business of banking, was a bank or banking institution, or company doing a banking business. It is true that in the days of special legislation the legislature did create a few so-called trust companies and authorized them to do a general banking business, and such companies enjoyed whatever powers were conferred upon them by the special charters granted. Even under these special grants of power, the courts carefully pointed out the distinction between banking institutions proper and banks so called which did not engage in a general banking business, by defining the powers and liabilities of each class of institution. This was the situation when the new constitution was adopted. In section eleven of article sixteen of that instrument, it is provided that no corporate body shall be created or organized to possess banking and dis-

counting privileges without three months' previous public notice being given of the intention to apply therefor, nor shall a charter for such privilege be granted for a longer period than twenty years. This is the organic law, and it cannot be laid aside or disregarded. In the present case the insolvent trust company, represented by the receiver, the appellant, was not created in pursuance of any law authorizing it to do a general banking business, nor was its incorporation preceded by three months' public notice of its intention to apply for such privileges, nor is the term of the enjoyment of the powers conferred limited to twenty years. Its charter is perpetual. If it should be determined that this trust company by its charter was authorized to engage in the business of banking, it would necessarily follow that the act of incorporation was a nullity because in violation of the plain provisions of the constitution which were not complied with. To so hold would mean the striking down of all trust companies throughout the commonwealth with their large volume of business and vast capitalization. The organization of trust companies in our state, under the general corporation act of 1874 and acts supplementary thereto, can only be sustained on the ground that they are not banks or banking institutions authorized to do a banking business."

It was therefore held that the words "trust companies" as used in the Act of May 11, 1874, applied only to such trust companies as were created by special acts prior to the adoption of the new Constitution and which were given the right to engage in a banking business; that the double liability of corporation stockholders does not exist unless imposed by statute, and statutes imposing such liability are to be strictly construed; and that there is no statute imposing a double liability upon trust companies incorporated under the general laws.

This same question was raised and decided in a like manner in *Rathfon, Receiver of the City Saving Fund & Trust Company vs. Rhoads, et al.*, 27 Lancaster Law Review 345.

Does the Act of May 9, 1923, P. L. 173 make any difference in this situation and impose upon the stockholders in the Carnegie Trust Company a double liability as provided for in the Act of 1874?

The Act of 1923 authorizes and empowers every trust company and bank organized and incorporated under the laws of the Commonwealth to discount, buy, sell, negotiate, assign promissory notes, drafts, bills of exchange \* \* \* and to receive and retain in advance interest on loans and discounts made.

The mere fact that a trust company or bank organized and incorporated under the laws of the Commonwealth is authorized and empowered to discount and do the other things enumerated in the Act of 1923, does not bring such institution within the provisions of the

Act of May 11, 1874. The liability imposed by that Act is on stockholders in institutions "doing the business of banks or loaning and discounting money as such." This includes trust companies which have accepted the provisions of the Act of 1923 and are actually exercising the power granted. It does not, however, include institutions which have not accepted the terms of the Act and are not exercising any of the powers therein given.

According to the information received by the Department of Banking the Carnegie Trust Company was not discounting paper at the time it was closed and had not done so since 1905, and the special counsel of the Department of Banking in this matter has ascertained that it had not been discounting and had not availed itself of the powers granted by the Act of 1923. It was conducting its business under the Act of 1874, its supplements and amendments, and its status was not in any way changed by the Act of 1923. Therefore, the law as enunciated in *DeHaven vs. Pratt*, supra, decides the question of the liability of the stockholders in this trust company, and you are advised that any proceeding to impose the double liability as provided by the Act of 1874, would be in vain.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

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*Bank Loans—Institutions under State Secretary of Banking—Officers and Directors—Loans—Corporations—Capital Stock owned by Director—Legal Limit—Act of June 14, 1901, P. L. 561.*

A loan made by an institution under the supervision of the State Secretary of Banking to a corporation in which one of the directors owned practically all the capital stock should be included in the total loans made to the officers and directors. Under the Act of June 14, 1901, P. L. 561, this total must not exceed 25 per cent. of the paid-in capital stock and surplus of the institution. "House" in the sense used in the Act, means a collection of persons; an institution. To permit a director of a banking institution to borrow money therefrom for a corporation, as technically distinguished from a firm or commercial house, would be an evasion of the policy of the Commonwealth recognized and followed for three-quarters of a century.

Department of Justice,  
Harrisburg, Pa., May 10, 1926.

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

Sir: Your communication of May 7, 1926 inquiring whether or not loans made by one of the institutions under your supervision to a corporation in which one of the directors of the institution owns

practically all of the stock, may under certain circumstances be treated as loans to the director individually, has been duly received and considered. It is noted that if the corporation loans are included, the total loans to the officers and directors of the institution in question will exceed the legal limit of 25% of the paid in capital stock and surplus of the institution. If these loans are not included, the institution is within its legal rights, so far as loans to officers and directors are concerned.

The Act of Assembly approved June 14, 1901, P. L. 561 provides that

“No director of any banking institution, trust company or savings institution \* \* \* 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 firms or houses in which they may be interested directly or indirectly, shall not exceed at any time the sum of 25% of the capital stock paid in, and surplus.”

This legislation is substantially the re-enactment of statutes on the same subject which had existed in Pennsylvania since 1850. All of these statutes were intended to prevent unwise banking. Such being the object of the legislation under consideration, it is important to consider your powers under the Administrative Code of 1923 and The Banking Act of the same year.

Section 50a—2203 of the Administrative Code provides:

“The Department of Banking shall enforce and administer the laws of this Commonwealth in relation to all corporations and persons under its jurisdiction, and shall see that the greatest possible safety is afforded to depositors therein or therewith, and to other interested persons.”

Section 4 of the Banking Act of 1923 charges the Department of Banking

“with the duty of taking care that the laws of this Commonwealth in relation thereto shall be faithfully executed, and that the greatest safety to depositors therein or therewith and to other interested persons shall be afforded.”

There can be no doubt that you have the right to treat the corporation loans which you have mentioned as the direct obligations of the individual director of the institution under consideration. The fact that the Act of 1901 does not mention corporations, but merely mentions “the firms or houses” in which directors may be interested directly or indirectly, does not change this conclusion.

"House" in the sense used in that statute means a collection of persons; an institution. To permit a director of a banking institution to borrow money therefrom for a corporation, as technically distinguished from a firm or commercial house, would be an evasion of the policy of the Commonwealth with regard to loans by such financial institutions, which has been in existence for three-quarters of a century.

In order, therefore, that the greatest safety to the depositors and other persons interested in the institution which you have under examination may be afforded, you are advised that the particular corporation loans which you mention should be included in the aggregate loans to the officers and directors of that institution.

Yours very truly,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

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*Trust companies—Investments—Trust funds—Bonds of private corporations secured by first mortgage—Constitution, art. iii, sect. 22—Acts of June 7, 1917, March 19, 1923, and June 29, 1923.*

Under article iii, section 22, of the Constitution, and the Act of June 7, 1917, P. L. 447, as amended by the Acts of March 19, 1923, P. L. 23, and June 29, 1923, P. L. 955, a trust company may not hold, as investments for trust funds in its custody, bonds or certificates of a private corporation secured by a first mortgage on the real estate of such corporation.

Department of Justice,  
Harrisburg, Pa. May 10, 1926.

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

Sir: The question which you have recently propounded, as to the right of a trust company to hold, as investments for trust funds in its custody, bonds or certificates of a private corporation, secured by a first mortgage on the real estate of the corporation, has received careful consideration. The mortgage specifically mentioned has been made by a private corporation on valuable real estate owned by it, to a trustee for the holders of the bonds or certificates, which bonds or certificates, moreover, confer on their holders the right to proceed against the mortgagor, without resort or application to the trustee, to enforce their rights as creditors.

Your question can only be answered adequately by an examination of the declared public policy of the Commonwealth since the adoption of the Constitution of 1874. Article III, Section 22 of that instrument provides that:

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

The Supreme Court, in *Comm. v. R. R. Co.*, 122 Pa. 306, (1888) pointed out the broad distinction between a mortgage of land secured by the bond of one or more individuals and a mortgage by a corporation secured by a mortgage to a trustee representing the holders of all the bonds issuable thereunder. These latter were there declared to be "not specialties but negotiable instruments, passing from hand to hand by delivery or indorsement; they find a market in all parts of the civilized world, and are held as an investment in moneyed institutions and by private persons. The mortgagee has no right to the custody of one of the bonds unless he buys it like any other investor." It will be noted that the Court there made no reference to the investment of trust funds by fiduciaries in corporate bonds even though they be secured by mortgage of the company's real estate to a trustee for bond-holders. That tribunal, however, in *Comm. v. McConnell*, 226 Pa. 244 (1910), squarely ruled that where a committee of a lunatic, without an order of court, invested the lunatic's estate in the bonds of a private corporation, secured by a mortgage, and the bonds became worthless by the bankruptcy of the corporation, the committee was personally liable for the loss. The article and section of the Constitution of 1874, quoted above, was there referred to as an attempt by the people of the Commonwealth to enforce a firmly established rule which "prohibits a trustee from investing the estate of his cestui que trust in the bonds or stocks of a private corporation."

In the general revision of the laws relating to decedents' estates which the legislature accomplished in 1917, fiduciaries were authorized to invest trust funds inter alia in "mortgages," by Section 41a of the Fiduciaries Act of June 7, 1917, P. L. 447. The word "mortgages" there used obviously means mortgages of land in the common form, where the bonds which they secure and the indentures of mortgage "are payable to the creditor both are under seal, both pass only by assignment, both are taken as constituting together one security, and the creditor may on default made by his debtor resort to either an action on the bond or a scire facias on the mortgage": *Comm. v. R. R. Co. supra*.

Under date of August 16, 1920, Deputy Attorney General Myers, on the strength of the constitutional provision which has already been cited and of the reference thereto in *Comm. v. McConnell supra*, reached the conclusion, in an opinion then rendered you, that the Fiduciaries Act of June 7, 1917, P. L. 447, did "not authorize fiduciaries to invest in the bonds or stock of any private corpora-

tion." On the very question now under consideration you were "therefore advised that the investment by a trust company under the supervision of your Department in the bonds issued by a private corporation, security for which is a mortgage covering the real estate owned by the private corporation, is not a legal investment under the Constitution and laws of the Commonwealth." Since then neither the organic nor the statutory law has been changed on the subject in hand.

Section 41a of the Fiduciaries Act above referred to has been twice amended, both amendments having been adopted at the same session of the legislature. By the Act of March 19, 1923, P. L. 23, poor districts were added to the list of public corporations in whose bonds or certificates fiduciaries might invest trust funds, and "mortgages" *eo nomine* were retained in the classification of legal investments for such funds. By the Act of June 29, 1923, P. L. 955, there was substituted for the word "mortgages" the phrase "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 bondholders."

In view of the legal history of mortgage investments by trustees or other fiduciaries in Pennsylvania, the legislation just quoted must be taken to mean, first, mortgages in the common form described in *Comm. v. R. R. Co.*, *supra*, and, second, bonds secured by mortgages executed and delivered by either individuals or partnerships to third parties as security for issues of such bonds. The addition of this latter class of investments as legal for fiduciaries cannot possibly authorize the investment of trust funds in the bonds of a private corporation. To construe it otherwise would virtually abrogate a firmly established rule of law, do violence to the constitutional provision already recited, and call for an unnecessary inconsistency between two statutes adopted and approved at the same session of the legislature. When passing the last named Act the legislature necessarily had in mind that constitutional provision, and also must be presumed to have intended to clarify the meaning of "mortgages" as used in Section 41a of the Fiduciaries Act, which was then in process of amendment.

The fact that in the present instance the bonds confer on their holders individual rights of section against the issuing corporation, does not make those bonds any other sort of investment than one in the bonds of a private corporation. The mortgage securing those bonds is not made to the bondholders but to a trustee for their benefit. This distinguishes them from mortgage securities in common form and popular parlance or sense.

You are therefore advised that, under your supervisory powers as set forth in the Administrative Code of June 7, 1923, P. L. 498, and further in The Banking Act 1923, P. L. 809, both of which Acts were adopted at the same legislative session in which the Fiduciaries Act of June 7, 1917, P. L. 447 was amended as above set forth, you have the power and duty to require trust companies to eliminate from their investments of trust funds all "bonds or stock of any private corporation," including the bonds more specifically described in the first paragraph of this opinion.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,

*Deputy Attorney General.*

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*Corporations—Guaranteeing mortgages—Acts of June 7, 1923, P. L. 498, and June 15, 1923, P. L. 809—Banking Department—Banks and banking.*

Pennsylvania corporations formed for the purpose of guaranteeing mortgages and foreign corporations chartered for the like purpose are subject to the supervision and regulation of the Department of Banking.

Department of Justice,  
Harrisburg, Pa., May 10, 1926.

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

Sir: Your letter of April 22, 1926, requesting information, first, as to whether a Pennsylvania corporation formed for the purpose of guaranteeing mortgages is subject to the Department of Banking, and second, what action must be taken by a foreign corporation formed for a like purpose in order to comply with the rules of said Department, has been received and given careful consideration.

Both questions would seem to have been answered by the portion of the Administrative Code of June 7, 1923, P. L. 498, which relates to the powers and duties of the Department of Banking, and by the Banking Act of 1923, approved June 15, 1923, P. L. 809. These two pieces of legislation obviously received consideration by the General Assembly at one and the same time and are to be read together as forming the statutory policy of the State with respect to the executive department of which the Secretary of Banking is the head.

In Section 50a-2202, Article XXII of the Administrative Code, it is provided as follows:

"The Department of Banking shall have supervision over:

(a) All corporations now or hereafter incorporated under the laws of this or any other State and authorized to transact business in this State, which have power to receive and are receiving money on deposit or for safe-keeping otherwise than as bailees, including all banks, banking companies, cooperative banking associations, trust, safe deposit, real estate, mortgage, title insurance guaranty, surety, and indemnity companies, savings institutions, savings banks, and provident institutions."

Section 4 of the Banking Act of 1923, charges the Department of Banking "with the duty of taking care that the laws of this Commonwealth in relation thereto shall be faithfully executed, and that the greatest safety to depositors therein or therewith and to other interested persons shall be afforded." That section proceeds as follows:

"The said supervision, duties, and powers shall extend and apply to the following corporations now or hereafter incorporated under the laws of this State or under the laws of any other State and authorized to transact business in this State; namely, all such corporations having power to receive and receiving money on deposit or for safe-keeping otherwise than as bailee, including all banks, banking companies, cooperative banking associations, trust, safe deposit, real estate, mortgage, title insurance, guarantee, surety, and indemnity companies, savings institutions, savings banks, and provident institutions. The said supervision, duties, and powers shall also extend and apply to mutual savings funds, building and loan associations, and corporations doing a safe-deposit business only."

From the legislation just quoted it is obvious that a corporation formed for the purpose of guaranteeing mortgages is subject to the Department of Banking.

The said legislation also renders it possible for the Secretary of Banking to impose upon foreign corporations operating as aforesaid the same restrictions which are imposed upon Pennsylvania corporations under like conditions.

You are advised specifically on this latter point that in addition to the requirements of the law dealing with the steps which a foreign corporation must take in order to be registered to do business in Pennsylvania, such corporations, if they are mortgage guarantee companies, may be subjected by your Department to all the supervision and regulation imposed upon corporations organized under the provisions of the Pennsylvania statutes.

Very truly yours,  
DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

*Banking—Trust Companies—Guaranteeing mortgages and bonds—Requirements of Department.*

A trust company formed under the Act of 1874, which has accepted the Act of 1889, may be required by the Banking Department to keep exact accounts showing what mortgages and bonds are guaranteed by it and all matters relevant thereto.

Department of Justice,  
Harrisburg, Pa., May 10, 1926.

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

Sir: Your communication of April 22, 1926, requesting an opinion as to the right of the Department of Banking to require a trust company incorporated under the provisions of the Act of April 29, 1874, and having qualified to do business by accepting the provisions of the Act of May 9, 1889, to show as liabilities in its general ledger participation certificates issued to its customers covering part ownership in a pool of bonds and mortgages which have been set aside as collateral security for the payment and redemption of the said mortgage collateral securities, which certificates are designated by the trust company as "first mortgage collateral guaranteed certificates," has been carefully examined and has led to the following conclusion:—

There being no question that the trust company is subject to the jurisdiction of the Department of Banking, that Department is required by Section 50a-2203, Article XXII of the Administrative Code of June 7, 1923, P. L. 498, to see that the greatest possible safety is afforded to depositors therein or therewith and to other interested persons. This statutory duty was almost immediately re-enacted in Section 4 of the Banking Act of 1923, approved June 15, 1923.

You are advised that the safety of the depositors in or with the trust company in question and of other interested persons necessitates the securing by the Department of Banking of the fullest and most unequivocal information as to the exact conditions of the assets and liabilities of that trust company. As a matter of accounting, where mortgages are held among the assets of the institution and are clearly earmarked so as to set forth the purpose for which they are held, and the payment of the principal and interest thereof is guaranteed by the trust company, it is wise and entirely within the province of the Department of Banking to require the institution to create an account among its liabilities showing the total amount guaranteed under these conditions; the institution should also create among its assets an account under the caption "mortgages pooled to redeem guaranteed certificates."

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

*Tourists agents—License—Banks and banking—Acts of July 17, 1919, and May 20, 1921—Steamship agent.*

A person who conducts tourists parties from points in Pennsylvania to points in Europe and return is not required to be licensed by the Banking Department as a steamship agent under the Act of July 17, 1919, P. L. 1003, as amended by the Act of May 20, 1921, P. L. 907.

Department of Justice,  
Harrisburg, Pa., May 26, 1926.

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

Sir: Your communication of May 21, 1926, desiring an opinion as to whether or not a man who conducts tourist parties from points in Pennsylvania to points in Europe and return and who is not licensed by the Banking Department as a steamship ticket agent is, by so doing, violating the provisions of the Act of July 17, 1919, P. L. 1003, as amended by the Act of May 20, 1921, P. L. 907, has been given attention.

The legislation just referred to was elaborately considered by our Supreme Court in *Commonwealth vs. Disant*, 285 Pa. 1. In the course of its opinion the Court said:

"The act was passed to prevent the many frauds, impositions, overreachings and criminal acts practiced on guileless and uneducated persons or those of foreign birth, who reside in the State and who did not know and understand our laws and customs; if it can be sustained it will substantially aid in abolishing these fraudulent and criminal acts. \* \* \*"

"The act before us is an effort to prevent fraud and unfair dealing against purchasers of steamship tickets committed by those in like position as defendant. We have in our vast mining and manufacturing sections large numbers of foreign people. It is to this class the mischief, which is a matter of common knowledge, is greatest. The State thus assures to intending travelers that when orders for tickets are presented at the ports, they will be honored, and that money paid for or on account of tickets will not be lost to their detriment; the ticket seller is thus held to strict accountability. Heretofore when an agent absconded with money or otherwise misbehaved, in most cases, the person injured, through ignorance, would not follow up their right and had no effective remedy if they did attempt to secure relief. The act is very simple. It requires some investigation by the banking department to determine the applicant's fitness, honesty and likelihood to deal fairly. This investigation of character should be no different in kind or quality from that which any honestly inclined steamship company should make of its own representatives; but where, in the scramble for business, no investigation is made, and individuals who are not responsible are permitted to sell, it is then harm is done.

"The statute requires individuals, who propose to transact certain business in which the public is interested, to take out a license that the public may be protected from unlawful acts."

In view of these expressions as to the purpose and effect of the legislation under consideration, I have to advise you that the tourist conductor is not violating the law which requires a license as a preliminary towards engaging in the business of selling steamship tickets.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

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*Corporations—Trust companies—Deposit of trust funds—Co-trustees.*

Where a trust company is a co-trustee or co-executor with another of a trust estate, it must transfer the funds of the estate to another depository, and no agreement or arrangement which it may make with its co-trustee or co-executor can relieve it of this duty.

Department of Justice,  
Harrisburg, Pa., May 26, 1926.

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

Sir: Your communication of May 24, 1926 relative to a Trust Company in Erie which is incorporated under the Act of April 29, 1874 and has accepted the provisions of the Act of May 9, 1889, P. L. 159, has been duly received.

The Trust Company in question is the co-executor with two individuals of a decedent estate one of whose assets is a large sum of money which was on deposit with the Trust Company at the time when the decedent died. That deposit still remains with the Trust Company in the name of the Estate. The executors do not intend to invest the money so deposited, but do intend within a few months to use it for distribution to the several beneficiaries under the terms of the decedent's will.

The question upon which you ask an opinion is whether the Trust Company under the foregoing circumstances may lawfully retain possession of the funds so deposited.

The law on this subject is clear and certain. By the Act of May 9, 1889, *supra*, Trust Companies are required to keep trust funds separate and apart from their assets. Under this legislation your Department has heretofore required all trust funds to be deposited in a separate banking institution.

In *Harrison's Estate*, 217 Pa. 207 our Supreme Court said:

"It should be understood by trust companies, as well as individuals, that the position of a trustee is not to be sought or granted for the purpose of profit."

In Adams' Estate, 221 Pa. 77, it was decided that

"The joint receipt of trust funds imposes upon co-trustees a joint liability."

In re National Bank of Germantown, 30 Dis. Rep. 603, the Orphans' Court of Philadelphia County refused to approve National Banks for appointment in fiduciary capacities where it appeared that such banks, acting under their Federal authority, did not segregate trust funds committed to their control. In an opinion rendered to your Department by Deputy Attorney General Myers under date of August 16, 1920, attention was called to the fact that

"A regulation of the banking department of the Commonwealth of Pennsylvania and a well-settled practice with relation to trust funds in this Commonwealth is that all such funds be absolutely segregated; and uninvested trust funds shall be deposited in some other institution, properly earmarked as trust funds."

Mr. Myers was of opinion that if any National Bank refused to comply with the regulations of your Department relative to fiduciary business you might compel such compliance or restrain such a bank from transacting any fiduciary business until it complies with the regulations of your Department relating to the deposit of uninvested trust funds. (30 Dis. Rep. 63).

Moneys deposited by customers of a trust company for investment in mortgages upon real estate for which the company issues "mortgage trust fund certificates" are such trust funds as must be kept separate and apart from the assets of the trust company in accordance with the provisions of Section 5 of the Act of May 9, 1889, *supra*. (Investment of Funds by Trust Companies, 2 D. & C. Rep. 59).

Where a trust company is a co-trustee with another and shares in the actual control or custody of the securities of a trust estate, or has a liability with respect thereto, such securities should be included in the trust estates to be reported and submitted to the Banking Department for examination: Trust Companies Acting as Co-Trustees, 2 D. & C. Rep. 584.

In view of the foregoing authorities you are advised that the Trust Company in question must transfer the funds of the estate of which it is a co-executor to another depository, and that no agreement or arrangement which its two co-executors may make

with it can relieve it of this duty. Your Department has full authority to require the performance by the Trust Company of this duty.

Yours very truly,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

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*Department of Banking—Trust Companies—Directors—Shares—Transfer of Shares  
—Act of 1911, P. L. 652.*

The directors of the trust company in question are in position to file with the Secretary of Banking oaths of office prescribed by the Act of 1911, and the addition to those oaths of a reference by the directors to the provisions of the declaration of trust as to all of the capital stock of the trust company neither invalidates nor weakens those oaths.

Department of Justice  
Harrisburg, Pa., June 8, 1926.

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

Sir. The letter of May 13, 1926, which Mr. I. M. Beckman, Third Deputy Secretary of Banking, addressed to the Attorney General, raises two questions of serious importance which have required careful and extended investigation. They can only be answered in the light of a complicated state of facts. Briefly, those facts are: A trust company in Philadelphia has recently been reorganized through the aid of two National Banks which have just consolidated. All of the capital stock of the reorganized trust company has been issued to three officers of the consolidated bank and those three officers have, in writing, declared, promised and agreed that they hold the said capital stock in trust "for the equal pro rata benefit of the persons who from time to time shall be the owners of the capital stock of the" consolidated bank, "and upon the termination of the said trust they will distribute the said shares of" trust company "stock to and among the stockholders of record of the said" consolidated bank "in the proportion in which they shall own the said shares of" trust company stock. During the continuance of the trust dividends which may be received by the trustees on the trust company stock are to be paid over to the beneficial owners thereof, whose interests therein shall be incapable of severance from ownership of stock in the consolidated bank. Beneficial ownership of the trust company stock shall be solely evidenced by an endorsement thereof on the certificates of the bank stock. The beneficial owners of the trust company stock are required to assume the

same statutory liability as though they were its legal owners, "and to that extent they shall indemnify and save harmless the trustees in whose names the said stock shall stand of record from any loss or liability on account of said stock as such holders of record thereof." Except as "directed in writing from time to time by the owners for the time being of the beneficial interests in not less than two-thirds of the amount of said shares of stock," the trustees "shall have and exercise all the rights and powers of absolute owners of the said shares of stock" \* \* \* "but at all times they shall retain control of the certificates." In order to qualify persons to become directors of the trust company, the trustees are given "the right to sell the requisite number of the said shares upon the receipt of and undertaking by each of such purchasers to re-sell the same at the same price to the trustees at their option; and further, in order to insure the undertaking to re-sell the said shares, each of such purchasers shall endorse the certificates therefor in blank and deliver the same to the trustees."

The exact questions for determination are:

(1) Are directors of the trust company, qualified in pursuance of the declaration of trust just summarized, the owners in good faith and in their own rights of shares of its capital stock subscribed by them or standing in their names on the books of the corporation?

(2) Are the shares transferred to the directors "not hypothecated or in any way pledged as security for any loan or debt?"

These questions arise under the Act of June 3, 1911, P. L. 652, which prescribe the qualifications of "each and every director of a bank of discount, banking company, co-operative banking association, trust company, mortgage company, real estate company, guarantee company, surety and indemnity company, and savings bank, which has been or may hereafter be incorporated under the laws of this Commonwealth, with the right to receive moneys on deposit."

The answer to the first question does not depend on the legality of the trust above recited, which may well be doubted under the decisions in *Commonwealth vs. Roydhouse*, 233 Pa. 234; *Boyer vs. Nesbitt*, 227 Pa. 398; *Garrett vs. Lawn Mower Company*, 39 Pa. Super. Ct. 98; *Lindsay's Estate*, 210 Pa. 224, and *Fitzsimmons vs. Lindsay*, 205 Pa. 79.

If it is a trust which the courts would declare to be valid, then the directors of the trust company own their qualifying shares in good faith and in their own rights regardless of the duties, rights and powers of the trustees and of the statutes by which the trust is to be effectuated. If the trust is invalid as contravening the public policy of the Commonwealth or as violative of the prin-

ciples on which voting trusts and trusts for corporate control and management have been sustained, then its conditions, provisions and terms may be cast aside, since equity regards substance and not form, and the legal title to the qualifying shares must inevitably be held to be in the directors.

It is not necessary that these directors be at all times in position to assert absolute ownership of their qualifying shares. An executor may be a director even though the stock does not stand in his name: *Schmidt vs. Mitchell*, 101 Ky. 570. A charter provision that directors shall own a certain amount of stock is satisfied by a director holding stock as executor, even though he has co-executors and all the stock is held in their names as executors: *Grundy vs. Briggs*, (1910), 1 Ch. 444.

The definitions of a share of stock which the Supreme Court of Pennsylvania has given put this conclusion beyond doubt. In *Neiler vs. Kelley*, 69 Pa. 403, Sharswood, J. said:

“A share of stock is an incorporeal intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive, in the mean time, such profits as may be made and declared in the shape of dividends.”

A share of stock represents only a right to participate in the profits and final distribution of assets of the corporation: *Goetz's Estate*, 85 Atl. (Pa.) 65.

The Uniform Stock Transfer Act of May 5, 1911, P. L. 126, recognizes these definitions.

The answer to the second question is equally plain. The shares in question “are not hypothecated or in any way pledged as security for any loan or debt.” The directors are in no sense debtors of the trustees. They are simply depositors of their stock certificates endorsed in blank with the trustees, and the trustees are simply optionees of the shares represented by the certificates which they hold for greater security.

You are therefore advised that the directors of the trust company in question are in position to file with you the oaths of office prescribed by the Act of June 3, 1911, supra, and that the addition to those oaths of a reference by the directors to the provisions of the declaration of trust as to all of the capital stock of the trust company neither invalidates nor weakens those oaths.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

*Corporations—Trust companies—Specially chartered companies—Branches—Control by Banking Department—Acts of April 13, 1868, and April 29, 1874.*

A trust company chartered under the special Act of April 13, 1868, P. L. 966, to carry on its business in the City of Philadelphia "or elsewhere, by agency, as the directors may establish," may conduct its business either within or without Philadelphia at such agencies or branches as the directors may establish, but such branches must be conducted according to the rules laid down by the Banking Department with reference to the conduct of branch office by trust companies chartered under the general Act of April 29, 1874, P. L. 73.

Department of Justice,  
Harrisburg, Pa., June 8, 1926.

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

Sir: The contents of the letter of May 17, 1926, which Alvin M. Whitney, First Deputy Secretary of your Department has transmitted to the Attorney General, have been noted with interest, and the question upon which you desire an opinion has been carefully considered.

By the Act of April 13, 1868, P. L. 966, the United Security Life Insurance and Trust Company of Pennsylvania was incorporated and the business of that Company was authorized to "be carried on in the City of Philadelphia, Pennsylvania, or elsewhere, by agency, as the directors shall determine, and at such agencies as they may establish."

This is one of the special charters which are graphically described by Sulzberger, J. in the Common Pleas, and by Elkin, J. in the Supreme Court, in *DeHaven vs. Pratt*, 223 Pa. 633, where the historic differences in Pennsylvania between banks and trust companies are pointed out. By those special acts the Legislature introduced trust companies to Pennsylvania, as a supposed minor branch of the business of life insurance. It was not until 1874, when the present Constitution of Pennsylvania went into effect, and the General Corporation Law of April 29, 1874 was approved, that trust companies were formed into a distinct class of corporations. Under this last mentioned Act and its supplements all Pennsylvania trust companies have since been incorporated, and permitted to do business.

You ask whether under the provisions of the Act of April 13, 1868, above mentioned, the United Security Life Insurance and Trust Company of Pennsylvania is authorized to conduct its regular business at the agencies either in or outside of the City of Philadelphia which have been established by its directors; and whether the Department of Banking has the authority to require its branch offices to be conducted according to the instructions contained in the opinions of former Attorneys General with reference to branch offices conducted by trust companies chartered under the General Corporation Law of 1874 and its supplements.

The answer to these questions is basically found in Section 17 of the Act of April 13, 1868, *supra*, wherein the Legislature reserved the power to alter, revoke or annul the charter of the said company whenever, in their opinion, it might be injurious to the citizens of the Commonwealth. To complete this answer, reference must next be made to the powers which the Legislature has conferred upon the Department of Banking. There was not even a Commissioner of Banking in existence when the United Security Life Insurance and Trust Company was chartered, but the functions which from time to time the Legislature thereafter conferred on the Commissioner of Banking have now been extended and transferred to a distinct department of the State Government. By Article XXII, Section 2202-3 of the Administrative Code of June 7, 1923, P. L. 498, the Department of Banking is treated as follows:

"The Department of Banking shall have supervision over:

(a) All corporations now or hereafter incorporated under the laws of this or any other State and authorized to transact business in this State, which have power to receive and are receiving money on deposit or for safe-keeping otherwise than as bailees, including all banks, banking companies, cooperative banking associations, trust, safe deposit, real estate, mortgage, title insurance, guaranty, surety, and indemnity companies, savings institutions, savings banks, and provident institutions;

(b) Mutual savings funds, building and loan associations, and corporations doing a safe deposit business only;

(c) All national banking associations located within this State, now or hereafter incorporated under the laws of the United States, which shall, in pursuance of Federal law or regulation, be granted a permit to act, as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of insane persons, or in any other fiduciary capacity;

(d) All unincorporated banks, except such as are or shall be exempt by law, and all such individuals, partnerships, and unincorporated associations as now are or shall be by law made subject to the supervision of the department, and any individuals or associations of individuals doing the business of cooperative banks, or of building and loan associations, or a business in the nature of either, whether under the guise of a deed of trust or otherwise. (1923, June 7; P. L. 498, art. XXII, Sec. 2202).

"The Department of Banking shall enforce and administer the laws of this Commonwealth in relation to all corporations and persons under its jurisdiction, and

shall see that the greatest possible safety is afforded to depositors therein or therewith and to other interested persons. (1923, June 7; P. L. 498, art. XXII, Sec. 2203)."

By Section 4 of the Banking Act of June 15, 1923, P. L. 809, it is provided:

"There shall continue to be a separate and distinct department, known as the Department of Banking, charged with the supervision of all the corporations and persons hereinafter described, and with the duty of taking care that the laws of this Commonwealth in relation thereto shall be faithfully executed, and that the greatest safety to depositors therein or therewith and to other interested persons shall be afforded.

The said supervision, duties, and powers shall extend and apply to the following corporations now or hereafter incorporated under the laws of this State or under the laws of any other State and authorized to transact business in this State; namely, all such corporations having power to receive and receiving money on deposit or for safe-keeping otherwise than as bailee, including all banks, banking companies, cooperative banking associations, trust, safe deposit, real estate, mortgage, title, insurance, guarantee, surety and indemnity companies, savings institutions, savings banks, and provident institutions. The said supervision, duties, and powers shall also extend and apply to mutual savings funds, building and loan associations, and corporations doing a safe-deposit business only.

The said supervision, duties, and powers shall also extend and apply to all national banking associations, located in this State, now or hereafter incorporated under the laws of the United States, which shall, in pursuance of Federal law or regulation, be granted a permit to act or shall act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity.

The said supervision, duties, and powers shall also extend and apply to all private or unincorporated banks, except such as are or shall be exempted by law, and to all such individuals, partnerships, and unincorporated associations, as are or shall be by law made subject to the supervision of said department, and to any individual or associations of individuals doing the business of cooperative banks or of building and loan associations, or a business in the nature of either, whether under the guise of a deed of trust or otherwise."

That this fundamental legislation of 1923 amounts to an alteration of the charter of the corporation under consideration follows

from certain principles of law which have been laid down by the courts. In *Relfe vs. Rundle*, 101 U. S. 222, in passing upon the status of the Missouri Superintendent of Insurance as a statutory liquidator of a dissolved insurance corporation, the Supreme Court of the United States said:

"Relfe is not an officer of the Missouri State Court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the Corporation."

More recently, in connection with the liquidation of a Pennsylvania casualty insurance company under the Insurance Act of June 1, 1911, P. L. 599, a Federal court sitting in Philadelphia, said:

"The state engaged in this undertaking primarily for the protection of the public. Being for the public, its action is a governmental function. When in its exercise it becomes necessary to protect the public from insolvent or improperly conducted insurance companies, the state pursues a remedy prescribed by the same law that conferred the corporation's rights and defined the state's duties."

This is an entirely constitutional exercise of the police power of the state. In *Commonwealth vs. Vrooman*, 164 Pa. 306, dealing with an act passed in 1870, the majority of our Supreme Court said:

"This question is to be considered upon the state of the law as it is when the question is raised. Since 1870 the constitution of the State has been remodeled and many of its new provisions have been enforced by suitable legislation. Our question is not, therefore, whether the Act of 1870 was valid under the Constitution as it then stood, but whether it was valid when its provisions were invoked against the defendant \* \* \* \* \* The police power must necessarily enlarge its range as business expands and society develops.

\* \* \* \* \*

Corporations derive their existence from the State, and hold their franchises subject to legislative control. They are subject to the visitatorial power of the Commonwealth, and they may be, and are, in fact, required to lay open before the several departments of state government, and before the public, the character and extent of their business, the profits realized, the dividends declared, and the investments made. \* \* \* \*

\* \* \* \* \*

The police power of a state may be exerted for the

complete or the partial control of a given business. It may prohibit it absolutely to all persons for the purpose of suppression. It may permit it to some persons and under certain restrictions in order to secure control over it and hold it within proper bounds: *Stone v. Mississippi*, 101 U. S. 814."

And the minority of the court there agreed "that the Legislature may, in the exercise of its police power, absolutely forbid contracts which are inimical to public interests; and, second, may adopt suitable regulations of contracts for the protection of the public."

The present Constitution, in Article XVI, Sec. 3, provides that "the exercise of the police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well being of the State."

Of course, the power of alteration and amendment is not without limit. The alteration must be reasonable, and be consistent with the scope and object of the act of incorporation: *Shields v. Ohio*, 95 U. S. 324. The reserved right to amend a corporate charter "does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by \* \* \* taking of property without due process of law:" *Stearns v. Minnesota*, 179 U. S. 223.

In *D. L. & W. R. Co. vs. Public Utilities*, 85 N. J. L. 28, it was held that, under such a power, the company could not be required to furnish free transportation to certain designated officials. These and numerous other cases of similar import are cited in *Chicago, M. & St. P. R. Co. vs. Wisconsin*, 238 U. S. 491. They point out federal restraints on State action which must constantly be borne in mind

If violations of the federal constitution are avoided, you are advised that while the United Security Life Insurance and Trust Company is authorized to conduct its regular business at the agencies either in or outside of the City of Philadelphia which have been established by its directors, those agencies or branch offices must be conducted according to the same instructions which this Department in the past has given your Department with reference to the conduct of branch offices by trust companies chartered under the General Corporation Act of 1874.

Yours very truly,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

*Banks and banking—Banks of discount—Trust companies—Merger—Subagency.*

A bank of discount and deposit, organized under a special act of assembly antedating the present constitution, may acquire a trust company located in the same city, borough or township as itself and thereafter carry on business at the location of the trust company as a sub-office or sub-agency of its main or principal place of business, the sub-office or sub-agency being subject to the supervision and control of the banking department of the Commonwealth.

Department of Justice,  
Harrisburg, Pa., August 3, 1926.

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

Sir: You have asked for advice as to whether a bank of discount and deposit organized under a special Act of Assembly which antedates the present Constitution of Pennsylvania may acquire a trust company located in the same city as itself and operate the said trust company as a suboffice or subagency under the limitations which have heretofore been placed upon the location and operation of suboffices and subagencies of trust companies throughout the Commonwealth. The general legislation on this subject dates back to the Act of 1850, whose fiftieth section prohibits each and every bank in this Commonwealth from establishing, maintaining, keeping or continuing, directly or indirectly, any branch or agency for the transaction of banking business at any other place than that fixed and named in its charter for its location and the transaction of its business without the express authority of an act of assembly of this Commonwealth to do so.

The institution which is seeking permission to establish and operate a suboffice or subagency was created subsequent to the Act just referred to. It was not, however, incorporated under the provisions of the Act of May 13, 1876, P. L. 161. The latter Act provides that the persons associating themselves into a bank of discount and deposit shall, among other things, certify the location or place of business, particularly designating the county, city, borough or village in which the bank is to be located. By the Act of July 28, 1917, P. L. 1235, which is a supplement to the Act of May 13, 1876, any bank of discount and deposit already incorporated or hereafter formed under the provisions of the Act of 1876, is authorized to establish and maintain in the city, borough or township in which its principal place of business is located, one or more suboffices or subagencies for the purpose only however of receiving and paying out moneys.

As a matter of history, therefore, there is no legislation in Pennsylvania that in terms covers the situation in hand. The special act chartering the institution which is concerned in the present application does not confer upon that corporation any power to establish or maintain branch offices.

The general legislation to which reference has been made has, however, been construed by former Attorneys General in a series of opinions rendered to you and to your predecessors in the Banking Department of the Commonwealth, beginning in Attorney General's Reports 1891-92, page 2, where banks of deposit were held to be limited to one place for doing business, and ending in 1924 (13 Pa. Corp. Rep. 127, 159), when it was ruled that the Act of 1917, *supra*, was intended to give to banks of discount and deposit the same right in regard to establishing branches or subagencies as trust companies enjoy under the rulings of the Attorney General's Department, but the authority given is expressly confined to the city, borough or township in which their principal place of business is located.

The Act of 1917 is couched in language obviously taken from the opinions of Attorneys General prior thereto, which opinions applied the policy of the Commonwealth with reference to banking institutions to trust companies doing a quasi banking business. The opinions which this Department has rendered to your Department since the passage of the Act of 1917, *supra*, put trust companies on the same footing as banks of discount and deposit so far as the maintenance of branch offices is concerned and construe the Act in question as declaratory of the general historical policy of the State on that point.

The only other legislation to be considered is the Banking Act of June 15, 1923, which is silent on the point now under consideration, but does charge you with the duty of taking care that the laws of this Commonwealth in relation to banks and banking shall be faithfully executed and that the greatest safety to depositors and other interested persons shall be afforded. The laws of the Commonwealth relating to banks and banking have been held to permit the establishment and maintenance of suboffices and subagencies by trust companies, savings banks and banks of discount and deposit, provided the purposes of such suboffices or subagencies are restricted to receiving and paying out money, and also provided that such suboffices and subagencies are located in the same city, borough or township as the principal office, as shown by the charters of the institutions which create such suboffices or subagencies, and that such suboffices and such subagencies at the close of each business day make full reports of their daily operations to the principal place of business and transfer the assets then on hand to the main offices of the institutions.

The fact that the charter of the institution which is concerned in the present inquiry is silent on the subject of branch offices does not prevent the particular transaction which is proposed to be carried out. The Banking Act of June 15, 1923, must be taken as at

once supplementing and yet limiting the powers of the institution in question so far as branch offices are concerned. It authorizes you to permit the establishment and maintenance of suboffices and subagencies for the restricted purposes above enumerated within the limits of the city, borough, or township where the main place of business of the institution in question is located, yet also places the conduct and management of such suboffices and subagencies under your control to the same extent that the conduct and management of the main office of the corporation are placed.

You are therefore advised that there is nothing in the law to prevent the particular bank which has brought forward the question which has been discussed in this opinion from acquiring a trust company which is located in the same city, borough, or township as itself and from hereafter carrying on business at the location of the trust company as a suboffice or subagency of its main or principal place of business, both the main place of business and the suboffice or subagency being subject to the supervision and control of your Department, as provided in the Banking Act of June 15, 1923.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

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*Banks and Banking—Secretary of Banking—Authority to bring suit against a specially secured depositor in a failed trust company to recover certain bonds pledged by that company to the depositor—Acts of 1901, P. L. 404 and 1923, P. L. 809.*

The Act of 1901, *supra*, applies to the proceeding instituted by the Secretary of Banking against a specially secured depositor in a failed trust company to recover certain bonds pledged by that company to the depositor within four months prior to the date when the Secretary took possession of the property of the trust company.

Department of Justice,  
Harrisburg, Pa., August 30, 1926.

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

Sir: I have before me your letter of August 26, 1926, requesting an opinion as to whether or not the Act of June 4, 1901, P. L. 404 "Relating to insolvency; embracing, among other matters, voluntary assignments for the benefit of creditors; and adverse proceedings in insolvency by creditors; forbidding, also, certain preferences; providing for the distribution of the insolvent's estate, and in certain contingencies relieving him, and others liable with him, from

further liability for his or their debts" can be applied in a case where you have brought suit against a specially secured depositor in a failed trust company to recover certain bonds pledged by that trust company to that depositor within four months prior to the date when you took possession of the trust company.

The particular points on which you desire to be advised will be answered in the order in which you have stated them.

(1) The Act of June 4, 1901, *supra*, authorizes you as Secretary of Banking to maintain a bill in equity to have the pledge above described declared to be for the benefit of all the creditors of the trust company, even though you are in possession of its business and property by virtue of the Banking Act of 1923. Section 17 of the Act of June 4, 1901, in describing the powers of a receiver in insolvency, provides:

"He may, by bill of discovery or other legal or equitable proceeding, obtain information of, and sue for and recover, in his own name as such assignee or receiver, any assets which the insolvent might sue for and recover or which any of his creditors might make available in payment of their claims; and any recovery had shall insure to the benefit of all, in proportion to their respective demands."

(2) The Act of 1901 confers upon an assignee or receiver for the benefit of the creditors of an insolvent some of the powers of a receiver appointed by the court of equity, and particularly confers the power which has enabled you to endeavor to set aside the pledge which the trust company whose business and property is in your possession, made of its bonds in favor of a particular depositor.

(3) The title of the Act of 1901 does not in terms include a proceeding in which the Secretary of Banking takes possession of an insolvent trust company under the Banking Act of 1923, but it does not exclude such a proceeding nor fail to give notice that such a proceeding might be resorted to.

The Act of 1901 and the Banking Act of 1923 are consistent with each other and are to be read together, particularly because the earlier Act is effective only in fields where the National Bankruptcy Act does not operate, such as the dissolution and liquidation of insolvent banks and banking institutions.

As a specific and conclusive answer to your third point, I call your attention to the language of a portion of Section 35 of the Banking Act of 1923, which is the section dealing with actions and suits by and against the Secretary of Banking. The particular language to which I refer is as follows:

"He may, by bill of discovery or other legal or equitable proceeding, obtain information of, and sue for and

recover any assets, debts, or damages which such corporation or person might sue for and recover, or which any of the creditors might make available for the payment of their claims."

This language is so strikingly similar to that which has heretofore been quoted from Section 17 of the Insolvency Act of June 4, 1901, as to remove any possible doubt as to your right to resort to the Act of 1901 as a basis for the suit about which you are inquiring.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

*Corporations—Trust companies—Credit to State highway contractors—Recommendations to State Highway Department.*

1. It is improper for trust companies to address communications to the State Highway Department to the effect that they stand ready to extend credit to highway contractors so that they may complete their work.

2. Such letters are offers to assume risks that no Pennsylvania bank or trust company should assume.

3. The Secretary of Banking has ample authority to require banks or trust companies to desist from writing such communications, even if their only intent is to express confidence in the financial ability of the contractors in question.

Department of Justice,  
Harrisburg, Pa., August 30, 1926.

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

Sir: You have requested an opinion as to your authority and duty with regard to a practice which has sprung up among banks and trust companies in Pennsylvania, whereby such institutions undertake to extend credit to contractors to whom the State Department of Highways awards contracts covering the construction of Sections of State Highways. The usual way in which this arrangement is made is for the bank or trust company to write to the State Department of Highways a letter in substantially the following form:

"Gentlemen: We understand that you are about to award a contract to ..... covering the construction of a Section of State highway on Route No. ...., Township ....., County. "In the prosecution of the above referred to project our institution stands ready, if necessary, to extend to this firm a line of credit to complete the work."

Such letters are imprudent, as they readily create the impression that the institutions whose officers write them are willing to take risks that no Pennsylvania bank or trust company should assume if the safety of its depositors is to be foremost in its policy.

In the course of your supervision of banks and trust companies you have on more than one occasion found that the capital of such institutions has been impaired because of the completion of such work after the contractor has failed to do so. In those instances of impairment it was necessary for the directors of the institutions involved personally to make good the impaired capital.

The situation which you present is one which should be approached in the light of the duty which is laid upon you in the Banking Act of 1923, P. L. 809.

“of taking care that the laws of this Commonwealth in relation thereto shall be faithfully executed and that the greatest safety to depositors therein or therewith, or other interested persons shall be afforded.”

And by that Act your supervisory duties and powers are extended to apply to all banking, quasi banking and trust companies doing business in this State.

The real question involved in your inquiry is whether, in view of the legislation just recited, you may refrain from ordering banks and trust companies which issue such letters as have been substantially set forth above to cease and desist from so doing.

While there is a marked difference, both in history and in functioning, between banks and trust companies.

“What they have in common is that they both receive deposits which they put out at interest so that dividends of profits may be earned for the shareholders.” *DeHaven vs. Pratt*, 223 Pa. 633-35.

Although banks are much more ancient than trust companies, it has been uniformly held that a bank cannot be an accommodation endorser or acceptor nor be surety for another in any business in which it is not interested, and can derive no profit; as for example, the guarantee of a building contract. *I Morse on Banks and Banking Sec. 65.*

In Pennsylvania under the Act of May 13, 1876, P. L. 161, the powers of State Banks with regard to loans are limited to

“all such powers as may be necessary to carry on the business of banking by loaning money, discounting, selling, buying, or negotiating promissory notes, drafts, coin and bullion bills of exchange, and all other written evidences of debt and specialties.”

The Act of 1876, with several supplements which do not affect the present inquiry, is still in force. It indicates the fundamental difference between banks and trust companies which has nowhere been better set forth than in *DeHaven v. Pratt*, *supra*, as follows:

“Banks deal primarily with merchants; trust companies with all classes without distinction. Banks loan on personal credit; trust companies on the security of pledged collaterals. Banks take the risk of the business success of mercantile enterprises, while trust companies incur only the risk of a decline in investment values. Banks actively promote commerce, while trust companies manage investments.”

Since it is money, not credit, that a bank is to lend, it is perfectly obvious that no bank falling under your supervisory powers has any authority, either express or implied, to issue any such letter as you have laid before this Department.

As to trust companies, it is to be remembered that in their present status these institutions have all originated and developed since 1874 when the present Constitution of Pennsylvania went into effect. Prior to that time there were a few corporations called trust companies granted by special Acts of Assembly, and such of these institutions as are still in existence are governed by their charters, subject to the ever growing police power of the Commonwealth. Since 1874 modern trust companies have developed as an off-shoot from title insurance companies, whose incorporation was first authorized in paragraph 29 of Section 19 of the General Corporation Act of 1874. By successive pieces of legislation beginning in 1861, and particularly including the Act of May 9, 1889, P. L. 169, such institutions have had their powers increased, but they have not been authorized to loan their credit to business enterprises.

Giving weights to the proper distinction between banks and trust companies, it is just as apparent that the latter are without lawful authority to pursue the practice which you have laid before this Department as are the banks and the banking companies that are under your supervision.

You are, therefore, advised that under the Banking Act of 1923, hereinbefore referred to, you have ample authority and power to require either banks, banking institutions or trust companies to abandon the practice of expressing their willingness to furnish credit to contractors with the State Highway Department in order that the work of those contractors may be carried out, even though such expressions are merely intended to express confidence in the contractors or to inform the Highway Department that the person,

firms or corporations with which it proposes to contract are solvent and entitled to credit.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

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*Bank Directors—Banking Institutions and Trust Companies—Vacancies temporarily filled—Election by stockholders—Number and qualifications—Acts of May 13, 1876, and February 19, 1926.*

The Act of February 19, 1926, P. L. 30, does not repeal Section 13 of the Act of May 13, 1876, P. L. 161, as to the manner in which vacancies in boards of directors of banks, banking corporations and trust companies may be filled; it does, however, supplement the last mentioned act by empowering the stockholders of such institutions to change the number of their directors from time to time so long as they annually elect at least five persons who are qualified to act as directors of their institutions.

Department of Justice  
Harrisburg, Pa., December 3, 1926.

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

Sir: Your communication of December 1, 1926 inquiring whether the Act of February 19th, 1926, P. L. 30, repeals in whole or in part, Section 13, of the Act of May 13, 1878, P. L. 161, has been received and carefully considered.

The Section of the Act of 1876 to which you refer provides that the directors of any banking company in Pennsylvania shall be elected annually and that any vacancies in the Board occurring between annual elections shall be filled by appointment by the remaining directors. The annual election of directors in such a banking institution must be the act of the stockholders; it is only by virtue of the language of said Section 13, under consideration that temporary vacancies in the Board may be filled by the remaining members thereof without the necessity of calling a special meeting of the stockholders to fill such a vacancy.

The Act of February 19, 1926 above mentioned, regulates the number of directors of banks, banking corporations and trust companies chartered under general or special laws of this Commonwealth. It accomplishes this purpose by fixing the minimum number of directors at five. It, however, permits the stockholders of banks, banking corporations and trust companies to have more directors than five and to change the number of directors which they desire, provided that there shall never be less than five members of the Board. This Act is silent on the subject of vacancies occurring

between elections of directors. It is, therefore, consistent with Section 13 of the Act of 1876 above referred to, so far as the method of filling vacancies is concerned. It permits such vacancies to be filled by the remaining members of the Board of Directors.

The powers of the stockholders with regard to membership in the Board of Directors are, however, specifically defined in this Act of 1926, which, to that extent, supersedes Section 13 of the Act of 1876. Those powers are to increase or diminish the number of directors from time to time at any regular annual meeting or any special meeting called for that purpose. This means that an institution governed by the Act in question which is managed, for instance, by a board consisting of seven members may either at the regular annual meeting or at a special meeting of the stockholders called for that purpose, increase the number of directors to any number desired or diminish it to not less than five; and this power to increase or diminish the number of directors cannot be delegated by the stockholders to the existing board of directors. If, after the stockholders have fixed the number of directors, there should occur a vacancy in the Board by any director ceasing to be the owner of the requisite amount of stock, or by becoming disqualified in another way, or by death, the remaining directors must fill the vacancy so caused; but the person or persons so appointed may only act until the next annual election which, as has been above stated, must be the Act of the stockholders themselves.

You are, therefore, advised that the Act of February 19, 1926 does not repeal Section 13 of the Act of May 13, 1876 as to the manner in which vacancies in boards of directors of banks, banking corporations and trust companies may be filled; it does, however, supplement the Act last mentioned by empowering the stockholders of such institutions to change the number of their directors from time to time so long as they annually select at least five persons who are qualified to act as directors of their institutions.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

*Banks and banking—Guaranteeing mortgages—Acts of May 13, 1876, and July 17, 1919.*

A bank chartered under the Act of May 13, 1876, P. L. 161, which, by virtue of the Act of July 17, 1919, P. L. 1032, has acquired the right to act in the same fiduciary capacities as a trust company and has added to its title the words "and trust company," has no power to guarantee the principal and interest of bonds secured by mortgages upon real estate which it sells to customers.

Department of Justice,  
Harrisburg, Pa., December 3, 1926.

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

Sir: You have requested an opinion as to whether a bank chartered under the Act of May 13, 1876, P. L. 161, which by virtue of the Act of July 17, 1919, P. L. 1032, has acquired the right to act in the same fiduciary capacities as a trust company, and has added to its title the words "and trust company," may lawfully guarantee the payment of the principal and interest of bonds secured by mortgages upon real estate which it sells to its customers. Trust companies clearly have that right by virtue of the Act of June 1, 1907, P. L. 382.

The Act last mentioned was one of a series of statutes which from time to time added to the powers and privileges of title insurance companies, so that those companies gradually became quite different from what they were conceived to be under the General Corporations law of 1874.

When, by the Act of July 17, 1919, banks were permitted to occupy the fiduciary positions that theretofore had been allowed to trust companies, all of the rights and privileges of trust companies were not bestowed upon banks. This was especially true with regard to the acquisition and disposition of bonds secured by mortgages of real estate. With regard to such securities, the rights of a bank are set forth in Section 1 of the Act of April 19, 1901, P. L. 79, which amends Section 8 of the Act of May 13, 1876, above referred to; under this amending Act it is lawful for a bank to purchase, hold and convey real estate as follows:

"First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith as security for debts.

"Third. Such as it shall purchase at sales under judgments, decrees or mortgages held by such corporation or shall purchase to secure debts due to said corporation."

There has since been no legislation widening the powers of banks with regard to the acquisition and disposition of mortgages of real estate which are security for bonds.

It is true that the Constitution of Pennsylvania, in Article XVI, Section 11, as amended November 2, 1920, authorizes and empowers the General Assembly "by general law to provide for the incorporation of banks and trust companies and to prescribe the powers thereof." In pursuance of that amendment, certain important legislation was enacted in the year 1923, and also at the Special Session of the Legislature in 1926; but no Act, passed since 1920, treats banks and trust companies alike with regard to the guaranteeing of the payment of the principal and interest of bonds secured by mortgages of real estate. It follows, therefore, that a bank which has complied with the provisions of the Act of 1919, above mentioned, so as to obtain the fiduciary powers of a trust company, and to embody in its title the words "trust company," may not issue such a guarantee. The effect of the Act of 1919 is simply to enable banks 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." The guaranteeing of bonds and mortgages by trust companies is not part of their fiduciary functions. Therefore, banks operating under the Act of 1919, do not possess the right and power to make such guarantees. The only way in which banks, whether or not they have acquired the rights and powers enumerated in the Act of 1919, may be enabled to guarantee mortgages is through legislation of the general character which is authorized by the amendment of November 2, 1920, to Article XVI, Section 11 of the Constitution.

You are, therefore, advised that it is within your province and power to cause any "bank and trust company" which is guaranteeing the payment of bonds secured by mortgages to cease and desist from that practice.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,

*Deputy Attorney General.*

*Banks and Trust Companies—Legal Investments—Certificates of Participation—Corporate and Individual Bonds—Fiduciaries Act of 1917, as Amended by Act of 1923.*

Banks and trust companies acting in a fiduciary capacity cannot lawfully invest trust funds in their possession in certificates of participation in guarantees of mortgages issued by corporations engaged in the business of executing and delivering such guarantees. They are not legal investments. The Fiduciaries Act of 1917 limits such investments to bonds of one or more individuals secured by mortgage on real estate situate within 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 a mortgage or deed of trust to a trustee for the benefit of all bondholders.

Department of Justice,  
Harrisburg, Pa., December 10, 1926.

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

Sir: You have requested advice as to whether banks or trust companies under your supervision, while acting in fiduciary capacities, may lawfully invest trust funds in their possession in certificates of participation in guarantees of mortgages issued by corporations engaged in the business of executing and delivering such guarantees. The answer to this question depends upon the proper construction of Section 41A of the Fiduciaries Act of June 7, 1917, P. L. 447, as amended by the Act of June 29, 1923, P. L. 955.

In an opinion which was rendered you on May 10, 1926 the history of the law relating to the investment of trust funds in mortgages was reviewed and you were advised that trust funds could not lawfully be invested in corporate bonds secured by mortgages on real estate, even when the bonds confer upon their holders direct rights of action against the mortgagees or the mortgaged premises. The Section of the Fiduciaries Act above mentioned was considered in that opinion and there was stated to apply only to individual mortgages securing bonds of the mortgagor. The amendment to that Section, so far as mortgage investments are concerned, was then held to have been adopted by the Legislature for the purpose of clarifying the kinds of mortgages in which fiduciaries might invest trust funds. That amendment authorizes the fiduciary to invest trust funds "in 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 a mortgage or deed of trust to a trustee for the benefit of all bondholders." It is obvious from this language that the mortgages in which trust funds may be invested are those which secure either a single bond or an issue of bonds, and that in the latter case the mortgage may be made to a trustee for the benefit of all bondholders. In either event the mortgage is regarded as collateral to the bond or bonds, the latter

representing the principal obligation of the mortgagor or mortgagors. Beyond the kinds of bonds thus described a fiduciary has no power or authority to invest trust funds. The investment of trust funds in the corporate guarantee of the payment of the principal and interest of a bond or bonds of the sorts above mentioned was not contemplated by the legislation under consideration. No fair construction of that legislation can justify the conclusion that trust funds may be invested in such guarantees. Indeed, such a construction might render the legislation entirely unconstitutional as contravening the prohibition of legislation authorizing fiduciaries to invest trust funds in the bonds of corporations.

While guarantees of the kind which you describe may be useful in assisting fiduciaries to manage the estates intrusted to them accurately and efficiently, they are in no sense legal investments, whether they cover an entire mortgage or relate only to a fractional interest therein.

You are therefore advised that it is within your province to require banks or trust companies under your supervision which have invested trust funds in certificates of participation in mortgage guarantees, or in such guarantees when undivided, to cease and desist from that practice.

Yours very truly,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

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OPINIONS TO THE SECRETARY OF THE  
COMMONWEALTH

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## OPINIONS TO THE SECRETARY OF THE COMMON-WEALTH

### *Secretary of the Commonwealth—Soldier's Bonus.*

Authority to advertise and submit to the vote of the people at the election of November 3, 1925, the proposed Soldier's Bonus amendment to the Constitution which was passed for the second time by the General Assembly in 1923. Article XVIII of the State Constitution; Section 4, Article IX of the same. Joint Resolution No. 5, 1923, P. L. 1121.

The Secretary of the Commonwealth should not advertise the proposed Soldier's Bonus amendment to the Constitution for three months before the election of November 3, 1925, nor submit it to the vote of the people at said election, unless ordered by the Court to do so.

Department of Justice,  
Harrisburg, Pa., March 31, 1925.

Honorable Clyde L. King, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: Upon request of Adjutant General Frank D. Beary you have asked the opinion of the Department of Justice on the following question:

"Should you, or should you not, advertise and submit to the vote of the people at the election of November 3, 1925 the Soldiers' Bonus (\$35,000,000) proposed amendment to the Constitution passed for the second time by the General Assembly at the Legislative session of 1923, and reported on page 1121 of the Session laws of 1923?"

On April 15, 1924 I gave you an opinion concerning your duty to submit this same proposed amendment at the election to be held November 4, 1924. In that opinion I called your attention to the fact that all the formalities required by Article XVIII of the Constitution, concerning the proposal of amendments to the Constitution, had been complied with including, particularly, an order of the Legislature in Section 2 of the Joint Resolution proposing the amendment prescribing that:

"Said proposed amendment shall be submitted to the qualified electors of the State at the general election to be held on the Tuesday next following the first Monday of November in the year 1924, for the purpose of deciding upon the approval and ratification, or the rejection of said amendment."

You were advised in that opinion that unless you were restrained by Court order, it was your duty to obey the specific direction of the Legislature quoted above. Consequently in answer to inquiry from interested taxpayers, you stated definitely that you would, unless restrained by Court order, submit said proposed amendment to the vote of the people at said election of November 4, 1924.

Thereupon, a Bill in Equity was filed in the Dauphin County Court to restrain you from carrying out the direction of the Legislature. The Dauphin County Court upheld your stand and dismissed the petition. The Petitioners appealed to the Supreme Court, which on July 8, 1924, reversed the lower Court and enjoined you from advertising, and submitting to the vote of the people, said proposed amendment. (Armstrong et al vs. Clyde L. King).

The Supreme Court resolved this question solely on the provision in Article XVIII of the Constitution which reads:

“But no amendment or amendments shall be submitted oftener than once in five years.”

The Supreme Court held that 1924 was an “untimely” year for submission, not being five years from the last “timely” submission to the people of a proposed Constitutional amendment. For that reason it did not pass upon any other of the questions discussed in the lower Court. This is unfortunate because it leaves us still confronted by the following serious situation:

If you advertise the proposed Soldiers’ Bonus Amendment in 1925, which I consider a “timely” election for the submission of Constitutional amendments based upon dictum in the Supreme Court decision in the Soldiers’ Bonus case, the advertisement should be of the Joint Resolution just as it passed the Legislature.

Said Joint Resolution states definitely that Section 4 of Article IX of the Constitution reads so that it permits a bond issue of “*fifty millions of dollars* for the purpose of improving and rebuilding the highways of the Commonwealth.”

This statement was true at the time it was passed by the Legislature but will be untrue if so advertised for three months prior to November 3, 1925, because Section 4, now reads \$100,000,000 for highways, instead of \$50,000,000 as the advertisement should state. The advertisement will also tell the people that they are to vote as to whether Section 4 shall, if the proposed amendment is adopted, permit only the issue of highway bonds “to the amount of *fifty millions of dollars* for the purpose of improving and rebuilding the highways of the Commonwealth.”

Also the ballot placed before the people will ask whether they desire, or do not desire, that the total bond issue for highway purposes shall be *fifty millions of dollars* instead of \$100,000,000 which the Constitution now permits. If they vote affirmatively a situation might result possibly contrary to the intent of the voters themselves and surely contrary to the desire of the Legislature in proposing this Constitutional amendment, namely:

1. The vote of the people might, by its own overwhelming force recognized in the decision of the Supreme Court on the validity of the last Highway Bond Constitutional Amendment, change the Con-

stitution from the \$100,000,000 provision for highway bonds now effective, to only "*fifty millions of dollars*", which latter sum had already been exhausted prior to the vote on the highway bond amendment in 1923.

2. Some, at least, of the people would be deceived by the advertisement and the ballot into the belief that they were voting to have the authorized highway bond issue remain as theretofore; because they would be told by the advertisement that Section 4 as existing at the time of the submission of the proposed amendment, provided for the same amount of Highway Bonds, as was allowed before the vote was taken.

In my opinion of April 15, 1924 I advised that, in view of the direct order of the Legislature that you must submit the proposed amendment at the November election in 1924, you should obey the order unless enjoined by the Courts, and "let the chips fall where they will." In the meantime, however, the legal situation has changed. The injunction of the Supreme Court set you free from the mandate of the Legislature. The Supreme Court did not substitute any other order with regard to the proposed Soldiers' Bonus Amendment. Therefore, you and the Department of Justice are free, as we were not prior to the Supreme Court decision of July 8, 1924, to consider *ab initio* the question as to whether you should submit this proposed Soldiers' Bonus Amendment at the election of November 3, 1925.

Under the circumstances, and being free from a direct mandate to submit, I advise you that you should not endanger the interests of the highway bond issue, and the improvement and rebuilding of the highways of the Commonwealth, which the people have already voted for, by advertising and submitting a proposed amendment which, if voted upon affirmatively, would on the face of it overthrow the will of the people as expressed in the highway bond amendment approved by them at the election of November 6, 1923.

The practical aspects of the matter, namely, the danger of deceiving the voters into doing what they otherwise would not desire to do, and the danger of upsetting bond issues and proposed bond issues and contracts for highway construction, is of great weight; but the advice that you should not submit the Soldiers' Bonus Amendment at the election of November 3, 1925, is further strengthened by the legal situation which may be expressed as follows:

1. The Supreme Court has said in the Highway Bond decision that under certain circumstances the affirmative vote of the majority of the people makes a Constitutional Amendment valid in spite of, at least, some irregularities.

2. There would be a much graver irregularity if this ruling of the Supreme Court could be stretched to make the proposed Soldiers' Bonus Amendment valid if voted upon by the people affirmatively and

thus change the total bond issue authorized for highway purposes from \$100,000,000 to \$50,000,000; because the Constitution would have been amended without the principal formalities required by Article XVIII, namely, (a) without the proposed amendment being voted upon affirmatively by even one session of the Legislature,—(b) without any advertisement after first passage by the Legislature of the proposed amendment,—and (c) without any action of the Legislature prescribing that it should be submitted at the election of November 3, 1925.

Therefore, for the reasons given above, I advise you that you should inform Adjutant General Beary in reply to his inquiry that, without any feeling of opposition or objection to the principle of the Soldiers' Bonus Amendment, you are constrained by this opinion from the Department of Justice to state that you will not advertise the proposed Soldiers' Bonus Amendment for three months before the election of November 3, 1925, nor submit it to the vote of the people at said election, unless you should be ordered to do so by the Court.

Yours very truly,  
DEPARTMENT OF JUSTICE,  
GEORGE W. WOODRUFF,  
*Attorney General.*

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*Corporations—Charter amendments—Application to the Governor—Acts of April 29, 1874, and June 13, 1883, P. L. 122.*

1. An application to the Governor to amend a charter will not be granted where it is sought to write into the charter provisions not required or specifically authorized to be inserted therein by section 3 or any other section of the Act of April 29, 1874, P. L. 73, and its supplements, or by any other act of assembly.

2. The Governor should not be called upon to approve or disapprove matters of corporate policy involving questions of law.

Department of Justice,  
Harrisburg, Pa., August 14, 1925.

Honorable Clyde L. King, Secretary of the Commonwealth, Harrisburg, Penna.

Sir: This Department is in receipt of your letter of August 11th, enclosing Certificate for Amendment of Charter of J. H. and C. K. Eagle, Incorporated. You inquire whether the proposed amendment is of such a character as is comprehended by the Act of June 13, 1883, P. L. 122, as amended, and should be submitted to the Governor for his approval.

The only question which can confront us is whether the corporation has chosen the proper method of adopting provisions prohibiting the creation of certain future obligations or the authorization of any additional class or classes of capital stock without first obtaining the consent of eighty-five per cent of the stockholders entitled to vote.

The answer to this question, in my opinion, depends entirely upon—

(a) Whether these provisions would have been proper matters for inclusion originally in the application for charter.

(b) Whether, if they were not or could not have been originally included in the charter, they may now be inserted by a proceeding in amendment of charter.

Briefly stated, it is sought in the proposed proceeding to write into the charter certain provisions not required or specifically authorized to be inserted therein by Section 3 or any other section of the General Corporation Act of April 29, 1874, and its supplements, or by any other Act of Assembly.

(a) Let us first inquire whether these would have been proper charter provisions. In the first reported opinion on this subject, after the passage of the General Corporation Act of April 29, 1874, we find Attorney General Dimmick advising the Secretary of the Commonwealth, under date of February 26, 1875, Reports of the Attorney General, 1895-1896, page 313, as follows:

“The certificate presented for the incorporation of ‘The Mechanics’ Saving Fund and Building Association of Pottsville’, is irregular and ought not, in my opinion, to be approved, because it contains unnecessary and irrelevant matters.

“It not merely sets forth all that section third of the act of 29 April, 1874, requires, but it further states that in accordance with section seventeen of that act, the association has purchased certain real estate and, in payment of it, has issued a number of shares of full paid stock.

“Even if it were not a matter of doubt whether the provisions of this latter section applied to corporations of this character, it is very plain that His Excellency the Governor ought not to be called upon to sanction or disapprove of such transactions.

“His duty in examining certificates is merely *to see if they conform to the conditions upon which corporate franchises are granted, and certificates ought not to set forth more than is necessary to enable him to discharge that duty.*”

In Formation and Regulation of Corporations in Pennsylvania, by Meredith and Tate, pages 217, 218, we find that on March 29, 1882, Attorney General Palmer advised the Secretary of the Commonwealth as follows:

“I am of opinion that nothing ought to appear in the certificate of incorporation but the *essential requisites designated in the third section* of the act of Assembly, and that the executive is bound to do nothing more than pass upon the formality of the papers.”

In an opinion by Attorney General Kirkpatrick, dated April 10, 1889, reported in 6 Pa. C. C. 575-578, he says:

"According to a ruling of one of my predecessors in this department, the duty of the Governor in examining certificates is merely to see that they conform to the conditions upon which corporate franchises are granted. It was further therein aptly suggested that a certificate ought not to set forth more than is necessary to enable him to discharge that duty, and that an application was irregular and ought not to be approved which contained irrelevant matter, and the Governor ought not to be called upon to sanction or disapprove transactions indicated by such recitals: Meredith & Tate's Corporations, p. 116. Without determining how far the opinion referred to, so far as it applied to the particular case then in hand, is in harmony with recent views, the principle thus generally stated is certainly to be commended. I think that the certificate would be proper and free from difficulty if the purpose stated were amended, as already suggested, and this last statement as to the purpose of said corporation to take coal and other lands, etc., in payment on stock, stricken out.

"It may be true that the recital above objected to would not invalidate the charter, and the same might be regarded as a mere surplusage, yet it is desirable to secure exact compliance with the requirements of the corporation Act in the framing of the certificate upon which the letters-patent are to issue, and *to preserve simplicity of statement uncomplicated with recitals which, if encouraged or permitted, might be productive of difficulty and doubt in passing upon the sufficiency and regularity of the application.* For that reason, if for no other, I would advise that the certificate be required to be *confined to such statements only as are prescribed by the Act as the prerequisite to the granting of a charter, and that all other matter, whatever may be the purpose sought to be subserved thereby, be required to be stricken out or omitted.*"

Thus the uniform practice has been to allow as articles and conditions of a charter, merely those specified in Section 3 of the said Act of 1874, and such others only as may be specifically authorized by statute.

(b) Let us now see whether, if such provisions were not or could not have been originally included in the charter, they may now be inserted by means of a proceeding in amendment of charter.

The answer to this question depends entirely upon whether these provisions were proper matters for inclusion originally in the application for charter, for it certainly cannot be contended that a corporation may accomplish by amending its charter something which could not originally have been done in its Certificate of Incorporation. To hold otherwise would result in permitting a corporation

to do in two steps that which it could not properly do in one, and as regards the improvement, alteration and amendment of charters, that clearly was not the intention of the Legislature in passing the so-called Corporation Amendment Act. See opinion of Attorney General Carson, under date of March 16, 1906, in re *Pennsylvania Stave Co.*, 32 Pa. C. C. 347.

The language of Attorney General Cassidy in an opinion rendered to the Secretary of the Commonwealth, September 28, 1883, Reports of the Attorney General, 1895-1896, pages 393-395, is of special interest in this connection:

"It (amendment) necessarily implies something upon which the correction, alteration, improvement or reformation can operate, something to be reformed, corrected, rectified, altered or improved. In other words, that which is proposed as an amendment must be germane or relate to the thing to be amended. In respect to the amendment of a charter of incorporation, the amendment must relate to the charter as *originally granted* and if it does not correct, improve, reform, rectify or alter *something in the original charter*, it is not properly speaking an amendment to that charter.

"\* \* \* *It does not pretend to alter in any proper sense any article or condition in the original charter, and if not it cannot be said to be such an alteration as is contemplated by the act.*"

In the instant case, it is not proposed to correct or reform any article or condition in the original Certificate of Incorporation or to insert any provision specifically authorized by statute to be written into charters.

That an amendment proceeding can apply only to an article or condition of the original charter, or to a provision specifically authorized by statute to be inserted in the charter, is further shown in the two opinions which follow:

(1) Prior to the passage of the Change of Name Act of April 22, 1903, Attorney General Kirkpatrick held that the said Corporation Amendment Act of 1883 applied to and authorized a change in corporate title for the following reasons (3 Pa. C. C. 184):

"Section 3 of the Corporation Act of 1874 provides that the charter shall specify in seven distinct paragraphs, numbered from one to seven inclusive, as many distinct things; the first of which is the name of the corporation.

"The corporation Amendment Act of 1883 authorizes the improvement, amendment, or alteration of such a charter. *The name of the corporation is a necessary part of its charter*, without which it can no more exist than it can exist without officers, corporate succession, or any other property essential to its nature. The name

is an indispensable part of the constitution of every corporation, the knot of its combination, as it has been called, without which it cannot perform its corporate functions.

*"This name is conferred by the charter, and cannot be changed without an alteration of the charter, and I am of opinion that a general power to alter or amend a charter is a power to alter or amend any part of the charter, and necessarily includes the power to alter the name which is a part of the charter. Fidelity Mutual Aid Association, 12 W. N. C. 269."*

Here the reasoning was put squarely on the ground that the first of the seven prescribed articles in the Certificate of Incorporation provided for the inclusion of the corporate title. The proceeding thus properly amended or altered an article of the charter, which is not the fact in the instant case.

(2) The opinion of Attorney General Carson upon the Pennsylvania Stave Co. application, *supra*, which, I understand the applicant relies upon principally in support of the present proceeding, decided that the charter of a manufacturing corporation might be so amended as to empower the directors to sell or release the real estate of the company without the consent of a majority of the stock in value consenting or agreeing thereto. It is easily seen that this opinion furnishes no precedent upon the facts in the instant case, and that there is a total lack of analogy, when we examine the reasons upon which it is based (32 Pa. C. C. 347, 349):

*"It must be borne in mind that, under clause XII of Section 39 of the Act of April 29, 1874, under which the company was chartered, relating to mechanical, mining, manufacturing and other corporations, P. L. 1874, p. 103, 'any such corporation may, from time to time, acquire and dispose of real estate, and may construct, have or otherwise dispose of dwellings and other buildings; but no power to sell or release the real estate of such corporation shall be exercised by the directors thereof, unless such power be expressly given in the certificates originally filed, without a consent of the majority of the stock in value consenting and agreeing to such sale or lease before making the same,' etc. Hence the power to sell or release real estate already belongs to the corporation. The amendment does not seek to confer it, but, as the charter did not confer this power, as it might have done, upon the directors, the application for the amendment is for the addition of a clause to the charter, which shall give to the directors the power to sell and release real estate without the consent of a majority of the stock before making the sale. \* \* \* The method sought by the amendment is one recognized by the Act and might have been had at the outstart."*

Thus the Pennsylvania Stave Co. was accomplishing by amendment only what it was specifically authorized by statute to do in its charter originally. It cannot, therefore, be too strongly emphasized at this point that the Pennsylvania Stave Co. having been formed as a manufacturing corporation under the provisions of paragraph 18, Section 2, of the General Corporation Act of 1874, could, under clause 12 of Section 39 of that Act, *provided in its charter* that the power to sell or release real estate shall be exercised by the directors. However, it has been expressly decided that in the case of corporations which are not empowered to insert such provisions *in their charters* in the first instance *they may not do so by amendment*. *In re Duquesne Brewing Co.*, 29 Pa. C. C. 463.

In an opinion by Whitworth, Corporation Deputy, dated October 1, 1903, reported in *Opinions Corporations, 1903-1912*, by Whitworth, page 7, after reciting the seven articles and conditions of the charter required to be set forth by section 3 of the General Corporation Act of 1874, it is stated:

"Under certain conditions, other articles and conditions of a special character may be included in a charter, such as an article giving power to directors to sell, lease or release real estate, and a provision as to the by-laws. (Authorization for inserting the former provision is found in Clause 12 Section 39, and for the latter, in Section 5 of the said Act of 1874.)

"It is to be observed here that the amendment, improvement or alteration is not of the charter, but of some article or condition in the charter, *and the Act does not authorize the charter contract to be changed by the insertion therein of an entirely new article or condition, unless it could have been legally inserted in the charter at the time of incorporation.*"

In the instant case no article or condition of the charter is sought to be amended, and no statute specifically authorizes the inclusion of such provisions in the charter, originally or by way of amendment. The provisions have to do with matters of corporate policy and involve questions of law which the Governor should not be called upon to approve or disapprove. Nor is there anything peculiar to the adoption of such a provision which makes necessary the Executive approval. The question here involved is by no means a novel one. Applications for similar amendments have been uniformly refused under numerous opinions of Attorneys General and the practice of the Department of the Secretary of the Commonwealth covering a period of forty years. The applicant has an easy and adequate method of adopting such a provision by means of an amendment to its by-laws.

I, therefore, advise you that this amendment proceeding is not of such a character as is comprehended by the Corporation Amendment Act of 1883 and should not be submitted to the Governor for approval.

Yours very truly,

DEPARTMENT OF JUSTICE,

LEON D. METZGER,

*Assistant Deputy Attorney General.*

*Notaries public—Recess appointments—Confirmation by Senate—Special session—  
Date of lifting commissions and filing bonds—Acts of April 14, 1840, P. L. 334,  
and April 4, 1901, P. L. 70.*

Notaries public who have been appointed during a recess and whose appointments have been confirmed by a special session of the Senate have, under the Act of April 14, 1840, P. L. 334, at least the space of thirty days after their confirmation to lift their commissions and file their bonds.

Department of Justice,

Harrisburg, Pa., February 16, 1926.

Mr. G. H. Hassler, Chief, Commission Bureau, Harrisburg, Pa.

Sir: You asked for an opinion as to the exact time within which notaries appointed during the recess of the Senate and confirmed by this Special Session of 1926 must lift their commissions and file their bonds.

Section one of the Act of April 4, 1901, P. L. 70 provides as follows:

“From and after the passage of this Act notaries public appointed by the Governor during the recess of the Senate, shall each receive a commission which shall expire at the end of the next session of the Senate.”

Section two of said Act provides as follows:

“When notaries public appointed by the Governor during the session of the Senate, and those appointed under the provisions of the first section of this act are duly confirmed by the Senate, they shall each be entitled to receive a commission for the term of four (4) years, to be computed from the date of such confirmation.”

Section three of the Act of April 14, 1840, P. L. 334, however, provides that the commission of any notary thereafter appointed who for the space of thirty (30) days after his appointment neglects to give bond and cause the same and his commission and oath to be recorded shall be null and void.

In accordance with the ruling made by C. W. Stone, then Secretary of the Commonwealth, it was held that the thirty (30) days limitation applies only to original appointments and to re-appointments made after the expiration of a full term. This rule has been recognized by your Department for more than thirty-five (35) years, and allows commissions issued during the recess of the Senate, when confirmed, to be lifted and the full term bonds filed any time before the final adjournment of the Senate confirming the recess appoint-

ments. Notarial recess appointees are usually presented comparatively early in the long regular sessions of the Senate next succeeding the issuance of such recess commissions and are usually confirmed more than thirty (30) days before the final adjournment of the Senate. This gives notarial recess appointees when confirmed at least thirty (30) days within which to file the full term bonds and lift the full term commissions. But this Session of 1926 is a Special Session and because of the early adjournment of the Senate, determined for February 18th, creates a different situation by reducing the time to one day less than thirty (30) days.

It is possible for the Senate to delay confirmation until nearly the final adjournment and in such case it would be impossible for Senate employes to certify to your department a separate confirmation notice for each notary as is the custom, and for your Department to then prepare the commissions and bonds for the numerous confirmed notaries before the Senate adjourns. In such a case notaries would be out of commission before the new commissions could issue, thus making ineffective and inoperative the purpose of the Senate's action and rendering null and void all recommissions for recess appointees.

Because of the possibility of this situation the Act of April 14, 1840, P. L. 334, Section 3, is controlling. The Legislature by the passage of this act evidently intended that all notary appointees should have at least the space of thirty (30) days after appointment to qualify.

I am therefore of the opinion that all recess appointees should have the full thirty (30) days after confirmation (which is the date of appointment) in which to file the four (4) year bond and lift their four year commissions. The date of the confirmation during the present session was January 20th. I am therefore of the opinion that the last day in which to file the four year bond and lift the four year commission and otherwise qualify, in this case, is February 19th, 1926. All confirmation recess commissions not lifted on or before that date will thereafter become null and void.

Yours very truly,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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**OPINION TO THE DELAWARE RIVER BRIDGE  
JOINT COMMISSION**

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## OPINION TO THE DELAWARE RIVER BRIDGE JOINT COMMISSION

*Delaware River Bridge Joint Commission—Authority of the Pennsylvania members of the Commission in connection with the establishment of tolls for the use of the Philadelphia-Camden Bridge—Acts of May 14, 1925, P. L. 737, July 9, 1919, P. L. 814, July 13, 1923, P. L. 1093.*

The Pennsylvania members of the Delaware River Bridge Joint Commission have no power or authority to take any part whatever in the consideration of the question whether or not tolls shall be charged by the State of New Jersey for pedestrian or private vehicular traffic across the bridge; they may, however, join with the representatives of New Jersey in negotiating and executing contracts or leases for the use of the bridge by public utility corporations.

Department of Justice,  
Harrisburg, Pa., June 26, 1925.

Delaware River Bridge Joint Commission, 640 Widener Building,  
Philadelphia, Pennsylvania.

Sirs: This Department has before it your Resolution adopted June 19, 1925, referring to the legal advisers of the Joint Commission the opinion of Honorable Joseph P. Gaffney, City Solicitor of Philadelphia, rendered to the Mayor of Philadelphia, on June 17, 1925.

We shall discuss the subject matter of Mr. Gaffney's opinion only to the extent of answering the question: What are the powers and duties of the Pennsylvania members of the Delaware River Bridge Joint Commission in connection with the establishment of tolls for the use of the Philadelphia-Camden Bridge by pedestrians, private vehicles, public vehicles and other facilities? We shall thus limit our discussion (1) because we assume that you are not concerned with the question whether tolls shall be charged for the use of the Bridge except as that question may come before you officially; and (2) because we feel that the New Jersey members of the Commission should, and doubtless will, be advised respecting their powers and duties under the statutes of New Jersey by the Attorney General of that State.

The original Pennsylvania legislation authorizing the creation of a "Pennsylvania Commission" to act in conjunction with the New Jersey Interstate Bridge and Tunnel Commission as a Joint Commission for the Commonwealth of Pennsylvania and the State of New Jersey to construct the Philadelphia-Camden Bridge was the Act of July 9, 1919, P. L. 814. That Act gave to the Pennsylvania Commission and the Joint Commission the power and authority necessary to enable land for the Pennsylvania approaches to be acquired and the Bridge proper constructed. The Act contained no provisions whatever with regard to the operation or maintenance of the Bridge except that Section 11 thereof provided that upon the completion of

the Bridge it should be turned over by the Joint Commission to the City of Philadelphia and such agency as should be designated by the State of New Jersey "by whom the same shall be maintained."

Clearly the Act of 1919 could not possibly be construed as giving to the Pennsylvania members of the Joint Commission acting independently or in conjunction with the New Jersey members authority to establish tolls for the use of the Bridge by pedestrians, private vehicles or public service corporations.

By the Act of July 13, 1923, P. L. 1093 the Pennsylvania Legislature gave its sanction to the equipment of the Bridge for carrying the rails, tracks or other appliances or facilities of public utilities for the transportation of passengers and freight across the bridge and to the installation, maintenance and operation on the Bridge of telegraph, telephone, electric light or power or other public service facilities. The Joint Commission so far as Pennsylvania is concerned was authorized either to operate facilities of the various kinds mentioned or to enter into leases or other contracts with public service corporations, companies, firms or individuals for this purpose. The Act specifically provided that in connection with any such contracts or leases the Joint Commission should have the power and authority "to fix, collect and receive suitable charges, rates or tolls for the leasing, operation, use or maintenance of any of the facilities comprehended within the provisions of this Act."

The Act of 1923 did not give to the Pennsylvania members of the Commission any authority to establish tolls for pedestrians or private vehicles. Nor did the Act of 1923 grant to the Pennsylvania members of the Joint Commission any power whatsoever in connection with the operation of the Bridge.

Finally, by Act No. 402 of the 1925 Session approved by the Governor on May 14th, our Legislature provided that upon the substantial completion of the bridge it shall be turned over by the Delaware River Joint Commission to a Board of Bridge Control representing the Commonwealth of Pennsylvania and the City of Philadelphia and such agency or agencies as shall be named and designated by the State of New Jersey by which bodies acting jointly the Bridge shall be controlled, managed, and maintained. Upon this joint body the Legislature conferred all of the powers which the Act of July 13, 1923 conferred upon the Delaware River Bridge Joint Commission so that the Board of Bridge Control will have the same powers to enter into leases or contracts for the use of the Bridge by public utility companies upon a pay basis as the Delaware River Bridge Joint Commission now has and will continue to have until the Bridge shall have been substantially completed and turned over to the Board of Bridge Control. The Act of 1923 makes specific reference to the matter of

establishing tolls for the use of the Bridge by pedestrians and private vehicles. Section 2 thereof contains the following proviso:

"That no tolls, fees, fares or other charges for persons or private vehicles, animal or power drawn or by any other means of private transportation shall ever be fixed, established, charged or collected for the use or benefit of the Commonwealth of Pennsylvania or the City of Philadelphia or in relief of its share or part of the cost of maintaining said bridge, to the end that the use and enjoyment of the said bridge shall remain forever free and open to the people and the traveling public."

This is the first statutory provision in our legislation dealing specifically with the subject of tolls for persons or private vehicles; and it specifically prohibits the establishment of such tolls for the use or benefit of this Commonwealth or of the City of Philadelphia. It is clear that neither the Act of 1919, the Act of 1923 nor the Act of 1925 confers any authority upon the Pennsylvania members of the Joint Commission to enter into any agreement with the representatives of the State of New Jersey for the establishment of tolls to be charged for the travel across the Bridge of pedestrians or private vehicles. If New Jersey can lawfully establish tolls to be collected at its end of the Bridge (a question upon which we express no opinion at the present time) it must establish such tolls without the concurrence or agreement of the Pennsylvania members of the Joint Commission.

Accordingly you are advised that the Pennsylvania members of the Delaware River Bridge Joint Commission have no power or authority to take any part whatever in the consideration of the question whether tolls shall be charged by the State of New Jersey for foot or private vehicular traffic across the Bridge. They may, however, join with the representatives of New Jersey in negotiating and executing contracts or leases for the use of the Bridge by public utility corporations, such leases to provide for compensation to be paid to the owners of the Bridge.

There is a definite agreement between the Commonwealth of Pennsylvania and the State of New Jersey for the construction of the Philadelphia-Camden Bridge. There is no agreement and there has never been any agreement with reference to the establishment and collection of tolls for foot and private vehicular traffic. Without further action by the Pennsylvania Legislature an agreement on the question of tolls for traffic of this character cannot lawfully be made, for as we have already pointed out the Pennsylvania members of the Joint Commission have no power or authority to take any action whatever on this question.

Very truly yours,  
DEPARTMENT OF JUSTICE,  
GEORGE W. WOODRUFF,  
*Attorney General.*

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**OPINIONS TO THE BOARD OF FINANCE AND  
REVENUE**

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## OPINIONS TO THE BOARD OF FINANCE AND REVENUE

*Taxation—Inheritance tax mistakenly paid—Reimbursement—Acts of March 30, 1811, 5 Sm. Laws, 228, April 8, 1869, P. L. 19, June 12, 1878, P. L. 206, June 9, 1911, P. L. 738, June 20, 1919, P. L. 521, and June 7, 1923, P. L. 498.*

1. Prior to the passage of the Act of June 7, 1923, P. L. 498, a refund of inheritance taxes mistakenly paid could not, under any act of assembly, be granted upon application made more than two years after date of payment of the tax, except in those special cases provided for in section 40 of the Act of June 20, 1919, P. L. 521.

2. Where an inheritance tax has been paid on real estate mistakenly included in the estate of a decedent, and no demand for reimbursement has been made until over three years after discovery of the mistake, no reimbursement can be allowed under the Act of June 7, 1923, P. L. 498.

3. The power of the Board of Finance and Revenue, under paragraph (b) of the Act of 1923, to "revise any settlement made...by the Auditor General or any other agency of the State government charged with the settlement of State taxes," does not apply to the collection of an inheritance tax by a register of wills appraised by appraisers duly appointed.

4. The word "settlement," in its technical sense, cannot be considered as synonymous with the word "appraisement," as used in the Act of June 20, 1919, P. L. 521.

5. The word "settlement," as construed by the courts and understood in prevailing practice, means an adjustment or determination of an amount.

Department of Justice,  
Harrisburg, Pa., March 5, 1925.

Honorable Clyde L. King, Secretary, Board of Finance and Revenue,  
Harrisburg, Pa.

In re Estate of Horatio B. Koch, deceased. Petition for refund of Transfer Inheritance Tax erroneously paid.

Dear Sir Replying to your inquiry concerning whether or not the Board of Finance and Revenue has the authority to grant a refund for certain transfer inheritance taxes alleged to have been erroneously assessed and paid in re Estate of Horatio B. Koch, deceased, permit me to advise you as follows:

It appears that Horatio B. Koch died September 29, 1920; that the State transfer inheritance tax was paid to the Register of Wills of Lehigh County, December 23, 1920, in which was included tax on certain real estate then supposed to have been owned by the decedent, but which it is now alleged was in fact owned by another.

The discovery of this alleged error was not made until, possibly, May 1, 1924, three years and four months after the date of payment.

More than two years having elapsed since the date of the payment of the tax and there being no question of an overvaluation by reason of the estate having consisted in whole or in part of a partner-

ship or other interest of uncertain value or having been involved in litigation, no question arises which calls for a consideration of the provisions of Section 40 of the Act of June 20, 1919, P. L. 521. The scope of this section has been considered in an opinion rendered to the State Treasurer by Deputy Attorney General John Robert Jones, under date of July 28, 1924, in the Estate of John B. Steele, deceased.

The only question is whether or not the Board of Finance and Revenue created by Section 1102 of Article XI of the Act of June 7, 1923, P. L. 498, 551, known as the "Administrative Code", has authority to consider the claim, and if valid, direct a refund of the amount of tax from the State Treasury. Paragraphs (a) and (b) of said section state that said Board shall have the power, and it shall be its duty:

"(a) To continue to exercise the powers by law, vested in and imposed upon the Board created by the Act, approved the eighth day of April, one thousand eight hundred and sixty-nine, entitled, 'An Act relating to the settlement of public accounts,' its amendments and supplements, the Board of Public Accounts, the Board of Revenue Commissioners, and the Sinking Fund Commission;

•  
Re-Settlements.

(b) To revise any settlement made with any person or body politic by the Auditor General or with any other agency of the State Government charged with the settlement of State taxes, when it may appear from the accounts or from other information that the same has been erroneously or illegally made, and to resettle the same according to law and to credit or charge, as the case may be, the account of such person or body politic."

The Act of April 8, 1869, P. L. 19, creating the said Board of Public Accounts, reads as follows:

"An Act

"Relating to the settlement of Public Accounts.

"Section 1. Be it enacted, etc., 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 erroneously 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."

To this Act the supplementary Act of June 9, 1911, P. L. 738, was subsequently passed, which, however, has no bearing upon the case in point.

The Act of June 12, 1878, P. L. 206, authorizing the State Treasurer to refund collateral inheritance taxes erroneously paid, upon application made within two years, was in all respects, so far as the question here involved is concerned, substantially the same as said Section 40 of the Act of June 20, 1919, and in an opinion by Henry C. McCormick, Attorney General, under date of January 14, 1899, to the then State Treasurer, he advised in part as follows:

“\* \* \* I advise you that the application for repayment of the collateral inheritance tax, paid erroneously into the State Treasury, cannot under any Act of Assembly be repaid to you. Repeating what I said to Hon S. M. Jackson, State Treasurer, in letter from this Department, dated June 6, 1895, and now before me: ‘I regret to say that the only legal authority vested in the State Treasurer to repay tax erroneously paid to the Commonwealth is by the Act of June 12th, 1878, and that, by a proviso contained in said Act, all applications for re-payment of tax erroneously paid into the Treasury must be made within two years from the date of payment. I reach this conclusion because of the imperative words of the statute.’ It has been made perfectly clear to me that this estate, as it was finally settled, paid several thousand dollars more tax than that to which the Commonwealth was entitled, but as the law now stands the only remedy is through an act of Assembly passed appropriating the money.”

See also the following opinions of Attorneys General to the same effect: *In re Estate of Franklin Mathias, deceased, 1895-96, P. 78—McClure's Estate, 37 Pa. C. C. 529.*

It is clear, therefore, that prior to the passage of the Administrative Code in 1923, opinion was well settled to the effect that refund of such taxes erroneously paid could not “*under any act of assembly*” be granted upon application made more than two years after date of payment of the tax, except in those special cases provided for in said Section 40 of the Act of June 20, 1919, which, as hereinbefore stated, have no application here.

The said Act of April 8, 1869, P. L. 19, creating the said Board of Public Accounts authorized it to “*revise any settlement made \* \* \* by the Auditor General.*” By paragraph (b) of the Act of June 7, 1923, the power of the Board of Finance and Revenue appears to be enlarged so that it may “*revise any settlement made \* \* \* by the Auditor General or any other agency of the State Government charged with the settlement of State taxes.*”

Webster's International Dictionary defines the word “settlement” as “the act or process of adjusting or determining; composure of doubts or differences; arrangement; adjustment; as *settlement* of a controversy, of *accounts*, etc.” The Act of March 30, 1811, 5 Smith's

Laws, Page 228, is entitled "An Act to amend and consolidate the several acts relating to the settlement of public accounts, etc.;" it consolidates the Acts relating to the settlement of public accounts and authorizes the Auditor General to examine and adjust the same according to law and equity; therein providing a procedure which is spoken of as a "settlement"; it seems to indicate that this term is used in the sense of *adjustment* or *determination* of an amount. In the case of Commonwealth of Pennsylvania vs. N. Y., Pa. & Ohio R. R. Co., reported in 188 Pa. State Reports, Page 178, Judge Simon-ton of the Dauphin County Court, whose decision was affirmed by the Supreme Court says:

"An 'account' or 'settlement' is a physical, tangible thing, a paper with figures and writing upon it, signed by the Auditor General and State Treasurer, indorsed, copied into a ledger and filed away in its appropriate place. Whether such a settlement has been made against a given corporation, for a tax of a given year, is therefore a question of fact, to be ascertained by looking in the proper place for the settlement."

The power and authority conferred upon the Board of Finance and Revenue must be strictly construed. Prior to the enactment of the Administrative Code, the authority of the Board extended only to the settlements made by the Auditor General. This authority was, by the Administrative Code, enlarged to cover *any settlement made \* \* \* by any other agency of the State Government charged with the settlement of State taxes*. The question then arises whether the Register of Wills, a County officer, charged by the Act of June 20, 1919, with certain duties in connection with the collection of the Transfer Inheritance Taxes, can be considered as an "agency of the State Government charged with the settlement of State taxes."

The following sections, or parts of sections, of the said Act of 1919 are of interest in this connection:

Section 21 provides that:

"The registers of wills, upon their filing with the Auditor General the bond hereinafter required, shall be the agents of the Commonwealth for the collection of the said tax \* \* \*".

Section 10 provides that:

"The register of wills \* \* \* shall appoint an appraiser, whenever occasion may require, to appraise the value of the property or estate \* \* \*. Such appraisers shall make a fair conscionable appraisement of such estates, and assess and fix the cash value of all annuities and life-estates, etc."

And Section 14 provides:

"The register of wills shall enter in a book to be pro-

vided for at the expense of the Commonwealth, which shall be a public record, the returns made by all appraisers appointed by him under the provisions of this act, opening an account in favor of the Commonwealth against each decedent's estate."

From the foregoing it does not appear that the register of wills is an "agency of the State Government charged with the settlement of State taxes," in the sense in which the word "settlement" has been construed by the Courts and is understood in prevailing practice: *Stratford vs. Franklin Paper Mills Company*, 257 Pa. 163. It cannot be assured that by the addition of words "or any other agency of the State government charged with the settlement of State taxes" in Section 1102 (b) of the Act of June 7, 1923, the Legislature intended to extend or place a new construction on the historically technical meaning of the word "settlement" as it is used in the aforesaid Act of March 30, 1811, its supplements and amendments and as it has always been understood in the office of the Auditor General in connection with the method of arriving at the amount of tax imposed upon certain taxables by that official. The word "settlement" in this technical sense can not be considered as synonymous with the word "appraisement" as used in the Act of June 20, 1919. Under this latter Act the appraiser ordinarily appointed makes the appraisement and the Register of Wills simply acts as the agent of the Commonwealth in the capacity of a collector with certain wide powers conferred by the Act. *Warden's Estate*, 43, Pa. C. C. 333, *Luzerne County vs. Morgan* 263 Pa. 458.

Further, the Board of Finance and Revenue would have no authority to grant the request that a refund of the erroneous payment be made. Neither the original Act of 1869 nor the Administrative Code of 1923 gives the Board authority to do more than "revise" a settlement made and "to credit or charge" the account of such person or body politic.

I, therefore, advise you that neither the State Treasurer at this time, nor the Board of Finance and Revenue, has jurisdiction in this matter, nor authority to refund the tax erroneously paid.

The only remedy, if any, that I could suggest, would be for the applicants to obtain the passage of a refunding Act through the Legislature, including an appropriation therefor.

Very truly yours,

DEPARTMENT OF JUSTICE

GEORGE W. WOODRUFF,  
Attorney General.

*Corporations—Trust companies—Sureties for depositories of the Commonwealth—  
Act of May 16, 1923.*

1. Under the Act of May 16, 1923, P. L. 248, a trust company cannot act as surety on the bond of banks and trust companies which are required to file bonds in order to qualify to become depositories of the money of the Commonwealth.

2. The relation between a bank and its depositories is one of debtor and creditor and not that of trustees and *cestui que trust*.

3. A bank which becomes depository for the Commonwealth is not a fiduciary within the meaning of the Act of May 16, 1923, P. L. 248, which limits the power of trust companies to become sureties to the bonds of fiduciaries and to bonds required in judicial proceedings.

Department of Justice,  
Harrisburg, Pa., March 27, 1925.

Board of Finance and Revenue, Harrisburg, Penna.

Gentlemen: I have been informed that you desire an opinion on the question as to whether trust companies may act as surety on the bonds of banks and trust companies in this State which must file bonds in order to qualify to become depositories of the money of the Commonwealth.

Prior to the passage of the Act of May 16, 1923, P. L. 248, there was no question about the right of trust companies to act as surety on bonds generally, which, of course, included bonds of banks and trust companies filed to qualify them to become depositories of money of the Commonwealth. Any doubt as to the right of trust companies to act as such surety is to be determined from said Act of May 16, 1923, and to it we must look for an answer to the question.

The provisions of the Act are brief and are as follows:

“Section 1. Be it enacted, &c., That the word ‘bank,’ as used in this act, means any State bank, incorporated banking company, trust company, saving banks, 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 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; Provided, That nothing in this act shall be construed to dispense with the approval of any court or officer now or hereafter required by law to approve such security.

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

By the plain and strict terms of the Act, any institution which comes within the definition of "bank" as laid down in the Act, namely: any State bank, incorporated banking company, trust company, savings bank, 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 become surety for other fiduciaries, and sole surety on any writ of error or appeal, or in any proceeding instituted in any court of this Commonwealth in which surety is required. The purpose of the Act is to limit and restrict banks. They are prevented from engaging in the bonding business generally and are confined by the Act to the bonds of fiduciaries and 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.

It is clear that any bank as defined by the Act may not become surety on general bonds and is limited to those enumerated in Section 2 of the Act of May 16, 1923. Within this limitation are the ones generally classified under fiduciaries, but just what constitutes a fiduciary is not clearly settled and is often the subject of controversy. While it has been held to apply to all persons who occupy a position of confidence towards others, it has been more often limited to technical trusts. As before said, the purpose of the Act is to limit and restrict banks in their general right to become surety on bonds, and it should be construed as applying to fiduciaries in their relation to technical trusts.

The question therefore arises does a bank or trust company by becoming a depository of the money of the Commonwealth thereby become a fiduciary?

All the cases in our State recognize the relation of a bank to its depositors to be one of debtor and creditor, and not one of trustee and cestui que trust.

As far back as *Bank of Northern Liberties vs. Jones*, 42 Pa. 536, it was held:

"The trade of a banker is to receive money and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own and for which money he is accountable as a debtor. I cannot at all confound the situation of a banker with that of a trustee, and conclude that the banker is a debtor with a fiduciary character: *Hill v. Foley*, 2 House of Lords' Cases 36, 37, 44. A banker is therefore in relation to his customer, neither a trustee nor a quasi trustee, but simply a debtor to him for a loan. The relation thus established is that of debtor and creditor merely, unaccompanied by any fiduciary connection."

In Spring's Appeal, 71 Pa. 11, the Court said:

"It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. 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 entrusted with the care and management of the property of another. It is certain that they are not technical trustees."

This principle was reiterated in *Reiff, et al. vs. Mack*, 160 Pa. 265, and in *Prudential Trust Company Assignment*, 223 Pa. 409, the law was laid down as follows:

"We do not agree with the proposition advanced in behalf of appellees to the effect that a depositor in making a deposit in a bank, does not thereby establish the relation of debtor and creditor, but rather chooses the bank as the custodian of his money for the time being. This is not the law. Money deposited in a bank ceases to be the money of the depositor and becomes the money of the banking institution in which deposited. It is the business of a bank to receive money on deposit and use it as its own, being accountable as debtor to the depositor for the money so deposited which may be subject to check or draft or payment upon notice or demand as the parties may agree. All of our cases recognize the relation of a bank to its depositors to be one of debtor and creditor."

Concluding therefore that a bank or trust company which becomes a depository of the money of the Commonwealth thereby becomes the debtor of the Commonwealth and not a fiduciary, especially not a technical fiduciary, you are advised that under the limitation of the Act of 1923 a trust company may not act as surety on the bond required from a bank or trust company in order to qualify as a depository of the money of the Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

*Depositories of State funds—Method of selection—Not required to be in business for two years.*

Banking institutions and trust companies may be selected as depositories of the public funds of the State, although they have not been in business for two years or any other period, if they are otherwise qualified under the statutes to act as depositories.

Department of Justice,  
Harrisburg, Pa., May 28, 1925.

Honorable Clyde L. King, Secretary of Board of Finance and Revenue  
Harrisburg, Pa.

Dear Sir: Pursuant to the request from the Board of Finance and Revenue I am sending you, with copies to the other members of the Board, this formal opinion on the following question:

Is the practice which has been in force in the selection of State depositories to confine the selection to banks, banking institutions and trust companies which have been doing business for a period of at least two years, a practice required by law, or is it a matter of discretionary policy on the part of the Board of Finance and Revenue?

A careful search does not disclose that there is any statutory provision with regard to the selection of "banks of deposit" except that contained in the Act of February 17, 1906, P. L. 45. Section 1 of said Act of 1906 reads as follows:

"On and after the first day of June, one thousand nine hundred and six, the selection of the banks, banking institutions, or trust companies in which the State moneys shall be deposited, shall be made by the Revenue Commissioners and the Banking Commissioner, jointly, or a majority of them; and for this purpose they shall meet once a month, or oftener at the call of the State Treasurer; but no selection shall be made of any institution not subject to National or State supervision, except as hereafter provided."

Section 2 of said Act of 1906 provides in considerable detail how the "banks, banking institutions and trust companies" shall make their applications for deposits of State money, and what shall be set forth in such applications.

Section 3 of said Act provides specifically how "private banking institutions" shall qualify to receive deposits of State money.

Other Acts, or Sections, such as the Act of July 18, 1917, P. L. 1065, which amends Sections 4 and 8 of the said Act of February 17, 1906,—Sections 5-6-7-9-10-11 and 12 of the said Act of 1906,—the Act of June 15, 1897, P. L. 157,—and the Act of April 17, 1905, P. L. 183 cover other phases of the amount of deposits,—rate of interest,—

reporting by the Treasurer,—and date of deposits; but none of them has anything to do with the question stated above herein.

Therefore, our investigation must be confined to Sections 1-2 and 3 of said Act of February 17, 1906, and therein we find no mention whatever of the length of time that any "bank, banking institution or trust company" must have been in business before it is qualified to be selected by the Revenue Commissioners and the Banking Commissioner (now the Board of Finance and Revenue by virtue of Section 1102 of the "Administrative Code", Act of June 7, 1923, P. L. 498) to be entitled to become a depository of State funds.

Therefore, it is my opinion that, although the Board of Finance and Revenue may in good faith and within reason adopt and follow rules, as to the qualification of banks, banking institutions or trust companies which it will select as State depositories, there is nevertheless no statutory requirement that the Board must reject applications of any such institutions, because of the length of time they have been doing business, provided such institutions are otherwise qualified for such selection, and conform to the requirements of the law and the rules of the Board.

Yours very truly,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General.*

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*Taxation—Tax on corporate loans—Exemption—Loans upon mortgages to trustees for charity—Acts of June 17, 1913, and July 15, 1919.*

1. A corporation which does business in this Commonwealth is subject to taxation upon mortgages upon which it pays the interest, even though it is not the mortgagor.

2. A mortgage held in trust, not for any person or corporation, but for a charitable object, is not subject to the tax on corporate loans imposed by the Act of July 15, 1919, P. L. 955, amending section 17 of the Act of June 17, 1913, P. L. 507.

3. A mortgage owned and held by the City of Philadelphia, as trustee under the will of Stephen Girard for the support and education of poor, white male orphans at Girard College, in accordance with the will of Stephen Girard, is a mortgage held in trust for a charitable object and is not subject to taxation under the acts cited.

Department of Justice,  
Harrisburg, Pa., June 25, 1925.

Honorable Clyde L. King, Secretary, Board of Finance and Revenue.  
Harrisburg, Pennsylvania.

Sir: F. H. Lehman, Esq., at the time, Secretary of Board of Public Accounts, referred to this Department the Capital Stock and Corporate Loans Report of the Horn and Hardart Baking Company

for the calendar year ending December 31, 1920, together with a petition and supplementary petitions and affidavits addressed to the Board of Public Accounts relative to the taxation of a certain mortgage which had been held subject to the tax and a settlement for such tax made thereon by the Auditor General and approved by the State Treasurer, and which mortgage said Company, petitioner, contended was exempt from taxation.

The Board of Public Accounts through its Secretary, requested an opinion from this Department upon the question of the taxability of this mortgage. By reason of the provisions of the Act of June 7, 1923, P. L. 498, 551, whereby the powers by law vested in and imposed upon the Board of Public Accounts, so-called, created by the Act of April 8, 1869, P. L. 19, are to be exercised by the Board of Finance and Revenue, created by the said Act of June 7, 1923, I am addressing this opinion to you.

### FACTS

The Horn & Hardart Baking Company, as appears from the Capital Stock Report filed for the calendar year ending December 31, 1920, is a corporation incorporated under the laws of the State of New Jersey for the purpose of the manufacture and sale of edibles and food stuffs, in which business it was engaged during the said year.

The said Company filed its Capital Stock and Corporate Loans Report for the said calendar year in the office of the Auditor General of the Commonwealth of Pennsylvania, February 17, 1921. A settlement of the tax upon the Capital Stock and the Corporate Loans for the said calendar year was made by the Auditor General, February 25, 1921, and approved by the State Treasurer March 2, 1921. A re-settlement of the tax upon the Corporate Loans was made by the Auditor General, April 20, 1921, and approved by the State Treasurer April 21, 1921, wherein and whereby a tax was imposed upon Corporate Loans at the proper rate in the amount of \$820, from which a deduction of Treasurer's commission in the amount of \$41.00 was allowed, fixing the amount of the tax as resettled, at the sum of \$779. The said tax was imposed upon the valuation of such corporate loans in the amount of \$205,000, included within which amount was a mortgage in the sum of \$130,000 owned and held by the City of Philadelphia, Trustee of the Girard Estate.

The said Horn & Hardart Baking Company did not take an appeal from the said settlement of tax and made payment thereof into the State Treasury, May 25, 1921.

The President and Assistant Treasurer of the said Company presented a petition to the Board of Public Accounts which was filed therewith June 15, 1922, wherein it prayed for a remission of the

tax upon the said mortgage in the amount of \$494, which was the amount of the tax at the proper rate, to wit, \$520 less the commission allowed to the Treasurer of the Company under the law in the amount of \$26.00. The basis upon which it prayed for such remission was that the mortgagee in such mortgage was the "City of Philadelphia as Trustee of the Estate of Stephen Girard."

In supplemental petitions and affidavits presented to the Board of Public Accounts it appeared that the said mortgage was owned and held by the said City of Philadelphia, as Trustee under the Will of Stephen Girard and was held by said Trustee "for and the interest received therefrom used and applied to the support and education of poor, white male orphans at Girard College, free of expense to them, in accordance with the will of Stephen Girard, deceased."

It does not appear that the said Horn and Hardart Baking Company were the mortgagors in such mortgage. It is established by the Corporate Loans Report filed that the said Company did pay the entire amount of interest due upon such mortgage during the said calendar year, 1920, the period of time for which the report was filed and upon which basis the tax was settled.

#### *QUESTION.*

The question raised is whether or not a mortgage held in trust not for any person or corporation, but for a charitable object, is subject to the tax imposed by the Act of July 15, 1919, P. L. 955, amending Section 17 of the Act of June 17, 1913, P. L. 507, and if not, whether the Girard Estate is such a public charity as to make the mortgage in question exempt from such tax?

#### *DISCUSSION.*

As set forth in the Finding of Facts, it does not appear that the said Horn and Hardart Baking Company created the said mortgage. On the contrary it is to be inferred from the facts that it did not, but purchased the property upon which the said mortgage was a lien subject to such mortgage. It does not appear that any bond had been given by the mortgagor as security for the payment of which bond the mortgage was given. Hence it does not appear that the Company had assumed such bond. However, these facts may be, they are not pertinent to the present issue by reason of the provisions of the said Act of July 15, 1919, P. L. 955. Under the provisions of this Act the tax is imposed upon "all scrip, bonds, certificates and evidences of indebtedness issued, and all scrip, bonds, certificates and evidences of indebtedness assumed, or on which interest shall be paid, by any and every private corporation,

incorporated or created under the laws of this Commonwealth, or the laws of any other State or of the United States, and doing business in this Commonwealth \* \* \* \*". The Company did business in this Commonwealth and did pay the interest upon this mortgage. Therefore, if such mortgage falls within the above stated classes of obligations upon which the said Company paid interest, such mortgage is subject to the tax and under and by the provisions of the Act of July 15, 1919, P. L. 958, and of the Act of July 21, 1919, P. L. 1067, it is the duty of the treasurer of the Company, upon the payment of the interest thereon, to assess the tax imposed and to make report of such indebtedness to the Auditor General and make deduction of the tax and return the same into the State Treasury in accordance with the provisions of the said Acts of Assembly.

In the case of the *Philadelphia Co. for Guaranteeing Mortgages vs. Guaranty Realty Co.*, 78 Pa. Super. Ct. 258. Judge Keller interpreted and construed the Act of July 15, 1919, P. L. 955, amending Section 17 of the Act of June 17, 1913 P. L. 507. In a full and carefully considered opinion he reviewed the history of the legislation bearing upon the subject, and the decisions of the Courts upon prior legislation, and held, inter alia, that—

"This amendment makes two things clear: first, that the state tax on corporate loans is extended from 'all scrip, bonds, or certificates of indebtedness issued' by the corporations referred to in the seventeenth section of the Act of 1913, to 'all scrip, bonds, certificates and evidences of indebtedness issued \* \* \* \* \* assumed, or on which interest shall be paid' by such corporations; and second, that the securities made taxable for county purposes under section 1 of the Act of 1913, are to be restricted to such as cannot be made taxable under section 17 as amended; that while the State, in its generosity, has turned over to the several counties for their own use, all, instead of three-fourths, of the tax derived from the kinds of personal property enumerated in section 1, it has reduced the subjects taxable for county purposes under that section, by transferring to section 17, to be taxed for state purposes, loans and indebtedness assumed by or on which interest is paid by corporations organized or doing business in this Commonwealth in addition to those issued by such corporations, and by enlarging its scope so as to include all evidences of indebtedness and not merely scrip, bonds and certificates; and has provided that the State is to have the right of way, and if any securities are apparently, by the language of the act, taxable under both sections, the seventeenth section is to prevail and the first section is to be confined to such securities as cannot be made taxable under section 17."

In answer to a contention "that as 'all mortgages' are included

under section 1 (of the Act of June 17, 1913, *supra*), and mortgages are not specifically made taxable in section 17, no mortgages can be taxed under section 17", he said—

"\* \* \* But this construction would apply to mortgages issued by corporations no less than to those only assumed by them or on which they pay interest, and the whole history of our tax legislation and the settled course of the decisions thereon negatives any such conclusion.

"The words 'all mortgages' appeared in every act imposing a state tax on personal property, to be assessed and collected through the local tax authorities, from the Act of April 29, 1844, *supra*, down to the Act of May 11, 1911, *supra*, and yet since the Act of June 30, 1885, *supra*, it was never disputed that the provisions for the assessment of a tax for state purposes on the nominal value of scrip, bonds, or certificates of indebtedness issued by corporations organized or doing business in Pennsylvania by the treasurers of such corporations and the deduction by them of the same from the interest paid resident holders of such indebtedness, included the interest on mortgages, or on the bonds secured by such mortgages, issued by such corporations; and that the mortgages returned to the local authorities for assessment and taxation on their actual value, comprised only mortgages which were not taxable as such corporate indebtedness. Money at interest was thus taxable in two distinct ways. If it was embraced within scrip, bonds or certificates of indebtedness issued by corporations incorporated in or doing business in Pennsylvania—and this included mortgages securing bonds issued by such corporations—it was taxed on its nominal or par value and the tax was assessed and collected for the State by the treasurer of such corporation. If it was not, it was assessed at its actual value by the local assessor and collected by the local tax collector. The term 'mortgages' as used in the acts imposing a tax on personal property, clearly means 'mortgage indebtedness'."

He further held (see page 265 of the opinion) that—

"\* \* \* when we examine the seventeenth section of the Act of 1913, even before its amendment in 1919, we find in one of its provisos,—reenacted in the amendment of 1919, and quoted above as a part of said amendment,—that mortgages are specifically mentioned as one of the corporate securities embraced within its provisions, thus showing that mortgages issued by the corporations specified in the seventeenth section were taxable under that section and not by the first section of the Act of 1913. It follows that since the seventeenth section was enlarged by the amendment of 1919 so as to include

all 'evidences of indebtedness' on which the corporation pays interest, mortgage indebtedness on which the corporation pays interest is subject for taxing purposes to the seventeenth and not the first section of the act, as amended. \* \* \*

In conclusion he held that—

"The Act of 1919, P. L. 955, amending section 17 of the Act of 1913, imposes a tax for state purposes on all evidences of indebtedness issued or assumed by corporations, incorporated in or doing business in this Commonwealth, or upon which they pay interest. Since the amendment, all such evidences of indebtedness are obligations of the company, for tax purposes, within the meaning of the eighteenth section, directing how the tax imposed in section 17 shall be assessed and collected.  
\* \* \*

Mortgages upon which a corporation which does business in the Commonwealth pays interest being, therefore, a subject of taxation under the provisions of the Act of July 15, 1919, P. L. 955, and by the provisions of the Act of July 21, 1919, P. L. 1067, it being the duty of the Treasurer of the Company upon the payment of the interest thereon to assess the tax imposed, make report of the amount of the indebtedness owned by residents of the Commonwealth to the Auditor General, make deduction of the tax and return the same into the State Treasury, we turn to the consideration of the main question involved.

The mortgage here in question was owned and held by the City of Philadelphia, as trustee, under the will of Stephen Girard, deceased, and was held by the said trustee "for, and the interest received therefrom used and applied to, the support and education of poor, white male orphans at Girard College, free of expense to them, in accordance with the will of Stephen Girard, deceased." That the provisions of the will of Stephen Girard created valid trusts which are of "an eleemosynary nature and charitable uses in a judicial sense," was determined by the Supreme Court of the United States in the case of *Videl et al. v. Girard's Executors*, 2 How, 127, 11 L. Ed. 205. The Supreme Court of the United States also said in this latter case "not only are charities for the maintenance and relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars." See also *City of Philadelphia vs. Girard's Heirs*, 45 Pa. 9.

In *Donohugh's Appeal*, 86 Pa. 306, the Court below, whose opinion was affirmed in a per curium opinion by the Supreme Court, said:

“The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character. The smallest street in the smallest village is a public highway of the Commonwealth, and none the less so because a vast majority of the citizens will certainly never derive any benefit from its use. It is enough that they may do so if they choose. So there is no charity conceivable which will not, in its practical operation, exclude a large part of mankind, and there are few which do not do so in express terms, or by the restrictive force of the description of the persons for whose benefit they are intended. Thus, Girard College excludes, by a single word, half the public, by requiring that only male children shall be received; the great Pennsylvania Hospital closes its gates to all but recent injuries, yet no one questions that they are public charities in the widest and most exacting sense.”

In the case of *General Assembly v. Gratz*, 139 Pa. 497, the question was whether or not “the moneys and securities which it is admitted by the demurrer are held by the plaintiffs as trustees for purely public charitable purposes are taxable under the Act of June 1, 1889, for State purposes.”

The said Act of June 1, 1889, P. L. 420, Section 1, imposed an annual tax for State purposes of three mills on each dollar of the value of—

“\* \* \* all personal property of the classes hereinafter enumerated, owned, held or possessed by any person, persons, co-partnership, or unincorporated association or company, resident, located or liable to taxation within this Commonwealth, or by any joint stock company or association, limited partnership, bank or corporation whatsoever, formed, erected or incorporated by, under or in pursuance of any law of this Commonwealth or of the United States, or of any other state or government, and liable to taxation within this Commonwealth, whether such personal property be owned, held or possessed by such person or persons, co-partnership, unincorporated association, company, joint stock company or association, limited partnership, bank or corporation in his, her, their or its own right, or as active trustee, agent, attorney-in-fact or in any other capacity, for the use, benefit or advantage of any other person, persons, co-partnership, unincorporated association, company, joint stock company or association, limited partnership, bank or corporation, is hereby made taxable annually  
\* \* \*”

The Court below whose opinion was adopted by the Supreme Court, said on pages 504, 505 and 506:

"It appears to us to be plain that the personal property intended to be taxed by this section is property owned or possessed by any person, copartnership, corporation or unincorporated association, in his or its own right, or as a trustee or agent for the use of some other person, copartnership, corporation or unincorporated body. Now, is any of the property described in the bill, in this case, so owned or possessed by the plaintiffs? Clearly, according to the bill, they do not own a dollar of it in their own right or for their own use, and it is equally plain that they do not hold it as trustee or agent for the use of any other person, copartnership or corporation in any proper or legal sense. They do not, according to the bill, hold the property for any person whomsoever, but for certain charitable and religious objects. It does not at all follow that because the charitable and religious purposes to which the property is applied have relation to certain classes of people that, therefore, it is held for a person or persons. By 'person', in the act, is meant a particular individual; one who could claim in the words of the act 'the use, benefit or advantage' of the property; one who could enforce the trust in his favor. The trusts mentioned are not trusts for particular persons, but for particular objects. It may be that in the administration of the trusts for these charitable and religious objects some person may be incidentally benefited, but he is not a person entitled by law to 'the use, benefit or advantage' of the trust, or who has by law any beneficial interest or ownership in it whatever. The funds are not held in trust for any person whomsoever, but to be applied to the particular charities and religious purposes mentioned, in the discretion of the trustees; so that no person or individual can possibly be said to have any legal right or interest in it whatever. Nor can it be correctly said, in any legal sense, that the plaintiffs are trustees for any person. If that were so, such person could come into court and demand the 'use, benefit or advantage' of the property held in trust for him. But it is quite plain that, as the trusts described in the plaintiffs' bill, no person would for a moment have any standing in court to do that. No person exists who can say that he had any legal or equitable claim to the property held in trust by the plaintiffs, or to any 'use, benefit or advantage' thereof. They do not hold it in trust for any person, but in trust for certain charitable and religious objects.

"Now, if the legislature had intended by this act to depart from the usage and practice settled and steadily adhered to for a great number of years,—I might, perhaps, say from the foundation of the commonwealth,—of abstaining from taxing the personal property of charitable and religious associations; if it had intended to introduce so great a change in the public policy of the state as the defendants' counsel contend has been

effected by this act, it is reasonable to suppose that they would have used no uncertain language to accomplish it. A simple enactment that personal property of the kind described in the act, owned or held by any person, partnership, corporation or association, either in his or its own right, or as trustees or agent, for any purpose whatsoever, would have accomplished the revolution in legislation upon this subject which the defendants contend has been accomplished by the act of 1889, and would have left no room for doubt or for argument. But it is not, in our judgment, reasonable to suppose that members of the legislature who voted for a bill taxing the personal property of persons and corporations; whether held in their own right or in trust for other persons, either knew or supposed that they were voting for a bill which taxed property held in trust, not for any other person or persons, but for the maintenance of religion and public charity; that they were voting for a bill which overthrew all the previous policy of the state upon this subject, and which would authorize the tax gatherer to thrust his hand into the treasure chest of every charity and religious society in the state."

The conclusion of the Court was that the property in question was not such property as was made taxable by the said Act of June 1, 1889.

In the case of *Mattern, Appellant, v. Canevin*, 213 Pa. 588, the question was whether or not a mortgage given by an individual to secure the balance of the purchase money on a cathedral property and held by the defendant for religious and charitable purposes was subject to the personal property tax imposed by the Act of June 8, 1891, P. L. 229.

Section 1 of the Act of June 8, 1891, P. L. 229, amends Section 1 of the said Act of June 1, 1889, P. L. 420. This amendment, however, did not change the subject of taxation. It simply changed the rate, increasing the same from three mills on each dollar of the value of the property made subject to the tax to four mills.

The Supreme Court in this case expressly affirmed its decision in *General Assembly v. Gratz*, 139, Pa. 497, construing the Act of 1889, *supra*, and after stating that the Act of 1891, *supra*, was a re-enactment of the Act of 1889, except as to the rate of taxation, held that the Legislature intended that the rule laid down in *General Assembly v. Gratz*, *supra*, was to be regarded as the settled policy of the State "in reference to the exemption of actual places of religious worship and institutions of purely public charity from taxation."

In conclusion the Supreme Court said:

"\* \* \* The mortgage was held by the trustee for the use of St. Paul's Roman Catholic Congregation, 'sole-

ly for the same objects of religion and purely public charity' as the real estate which had been sold and for part of which purchase price this mortgage was given. The 'real estate' mentioned was the old cathedral property which it is conceded was used as an actual place of religious worship and for purposes of purely public charity. These conceded facts bring the case within the rule stated and the mortgage is exempt."

It will thus be seen that the mortgage in this case was held to be exempt from taxation "because of the uses and purposes for which it is held."

In the case of *Commonwealth vs. William M. Lloyd Co., 15 Dauphin Co. Rep. 149*, the facts were as follows:

A settlement had been made by the accounting officers of the Commonwealth against the said Company for a tax on loans for the year 1908. An appeal was taken from the settlement and upon hearing thereof by the Court it appeared that the defendant Company was the owner of real estate in the City of Philadelphia, which, at the time of its purchase, was covered by a mortgage given by an individual "to the City of Philadelphia, Trustee of Stephen Girard, deceased." This mortgage was a part of the residuary fund of that trust which is "used solely for the care and maintenance of Girard College, in the City of Philadelphia, and for the free education, support and maintenance therein of poor, white male orphan children in the State of Pennsylvania, without restriction to any class thereof or as to locality or residence of such children." It further appeared that the defendant Company had executed and delivered a bond to the said Trustee as collateral security for the payment of the principal sum and interest secured by the said mortgage, in which bond the said Company agreed to answer for the default of the mortgagor. The mortgage having matured and being unpaid, the defendant Company paid the interest for the succeeding years, including the year for which the accounting officers had imposed the tax, the settlement of which tax was the basis of the appeal in question. The tax was imposed under the provisions of the Act of June 30, 1885, P. L. 193, and the Act of June 1, 1889, as amended by the Act of June 8, 1891, P. L. 229. The tax charge was four mills upon the amount of the mortgage less the Treasurer's commission.

In the forepart of his opinion Judge Kunkel gave consideration to the question as to whether or not the tax claim was to be treated as charged upon the mortgage or upon the bond given as collateral security for its payment. He expressed the opinion that in neither case would the defendant Company be liable for the payment of the tax. He considered the provisions of the Act of 1891, *supra*, and called attention to the fact that under the language of the

Act the mortgage was not subject to the tax for the reason that it was not an obligation issued by the corporation, which mortgages alone were subject to the tax. With reference to the bond he held that the obligation was one of suretyship and therefore did not fall within the phrase "loans issued by any corporation," or "including \* \* \* loans secured by bonds or any other forms of certificate or evidence of indebtedness, \* \* \*". He held that the bond was issued not to represent any indebtedness of the defendant Company, but for the purpose of securing the indebtedness of the mortgagor. Turning to a consideration of Section 4 of the Act of 1885, *supra*, which provides for the assessment and collection of the tax on corporate indebtedness, he held that under the provisions of the Act the bond given as collateral security was not a bond evidencing an indebtedness of the Company as contemplated by the provision of the said section. He denied the contention of the Commonwealth that the Company by giving the bond and paying the interest to the holder of the mortgage upon the default of the mortgagor thereby assumed the payment of the mortgage and was bound to assess and collect the tax. Judge Kunkel said:

"The tax on the mortgage, if collectible at all, was collectible, like the tax on all individual indebtedness, through the local authorities."

This portion of the opinion is no longer pertinent by reason of the provisions of the Act of July 15, 1919, P. L. 955, and July 21, 1919, P. L. 1067, *supra*.

However, Judge Kunkel did not base his decision solely, if at all, upon this portion of his opinion. He held that the holder of the mortgage was not subject to the tax because it was held "in trust, not for any person or corporation but for a charitable object." This portion of Judge Kunkel's opinion reads as follows:

"We might rest our decisions of this case upon the grounds above stated, were we not satisfied that the defendant company is not liable for the tax on the mortgage debt for the more cogent reason that the mortgage was not taxable. It was held by the trustee of Stephen Girard, deceased, in trust, not for any person or corporation but for a charitable object. In *General Assembly vs. Gratz*, 139 Pa. 497, it was determined that 'funds held in trust, not for particular persons, but for charitable and religious objects in which no particular individual or person has any legal or equitable rights, the beneficiaries being elected from year to year, at the discretion of the trustees, out of indefinite classes of persons, are not subject to the personal property tax provided in the Act of June 1, 1889, P. L. 420; and in *Mattern vs. Canevin*, 213 Pa. 588, it was held

that a mortgage taken to secure the purchase money of a church building and held for religious and charitable purposes is not subject to the tax imposed by the Act of June 8, 1891, P. L. 229. These cases establish the lack of legislative authority for the loans tax on the mortgage in the present case. As there was no tax imposed, there was no duty upon the defendant company to assess and collect it."

- It will be observed that in each of the three cited cases the conclusion of the Courts was based upon the language of the first Sections of the said Acts of 1889 and 1891, *supra*, the Courts holding that the particular property in question in each case being held for a religious or charitable use or object was not intended to be made subject to the tax because the language of the said Acts did not evidence an intent to tax such property. Did the Act of June 17, 1913, P. L. 507, and the amendment of Section 17 thereof by the Act of July 15, 1919, P. L. 935, change the law and make such property subject to tax? When we examine Section 1 of the said Act of June 17, 1913, P. L. 507, we find no change in the subject of taxation or its rate. The language of the first paragraph in Section 1 is exactly similar to that of the first paragraph of the Act of June 8, 1891, P. L. 229.

In the case of *Philadelphia Company for Guaranteeing Mortgages vs. Guaranty Realty Co.*, 78 *Super. Ct.*, 258, 260, the Court said:

"The Act of June 17, 1913, P. L. 507, which was enacted after the settlement of the tax involved in the DuPont case, used practically the same language, with respect to the subjects taxable for state purposes, (Section 17), as was contained in the Act of 1885 (Section 4); its greatest difference, and chief purpose, was to provide that the tax (now four mills) or moneyed capital in the hands of individual residents of this Commonwealth, commonly known as the personal property tax, originally imposed by the Act of April 29, 1844, P. L. 497, section 32, and reenacted from time to time with but few changes in the Acts of June 7, 1879, P. L. 112, (Section 17); June 30, 1885, *supra*, (Section 1); June 1, 1889, P. L. 420; June 8, 1891, P. L. 229; May 1, 1909, P. L. 298, and May 11, 1911, P. L. 265, should be assessed and collected for county purposes only,—instead of for state purposes, with a return by the state to the county of one-third (Act of 1889) or three-fourths (Act of 1891); *Provident Life & Trust Co. v. Klemmer et al.*, 257 Pa. 91, 100. The decision in the DuPont case, therefore, applied with equal force to the Act of 1913."

And see Opinion of Deputy Attorney General Kun, under date of July 21, 1916, reported in 45 Pa. C. C. at page 551.

The amendment of Section 17 by the said Act of 1919 simply made taxable for State purposes certain subjects of tax which under the Act of 1913, *supra*, were subject to tax for county purposes only, namely, those obligations which had been assumed or on which interest had been paid by any and every private corporation incorporated or created under the laws of this Commonwealth or the laws of another State or of the United States and doing business in this Commonwealth. It will thus be seen that under the provisions of the Act of July 15, 1919, the subjects of taxation are exactly similar to those contained in the said Acts of 1913, 1891, and 1889, *supra*. The effect of the said Act of 1913 was to divide the former subjects of the personal property tax into certain classes for county purposes and State purposes, respectively. The effect of the said Act of 1919 was to remove certain subjects of taxation from the class for county purposes into the class for State purposes.

There is nothing in either the Act of 1913 or its amendment of 1919 which indicates an intent on the part of the Legislature to upset "the settled policy of the State in reference to the exemption of actual places of religious worship and institutions of purely public charity from taxation," (See *Mattern vs. Canavin*, *supra*.) Being of the opinion that the subjects of taxation in the Acts of 1889, 1891, 1913 and 1919 are similar, the rule of law declared in the cited cases of *General Assembly vs. Gratz*, *Mattern vs. Canavin* and *Commonwealth vs. William M. Lloyd Co.*, *supra*, is applicable to the said Act of 1919 in the absence of express language showing a contrary intent.

I am, therefore, of the opinion that this mortgage is not subject to the tax imposed under and by the provisions of the Act of July 15, 1919, P. L. 955, and that, therefore, the said Horn & Hardart Baking Company, and its Treasurer, were not subject with reference thereto to the provisions of the Act of July 15, 1919, P. L. 958, and the Act of July 21, 1919, P. L. 1067.

Yours very truly,

DEPARTMENT OF JUSTICE,

LEON D. METZGER,

*Ass't. Deputy Attorney General.*

*Finance and Revenue—Taxation—School District Bonds—Annuity Reserve Fund No. 2.*

Bonds issued by the School District of Foster Township, McKean County, when held by the State Annuity Reserve Fund No. 2, are not subject to the State tax on loans provided by the Act of 1913, P. L. 307, as amended by the Act of 1919, P. L. 955.

Department of Justice,  
Harrisburg, Pa., June 15, 1926.

Hon. Clyde B. King, Secretary, Board of Finance and Revenue, Harrisburg, Pennsylvania.

Sir: At a meeting of the Board of Finance and Revenue held March 24, 1926, the Attorney General was asked for an opinion as to whether or not bonds issued by the School District of Foster Township, McKean County, Pennsylvania, when held by the State Annuity Reserve Fund No. 2, are subject to the State loans tax provided for by the Act of June 17, 1913, P. L. 507, as amended by the Act of July 15, 1919, P. L. 955. Each of the bonds in question contains the following provision:

"Both principal and interest of this bond are payable free of all state, municipal or other taxes which the said School District of Foster Township hereby covenants and agrees to pay."

The State Annuity Reserve Fund No. 2 was created by Section 8, paragraph 5, of the Act of July 18, 1917, P. L. 1043, and consists of payments made semi-annually by the Commonwealth to provide in part for pensions payable to retired school employes. By Section 6, paragraph 3, of the said Act the State Treasurer is made the "custodian" of this fund and by paragraph 1 of the same section the members of the Retirement Board are made trustees of the fund with exclusive control over and full power to invest the same. By Section 10, the Legislature guaranteed financially the operation and maintenance of the fund.

The Act of 1913, *supra*, as amended by the Act of 1919, *supra*, provides in part as follows:

"That all scrip, bonds, certificates and evidences of indebtedness issued \* \* \* and all scrip, bonds, certificates and evidences of indebtedness assumed, or on which interest shall be paid by any county, city, borough, township, school district, or incorporated district of this Commonwealth are hereby made taxable \* \* \* for State purposes \* \* \*."

It is thus seen that bonds issued by school districts are one of the subjects of tax under the express language of the Act. The tax, however, is on the *holders* of such bonds. As was said in *Commonwealth v. Lehigh Valley R. R. Co.* 186 Pa. 235, 246:

"The tax (i. e. the so-called loans tax) is not in any sense or in any degree a tax on the corporation or its property, but on the individual citizen of the state who holds the bonds. The corporation is chargeable with it only as a collector, and by reason of default in the duty to collect."

In the case of *Philadelphia Company for Guaranteeing Mortgages v. Guaranty Realty Company*, 78 Superior Court 258, 266, 267, it is said:

"Section 18 of the Act of June 17, 1913, provides 'That the tax for state purposes, imposed upon obligations of private and *public* corporations by section 17 of this act, shall be collected in the same manner as the tax heretofore imposed for state purposes upon such obligations; it being the true intent and meaning of this act that the provisions of the law in force at the time of the passage of this act, relating to the collection of the state tax upon such obligations, shall remain unaffected by the present act.'

\* \* \* \* \*

"\* \* \* Nor does the eighteenth section prescribe the method of collection minutely or other than by reference to the manner of collection of state tax on corporate obligations under the laws then in force, that is, section 4 of the Act of June 30, 1885, P. L. 193, (amended by the Act of July 21, 1919, P. L. 1067, so as to cover any evidence of indebtedness), which directs the treasurer of the corporation to assess the tax on the indebtedness taxable by law at its nominal value *and to deduct from the interest due the creditor the tax thus assessed and pay it over to the state treasurer.*"

Thus the Act of June 30, 1885, *supra*, as amended by the Act of July 21, 1919, *supra*, merely imposed upon the treasurer of the public or private corporation issuing, assuming, or paying interest upon the indebtedness the duty of deducting the tax from the interest at the time he pays the same to the creditor, and paying said tax into the State Treasury. It is only when the treasurer wilfully fails or neglects to perform this duty that the corporation itself becomes liable for the tax. In referring to the "loans tax" and the provisions of Section 4 of the said Act of June 30, 1885, which constitute the treasurer of the issuing corporation the agent of the state for the purpose of collecting the tax the Supreme Court has said:

"The act constitutes the company, or its treasurer as such, the collector of the tax, and, upon failure to discharge the duty imposed by law, the settlement is properly made against the company, whose servant he is, as in case of the default or any other officer of the government, upon whom a like duty is imposed. The obligation rests upon the company, but as the company

can only act through its officers, the default of the officer is esteemed the default of the company, and the penalty is visited upon them."

*Commonwealth v. Del. Div. Canal Co.*, 123 Pa. 594-618.

"The settlement is made against the company, *not for taxes of the company*, but for taxes which the company, through its treasurer, ought to have collected. If the treasurer has failed or refused to perform what the law plainly required him to do, and has thereby relinquished his right to charge the *creditors upon whom the primary obligation would otherwise have rested*, the company whose interests he represented and whose instructions he is presumed to have pursued, is rightly held for the consequences of such wilful default."

*Commonwealth v. Lehigh Valley R. R. Co.*, 129 Pa. 429-449.

Unquestionably, therefore, the tax is on the *holder* of the indebtedness, and it can be collected from the corporation which issues it, assumes it, or pays interest upon it, only in the nature of a penalty when its treasurer has failed to perform his duties as a collector. In the instant case the holder of the indebtedness is the State Annuity Reserve Fund No. 2. Section 18 of the said School Employees' Retirement Act of July 18, 1917, *supra*, which created this holder, expressly provides as follows:

"The right of a person to an employe's annuity, a State annuity, or retirement allowance, to the return of contributions, any benefit or right accrued or accruing to any person under the provisions of this act, *and the moneys in the various funds created under this act, are hereby exempt from any State or municipal tax.*

This establishes conclusively that the holder itself, the State Annuity Reserve Fund No. 2, is not subject to the tax. There can be no doubt but that the word "moneys" as used in the above section comprehends securities of various kinds, because by Section 6, paragraph 1, of the said Retirement Act, the members of the Retirement Board are made trustees of the fund "with full power to invest the same."

There remains then the single question of whether the School District issuing these bonds may be subject to the tax by reason of its contract to issue them free of all state, municipal and other taxes both as to principal and interest. It would seem to follow necessarily, in the absence of any statutory provision to the contrary, that if the holder of the obligation is exempt from the tax there can be no duty on the part of the treasurer of the issuing corporation to collect a tax that does not exist.

The only case known to the writer requiring the payment of the co-called "loans tax" by the issuing corporation when it contracts that its indebtedness shall be issued tax free, and when the holder itself is expressly exempted by statute, is that of *Commonwealth v. Lehigh Valley R. R. Co.*, 244 Pa. 241. There an express statutory provision made indebtedness, issued tax free and held by *savings institutions*, having no capital stock, taxable against the issuing corporation under such circumstances, although, if such obligations had not been issued tax free they would admittedly not have been taxable either in the hands of the holder or against the issuing corporation.

This decision turned upon the wording of the Act of May 1, 1909, P. L. 298, amending Section 1 of the Act of June 8, 1891, P. L. 229, proviso 2 of which reads as follows:

"And provided, That the provisions of this act shall not apply to building and loan associations, or to savings institutions having no capital stock:"

And Proviso 4, as follows:

"And also provided, That if at any time, either now or hereafter, any persons, individuals, or bodies corporate have agreed or shall hereafter agree to issue his, their, or its securities, bonds or other evidences of indebtedness clear of and free from the said four mills tax, herein provided for, or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it or them from paying the said four mills tax on any of the said such securities, bonds, or other evidences of indebtedness as may be held, owned by, or owing to the said *saving institution* having no capital stock: Provided also, That this section shall take effect on the first day of January, Anno Domini one thousand nine hundred and ten."

This decision is no precedent in the instant case. It resulted simply from an interpretation of provisions in an act of assembly which applied solely to obligations held by saving institutions, having no capital stock. Provisos similar to Proviso 4, above quoted, are contained in Section 1 of the said Act of June 17, 1913, and in the said Act of July 15, 1919, but they likewise are applicable only to holdings of savings institutions having no capital stock, which have been issued tax free. The decision in the above case was, therefore, based upon no general principles of law or construction and clearly did not carry any implication that the mere contract of the corporation issuing the indebtedness to the effect that it should be tax free could in itself impose a tax on such issuing corporation. On the contrary the court says, on page 246:

“The liability of the defendant for the tax does not arise *out of the contract*, but out of the legislation which imposes the tax and which requires the defendant to collect and pay. The exemption from the tax is modified by the proviso as respects the one kind of securities; as to the other kind only, the exemption remains. The language of the proviso is descriptive merely of the kind which shall not receive the exemption.”

In the instant case the exemption from all State taxation is on the “moneys in the various funds created” by the Retirement Act; there is no exclusion whatever provided from this exemption and it must, therefore, apply generally.

We have seen that a contract between the principal parties to the transaction cannot impose a tax; that this can be done only by the Legislature and in the instant case the Legislature made the exemption, above referred to, a general one. In other words, since the Legislature has seen fit to expressly release this holder from all State taxes, it follows that in the absence of an express statutory provision to the contrary, the issuing school district, whose treasurer is only the collector, is likewise released. The effect of the school district’s contract with the holder, in the absence of an express statutory provision to the contrary, is simply to pay the tax if any is due; its effect is not to *impose a tax* where one is not otherwise due. The case of *Commonwealth v. Lehigh Valley R. R. Co.*, *supra*, simply illustrates an express statutory exception to what is otherwise necessarily the rule.

To hold otherwise would mean that all corporate indebtedness issued tax free and held by holders expressly exempt by statute would be taxable against the issuing corporation and such a conclusion would be entirely inconsistent with numerous decisions of our Supreme Court which have held that where bonds can not be shown to be taxable the corporations which issued them can not be held responsible for failure to assess and collect the tax.

*Commonwealth v. Clairton Steel Co.*, 222 Pa. 295.

*Commonwealth v. N. Y. L. E. & W. R. R. Co.*, 145 Pa. 57.

*Commonwealth v. Lehigh Valley R. R. Co.*, 186 Pa. 235.

*Commonwealth v. Jarecki Mfg. Co.*, 204 Pa. 26.

You are, therefore, advised that the bonds issued by the School District of Foster Township, McKean County, Pennsylvania, when

held by the State Annuity Reserve Fund No. 2, are not subject to the State tax on loans provided by the act of June 17, 1913, *supra*, as amended by the Act of July 13, 1919, *supra*.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON D. METZGER,

*Assistant Deputy Attorney General.*

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**OPINION TO THE COMMISSIONER OF  
FISHERIES**

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**OPINION TO THE COMMISSIONER OF FISHERIES**

*Commissioner of Fisheries—Interpretation of the provisions of Chapter 2, Article IV, Section 40 of the Fish Code of 1925, P. L. 451.*

Department of Justice,  
Harrisburg, Pa., February 20, 1926.

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

Sir: You ask for an interpretation of the provisions of Chapter 2, Article IV, Section 40 of the Fish Code of 1925, P. L. 451, which provides as follows:

"Section 40. Number of Fish which may be Caught. No person, except as in this Article otherwise provided, shall in any one day catch, kill or have in possession more than the number of fish hereby designated for the respective species, that is to say:

(a) Charr, or trout, of the combined species, twenty-five \* \* \*."

You state that your Board has ruled that:

"No person shall have in possession (on the stream) or in any one day more than twenty-five trout of the combined species. If the fisherman is on a trip covering three or four days and returns with more than twenty-five trout in his possession, the burden of proof as to when and where the same were caught rests with the person having the trout."

Since a strict interpretation of this section of the Act could be made to read:

"No person, except as in this Act otherwise provided, shall in any one day \* \* \* have in possession more than the number of fish hereby designated for the respective species, that is to say:

(a) Charr, or trout, twenty-five."

the interpretation as contained in the Rule of your Board is one which can readily be adopted as being within the intent of Section 40, referred to above, especially since Chapter XII, Section 50, provides that:

"the Commissioner with the approval of the Board, may promulgate such rules and regulations for the angling, catching, or removal of fish in or from any waters, wholly within the Commonwealth as he may deem necessary,"

and also since Section 276 of Chapter XIV provides that:

"In all cases of arrest for the violation of any of the provisions of this Act the possession of the fishes \* \* \* shall be prima facie evidence of the violation of this Act."

Very truly yours,  
DEPARTMENT OF JUSTICE,  
FRANK I. COLLMAR,  
Deputy Attorney General.

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**OPINION TO THE SECRETARY OF FORESTS AND  
WATERS**

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## OPINION TO THE SECRETARY OF FORESTS AND WATERS

*Department of Forests and Waters—Fort Washington Park Commission—Act of 1915, P. L. 1053; Act of 1923, P. L. 498.*

The Department of Forests and Waters does not have any authority to take any steps whatever looking toward the acquisition of additional land for Fort Washington Park Commission.

Department of Justice,  
Harrisburg, Pa., October 26, 1926.

Major R. Y. Stuart, Secretary of Forests and Waters, Harrisburg,  
Pennsylvania.

Sir: We have your request to be advised with respect to the present status of the Fort Washington Park Commission which was created by the Act of June 18, 1915, P. L. 1053. We understand that you desire to know specifically by what procedure the land which is intended to constitute Fort Washington Park must be acquired.

The Act of June 18, 1915, P. L. 1053 provides that the Commissioners of Fairmount Park should constitute a Commission for the purpose of causing a survey to be made of the land necessary to establish a public park including and surrounding the historic sites of Militia Hill and Fort Hill upon which was erected Fort Washington in Whitmarsh Township, Montgomery County. Upon the preparation of the survey it was to be filed in the office of the clerk of the Court of Quarter Sessions of Montgomery County and upon the filing of the survey the owners of land included within the boundaries of the proposed park were to be on notice that their land might be taken by the Commonwealth for park purposes with the result that they would not be entitled to any damages for the taking of any buildings or parts thereof erected on said ground after the date of the filing of the survey.

The Commission thus created performed the duties imposed upon it by the Act of 1915 to the extent of having a survey made as therein directed, but the survey has never been filed. The Commission did, however, acquire approximately one hundred and seventy acres of land, partly by purchase and partly by gift. The land acquired by gift was subject to a mortgage which has not been paid off, and upon which the Commonwealth has for some years been paying interest.

On June 7, 1923 the Governor approved the Administrative Code (P. L. 498), Section 2 of which abolished the Fort Washington Park Commission and Section 2901 of which repealed in toto the Act of June 18, 1915, P. L. 1053.

In connection with the abolition of this Commission the Legislature transferred to the Department of Forests and Waters the duty of supervising, maintaining, improving and preserving all parks belonging to the Commonwealth (excepting only Valley Forge Park, Washington Crossing Park and the State Park at Erie) and made it the duty of that Department from time to time to acquire additional lands for State parks when money should have been specifically appropriated by the General Assembly (Section 1606 (b) of the Code). The Legislature also created a new Commission within the Department of Forests and Waters to be known as the Fort Washington Park Commission (Section 203 of the Code). The organization of this Commission was provided for in Section 439 (b) of the Code. Its duties were specifically set forth in Section 1615 of the Code which provides that the several advisory park commissions shall have the right from time to time to meet for the purpose of considering and studying the work of the Department of Forests and Waters with regard to the particular parks over which they respectively have jurisdiction and to make recommendations and render advice to the Department with reference to the conduct, improvement and maintenance of such parks. For these purposes the Fort Washington Park Commission was specifically given jurisdiction over Fort Washington Park, Montgomery County (Section 1615 (a) of the Code.)

One other Section of the Administrative Code should be mentioned in this connection, namely, Section 2102 (f), which empowers the Department of Property and Supplies "to purchase or condemn lands for the purpose of adding the same to any of the public lands, parks \* \* \* of the Commonwealth whenever in the judgment of the Secretary of Property and Supplies and of the Governor the purchase of such additional lands is necessary, \* \* \*" but under the procedure for condemnation specified in this Section of the Code, (the procedure set forth in the Act of July 15, 1919, P. L. 976), the Secretary of Property and Supplies could enter upon and take possession of land only after giving security or after an appropriation has actually been made for the purchase of the land which the Secretary and the Governor desire to acquire for the Commonwealth. In the present instance, the Legislature has neither authorized security to be entered nor made an appropriation.

The Legislature did not transfer to any agency of the Commonwealth the former duty of the Fort Washington Park Commission to file in the Court of Quarter Sessions of Montgomery County the survey of lands which ought to be comprehended within the proposed Fort Washington Park. This omission may have been due to the Legislature's failure to understand that the Fort Washington Park Commission had not yet actually filed the survey.

A study of the statutory provisions to which reference has been made leads to the following conclusions in accordance with which you are advised that:

1. The Fort Washington Park Commission as it previously existed was entirely abolished by the Administrative Code and the present Fort Washington Park Commission is merely an advisory board within your Department for the purpose of studying your Department's activities in connection with Fort Washington Park and making recommendations thereon;

2. There is no agency of the State government which now has the power to file the survey authorized by the Act of June 18, 1915, P. L. 1053, in the office of the Clerk of the Court of Quarter Sessions of Montgomery County. To authorize your Department to file this survey it will be necessary for the Legislature to give you authority for so doing;

3. Your Department is charged with the duty of "supervising, maintaining, improving and preserving" the land thus far acquired as a part of Fort Washington Park;

4. Neither the Department of Property and Supplies nor your Department can without legislative action acquire any additional land for Fort Washington Park. Indeed without an appropriation by the Legislature your Department does not have any authority to take any steps whatever looking towards the acquisition of additional lands for this Park; and if the Legislature should desire your Department to acquire additional land and make an appropriation therefor, it should also give you specific authority to institute condemnation proceedings, if necessary, as your Department does not now have the power to condemn land for park purposes.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

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**OPINIONS TO THE BOARD OF GAME  
COMMISSIONERS**

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## OPINIONS TO THE BOARD OF GAME COMMISSIONERS

*Citizenship—Married alien women—Remarriage—Loss of citizenship—Federal Act of Sept. 22, 1922.*

1. If an alien woman, prior to the passage of the Federal Act of Sept. 22, 1922, ch. 411, 42 Stat. at L. 1022, had married a naturalized foreigner, she thereby became a citizen of the United States by virtue of her marriage.

2. If an alien woman, subsequent to the passage of the Act of 1922, marries a naturalized foreigner, she does not thereby become a citizen of the United States, but in order to become such she must meet the requirements of the Act of 1922.

3. If at the time of the death of her first husband a woman was a citizen of the United States, and subsequently, but prior to the passage of the Act of 1922, married an alien, she thereby took the citizenship of her husband and lost her status as a United States citizen.

4. But if at the time of the death of her first husband she was a citizen, and then, subsequently to the passage of the Act of 1922, married an alien, she did not thereby lose her citizenship.

5. In order to do so she must renounce her citizenship before a court having jurisdiction over the naturalization of aliens as provided by the act; but if the alien whom she married was ineligible to citizenship, she thereby lost her citizenship.

Department of Justice,  
Harrisburg, Pa., December 18, 1925.

Mr. J. B. Truman, Chief, Bureau of Inspection, Board of Game Commissioners, Harrisburg, Penna.

Sir: I am in receipt of your communication asking (a) The status as to citizenship of an alien woman who marries a naturalized foreigner (citizen); (b) As to her status as a citizen if she, having become a widow then marries an alien. You ask this question because under our Pennsylvania laws an alien cannot legally possess guns.

## A

The Federal statutes relating to this subject are the Act of March 2, 1907, C 2534, and the Act of September 22, 1922, C 411. Prior to the passage of the Act of 1922, referred to above, the law in relation to your question was that whenever a woman is in a state of marriage to a citizen, whether his citizenship existed before or after his marriage, she becomes by that fact a citizen also. *Kelley vs. Owens*, 7 Wall. (U. S.) 496; 11 *Corpus Juris* 780; 14 *Opinion of Attorney General*, 402; U. S. *Revised Statutes*, Section 1994.

But the Federal Act of September 22, 1922, Section 2, referred to above, provides as follows:

“Any woman who marries a citizen of the United States *after* the passage of this act, or any woman whose

husband is naturalized after the passage of this act, shall not become a citizen of the United States by reason of such marriage or naturalization; but if eligible to citizenship she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions: (a) no declaration of intention shall be required; (b) in lieu of the five year period of residence within the United States and the one year period of residence within the state or territory where the naturalization court is held, she shall have resided continuously in the United States, Hawaii, Alaska or Porto Rico for at least one year immediately preceding the filing of the petition."

Therefore, in answer to your question (a), I am of the opinion that if an alien woman, prior to the passage of the Federal Act of September 22, 1922, C. 411, had married a naturalized foreigner (citizen) she thereby became a citizen of the United States. But if an alien woman subsequent to the passage of the Act of 1922 married a naturalized foreigner (citizen), she did not thereby become a citizen of the United States. In order to become such she must meet the requirements of the Act of 1922 as provided above.

#### B.

As to her status as a citizen if she, having become a widow, married an alien, this question must be considered in relation to whether she had married her first husband before or after the passage of the Act of 1922. The Act of September 22, 1922, C 411, Section 3, provides as follows:

"A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this act, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: Provided that any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States. If, at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If, during the continuance of the marital status she resides continuously for two years in a foreign state of which her husband is a citizen or subject, or for five years continuously outside of the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United States \* \* \*."

Therefore, in answer to your question (b), the status of the woman as regards citizenship at the time of her second marriage must be taken into consideration; if at the time of the death of her first husband a woman is a citizen of the United States and subsequently,

(but prior to the passage of the Act of 1922, referred to above), married an alien, she thereby took the citizenship of her husband and lost her status as a United States citizen. But if at the time of the death of her first husband she was a citizen and then *subsequent* to the passage of the Act of 1922 she married an alien, she did not thereby lose her citizenship. In order to do so she must renounce her citizenship before a court having jurisdiction over the naturalization of aliens, as provided by the Act; but if the alien whom she married was ineligible to citizenship, she thereby lost her citizenship.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
Deputy Attorney General.

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*Game laws—Preservation of game on national forest lands—Jurisdiction of Pennsylvania.*

1. The State of Pennsylvania has jurisdiction for the protection of wild life on national forest lands, except so far as its regulation is in conflict with the Acts of Congress.

2. Such jurisdiction may be superseded at any time by appropriate action of the Federal Government.

3. The Board of Game Commissioners of Pennsylvania has authority to enter into a co-operative agreement with the Secretary of Agriculture of the United States for the administration of the Pennsylvania game laws on national forest lands.

Department of Justice,  
Harrisburg, Pa., December 17, 1926.

W. Gard Conklin, Chief, Bureau of Refuges and Lands, Board of Game Commissioners, Harrisburg, Pa.

Dear Sir: Your letter of February 20, 1926, and the letters supplementary thereto in reference to the establishment of Game Refuges on lands purchased by the National Government in this State have been referred to me for an opinion.

As I understand your inquiry, it raises the following questions:

1. Does the Commonwealth of Pennsylvania have full jurisdiction over game on lands owned by the National Government in Allegheny National Forest and in Tobyhanna National Forest?

2. Does the Board of Game Commissioners have authority to enter into a cooperative agreement with the Secretary of Agriculture of the United States for the purpose of regulating wild life within these forest areas?

On lands acquired by the United States under the Act of May 11, 1911, P. L. 71 and its amendments and under the authority conferred

upon the Secretary of Agriculture of the United States by the Weeks Law the jurisdiction of Pennsylvania as to game and fish is superseded by the laws of the United States and the regulations of the United States Department of Agriculture. This position is fully supported by the Opinion of Deputy Attorney General Swope given to Gifford Pinchot, Forestry Commissioner, September 26, 1921. I have re-examined the questions there covered and concur in that Opinion. This covers the situation as to Allegheny National Forest.

The effect of this situation would be that if the President of the United States "Should establish a Game Preserve on lands acquired in Pennsylvania the regulations of the Secretary of Agriculture respecting the game on such lands would supersede the Laws of that State." (Opinion C. W. Boyle, Assistant Solicitor, May 9, 1922).

Tobyhanna National Forest is established under the authority of Section 9 of the Act of Congress approved June 7, 1924 authorizing the establishment of National Forests on Lands within the boundary of Government Reservations. This area would be administered by the Secretary of Agriculture of the United States under such rules and regulations and in accordance with such general plans as may be jointly approved by the Secretary of Agriculture and the Secretary of War. The War Department can take over the entire reservation and its control at any time for purposes of National defense. Aside from these considerations, there is nothing to prevent the Secretary of Agriculture from adopting the State Game and Fish Law as its regulation of game and fish on this reservation. The jurisdiction, however, is in the Federal authorities if they see fit to assume it and not in Pennsylvania except as such jurisdiction may be conceded to Pennsylvania by the policy of such Federal authorities.

While it is true the Laws of Pennsylvania as to game and fish on National Forest Lands is superseded by the Laws of the United States, yet, it appears to be the practice of the United States Department of Agriculture to recognize the existence of the State Game Laws and to cooperate with the State in the enforcement of these Laws. It is stated in the National Forest Manual, under the title, "Hunting and Fishing Trespass" that, "Prosecutions for Game Trespass are usually based on the violation of a State Game Law or more rarely Regulation T-7," which makes it possible to bring prosecution before the nearest United States Commissioner.

The provisions of the Grazing Manual as to game refuges recognize the jurisdiction of the State over State Game Refuges and provide that State Acts creating them "apply to all lands embraced within the prescribed area including public lands of the United States unless they conflict with the Acts of Congress." This Manual also contains elaborate provisions for cooperation with the State in enforcing the State Laws for protection of game. The authority of

the Department of Agriculture to cooperate with the States for the protection of wild life on National Forest Lands is based on the Act of Congress of May 23, 1908, 35 Statute 251 which provides that:

"Hereafter officials of the Forest Service designated by the Secretary of Agriculture shall in all ways that are practicable aid in the enforcement of the laws of the States and territories with regard to stock, for the prevention and extinguishment of forest fires and for the protection of fish and game."

It appears, therefore, that the National Forest authorities as a matter of practice do recognize the jurisdiction of the State Game Laws over National Forest Lands and that the State does have jurisdiction for the protection of wild life on such lands except so far as its regulation is in conflict with the Act of Congress. This jurisdiction, however, may be superseded at any time by appropriate action of the Federal Government. The policy of cooperation seems to be firmly established and for practical purposes may be regarded as permanent.

It remains to consider the second question. The Secretary of Agriculture has proposed a cooperative agreement under which he adopts the game laws of Pennsylvania for the regulation of Tobyhanna National Forest and constitutes the Board of Game Commissioners his agents for the enforcement of these laws.

The answer to this question must be found by an examination of the powers conferred upon these Commissioners by the Laws of Pennsylvania.

Section 815 of the Game Law provides:

"The board may also, with and by the consent of the State Forestry Department or proper Federal authority locate State game reserves on State Forest, or National Forest."

Section 840 reads as follows:

"The board may formulate, adopt, and post such rules and regulations for the government of lands under its control, and for protection and propagation of game thereon, as it may deem necessary for their proper use and administration, or as may be established pursuant to agreements with the State Forest Commission or proper Federal authority or lessors. Such rules and regulations shall be the law of this Commonwealth controlling such lands, and a violation of any of the provisions of such rules and regulations shall subject the offender to the payment of fines provided for in this article for the violation of such rules and regulations."

Section 841 contains the following provision:

"In connection with the official duties, it is lawful for any member or employe or duly appointed agent of the board or the Department of Forestry or the Federal Forest Service to go upon a game refuge at any time and in any manner, with or without firearms or traps or dogs."

These Sections indicate that at least as to game refuges the Legislature had directly within its contemplation some form of understanding would naturally take the form of an agreement which would make specific the things to be performed by the parties and would make a formal record of the understanding.

The Game Law grants no specific authority to the Board of Game Commissioners to enter into a general agreement with the Secretary of Agriculture for the enforcement of the Game Laws within a National Forest. In Section 209 it is made the duty of the board "to protect, prosecute, and preserve the game, fur bearing animals and protected birds of the State, and to enforce, by proper action and proceedings, the Laws of this Commonwealth relating to the same." The imposition of this duty carries with it a grant of power sufficient for the proper and complete performance of the duty imposed.

The proposed agreement requires the Board of Game Commissioners to enforce the Game Law of Pennsylvania within the limits of the National Forests. This is exactly the duty imposed upon the Board as to the whole State. Beyond a requirement that the Board shall make a report to the Secretary of Agriculture as to the administration of the Game Laws in this area, the Board assumes no duty which it does not already have as to the State at large. If the Board is to establish refuges on or near National Forest Lands it is essential that it should have control of the administration of the Game Laws not only on the refuge itself but on the adjoining lands. It seems fair to conclude, therefore, that the power to make such a cooperative agreement with the National Forest authorities is essential in a proper and efficient performance by the Board of Game Commissioners of the duties imposed upon it by Law.

I am of the opinion that the Board of Game Commissioners has authority to enter into a cooperative agreement with the Secretary of Agriculture for the administration of the Pennsylvania Game Laws on National Forest Lands and I therefore answer the second question in the affirmative.

Very truly yours,  
DEPARTMENT OF JUSTICE

M. A. CARRINGER,  
*Deputy Attorney General.*

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## OPINIONS TO THE GOVERNOR

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## OPINIONS TO THE GOVERNOR

*Justice of the peace—Vacancy in office—Appointment—Constitutional officer.*

1. A justice of the peace is an elective, constitutional officer.

2. No vacancy exists in the office of justice of the peace until the incumbent is removed in one of the ways provided in article vi, section 4, of the Constitution for removing elective officers, or until his death is proven, or his resignation received.

Department of Justice,  
Harrisburg, Pa., January 15, 1925.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg,  
Pennsylvania.

Sir This Department is in receipt of your request for an opinion as to whether under the facts submitted a vacancy exists in the office of the Justice of the Peace of the Borough of Freeland, Luzerne County, Pennsylvania, which you may fill by appointment.

The facts are as follows:

Charles K. Kusmider, a duly elected and commissioned Justice of the Peace for said Borough, whose term has not expired, disappeared from Freeland during the latter part of August, 1924, and has not returned. His whereabouts cannot be ascertained.

Article VI, Section 4 of the Constitution of Pennsylvania is as follows:

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

"Under the new Constitution there are three kinds of removal, to wit:

"On conviction of misbehavior or crime,

"At the pleasure of the appointing power, and

"For reasonable cause on the address of two-thirds of the Senate.

"All officers are subject to the first kind, appointed

officers to the second and elected officers to the third.”  
Com. ex rel. vs. Likely, 267 Pa. 310.

A Justice of the Peace is an elective, constitutional officer. Bowman’s Case, 225 Pa. 364, 368.

In Bowman’s Case the Act of May 25, 1907, P. L. 257 was held unconstitutional. That Act authorized the respective Courts of Common Pleas of the Commonwealth to declare vacant the office of an Alderman or Justice of the Peace who shall for a period of six calendar months, at any time during his term of office, fail or neglect to reside and maintain an office in the ward, district, borough or township, for which he was elected and commissioned. The appellant in that case, being a duly elected and commissioned Justice of the Peace for the Borough of Brownsville, whose term was unexpired, had been absent in Europe for a period of six months and one day when a petition was presented to the Court under the aforesaid Act of 1907, setting forth the fact of such absence and praying for a rule to show cause why his office should not be declared vacant. The rule was made absolute, and from the decree declaring the office vacant an appeal was taken to the Supreme Court. Held, reversing the decree of the lower Court, that:

“A constitutional direction as to how a thing is to be done is exclusive and prohibitory of any other which the legislature may deem better and more convenient. As the people have spoken directly in adopting their organic law, their representatives in General Assembly met are at all times bound in undertaking to act for them, and what is forbidden, either expressly or by necessary implication, in the constitution can not become a law.” (225 Pa. 364-367).

The same rule, of course, applies to the executive, and it was held in an opinion by Attorney General McCormick in Swanck’s Case, 16 Pa. County Court Report 318 that physical or mental disability of an incumbent of the office of alderman does not create such a vacancy as may be filled by the Governor, unless the office has been declared vacant in the manner as provided by Article VI, Section 4 of the Constitution. See also opinion of the same Attorney General as recorded in 5 Pa. Dis. Rep. 158, in which a similar conclusion is reached with respect to a Judge of the Court of Common Pleas who had been incapacitated for work for three years due to physical disability.

You are, therefore, advised that under the facts submitted, no vacancy exists in the said office of Justice of the Peace for the Borough of Freeland, and you are not authorized to make an appointment until the said Charles K. Kusmider is removed therefrom

in one of the two ways provided in Article VI, Section 4 of the Constitution for removing elective officers, or until his death is proven or his resignation received.

Yours very truly,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

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*Governor—Commission—Duties of Officers so Appointed—Act of February 27, 1865, P. L. 225.*

Under the Act of February 27, 1865, P. L. 225, and its supplements, the Governor is authorized, on the request of an Express Company, to issue a commission to any officer, and known as "Express Police," without designating any county in which the same is to be effective, provided the applicant company is located within the State or runs through or into any county of the State, the counties in which such commission shall be valid to be determined by the recording of the oath and commission as provided for in said Act of 1865.

Department of Justice,  
Harrisburg, Pa., May 25, 1925.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg,  
Pennsylvania.

Sir: This Department has your request for an opinion as to your authority to appoint and to commission "Express Police" who shall have authority to act as such in every county of the State.

It appears that the custom in issuing such commissions has been to include therein a statement of the counties in which the appointed policemen is authorized to act, the counties so named being limited to those in which the property of the applicant company is located.

It also appears that, in the instant case, an express company has made application for the appointment of policemen to be commissioned to act in every county of the State in order that they may be used to protect express company property in those counties in which the company has its offices, in those in which delivery of express matter is made, and in those through which it is carried while in transit.

The authority of the Governor to appoint and commission policemen upon the request of express companies, to be known as "Express Police" is contained in the Act of April 8, 1925, which is an amendment to Section 1 of the Act of April 11, 1866, P. L. 99, which is a supplement to the Act of February 27, 1865, P. L. 225. The Acts of 1925 and of 1866 do not contain any limitation as to the territory within which policemen appointed thereunder may operate, nor any limitation as to the counties for which they may be commissioned.

The terms of the aforesaid Act of 1865 are applicable to "Express Police" and answer your inquiry.

Its relevant provisions are as follows:

The Governor, upon application of a railroad company (express company) may appoint such persons as the company designates as policemen and issue a commission to them to act as such.

"Every policeman so appointed shall, before entering upon the duties of his office, take and subscribe the oath required by the eighth Article of the Constitution, before the recorder of any county through which the railroad (express company), for which such policeman was appointed, shall be located; which oath, after being duly recorded by such recorder shall be filed in the office of the Secretary of State and a certified copy of such oath, made by the recorder of the proper county, shall be recorded, with the commission, in every county through, or into which, the railroad (express company), for which such policeman is appointed, may run and in which it is intended the said policeman shall act; and such policeman, so appointed, shall severally possess and exercise all the powers of policemen of the City of Philadelphia in the several counties in which they shall be so authorized to act as aforesaid."

In order that these policemen may be qualified as such this act requires: (1) That a commission be issued by the Governor, which may be issued if the applicant company is located within the State or runs through or into any county of the State, i. e. operates within any county; (2) That the oath subscribed by the Act be administered as therein prescribed; and (3) That the commission and a copy of the oath be filed with the Secretary of the Commonwealth and in those counties within which such applicant company operates and in which it is desired that such commission shall be effective.

The express company is a common carrier authorized to do business throughout the State and as such it must accept for transportation and delivery all express matter presented to it for delivery in those localities in which it does business. This obligation may involve transportation through any county of the State. In transporting such property it may use its own vehicles or those of others, including the railroad's. In so transporting such property, whether in its own vehicles or those of others, including railroad cars, the express company runs or operates through or into every county so traversed.

You are therefore authorized to issue a commission to any such policeman, without designating any county in which the same is to be effective, provided the applicant company is located within the State or runs through or into any county of the State as above indicated, the counties in which such commission shall be valid to

be determined by the recording of the oath and commission as provided for in the said Act of 1865.

If preferable, in order to conform with custom, such commission may contain the counties in which such policeman is authorized to qualify to act as above indicated, however, the fact that a county is so named will not authorize the policeman to act therein unless (1) the company requesting his appointment shall be located therein or (2) unless the company shall run or operate through or into it, and until he has qualified therein as required in the said Act of 1865.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

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*Courts—Judges—President judges' commissions—Priority of commission—Constitution, Schedule No. 1, sections 15 and 16—Act of May 25, 1921.*

1. In a judicial district where there are three or more judges and the president judge dies, that one of the remaining judges, who is oldest in commission, that is oldest in continuous service, is entitled to be president judge, although the commission under which he is actually serving may be junior in date to that of one or more of the other judges.

2. A construction of the Act of May 25, 1921, P. L. 1163, which would establish any other rule would render the act unconstitutional.

3. It is the rule of the Department of Justice that, unless for very strong and compelling reasons, it will not reverse or materially modify the opinion of previous Attorneys-General, and this rule applies with great force when any such opinion has been referred to specifically by the Supreme Court and unequivocally approved.

Department of Justice,

Harrisburg, Pa., December 8, 1925.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg, Pa.

Sir: I have received your request for an opinion on the following:

Honorable Henry M. Edwards died November 28, 1925. At the time of his death he was President Judge of the 45th Judicial District, namely, Lackawanna County. His death left, commissioned as Judges of the 45th Judicial District, Honorable Edward C. Newcomb, who has been by re-election, in continuous service as a Judge of the 45th Judicial District for twenty-four years, and Honorable George W. Maxey, who has been commissioned and in continuous service as a Judge of the 45th Judicial District for six years. Judge Newcomb's present commission will expire on the first Monday

of January, 1932, and Judge Maxey's present commission will expire on the first Monday of January, 1930. In other words, Judge Maxey's commission will be the first to expire as compared with Judge Newcomb's. The question is, whether Judge Newcomb or Judge Maxey is entitled to be commissioned President Judge in place of Judge Edwards.

Sections 15 and 16 of "Schedule No. 1" (Adopted with the Constitution,) read as follows:

"Sec 15. Judges in Commission. Judges learned in the law of any court of record holding commissions in force at the adoption of this Constitution shall hold their respective offices until the expiration of the terms for which they were commissioned, and until their successors shall be duly qualified. The Governor shall commission the president judge of the court of first criminal jurisdiction for the counties of Schuylkill, Lebanon and Dauphin as a judge of the court of common pleas of Schuylkill county, for the unexpired term of his office."

Section 16. President Judges. Casting Lots. Associate Judges. After the expiration of the term of any president judge of any court of common pleas, in commission at the adoption of this Constitution, the judge of such court learned in the law and oldest in commission shall be president judge thereof; and when two or more judges are elected at the time in any judicial district they shall decide by lot which shall be president judge; but when a president judge of a court shall be re-elected he shall continue to be president judge of that court. Associate judges not learned in the law, elected after the adoption of this Constitution, shall be commissioned to hold their offices for the term of five years from the first day of January next after their election."

Section 10 of the Act of May 25, 1921, P. L. 1163, provides:

"In all districts in which, by the provisions of this act, two or more judges are provided, one of said judges shall be the president judge of said district, and the other or others shall be the additional law judge or judges thereof. The judge of said districts whose commission shall first expire shall be the president judge thereof, except when the president judge has been or shall be re-elected, in which case he shall continue to be president judge."

The above statutory provision, if Schedule 16 of the Constitution had not been interpreted by the Supreme Court as providing a permanent and not merely a temporary rule of succession, would require the issuance of the commission of president judge to Judge Maxey as he is the judge whose commission "shall first expire." Under the statute the judge whose commission "shall first expire" is entitled to the commission of president judge.

It appears that, with no exception since 1877, the rule used for determining who shall be considered President Judge, in case of a vacancy in that position caused by the death, resignation or non-election of the former President Judge, has been that the remaining judge "oldest in commission", namely, "oldest in continuous service", is to be President Judge, and commissioned as such, "without regard to the date of the commission under which he was" serving at the time the vacancy in the position of President Judge happened. (See *Commonwealth vs. Pattison*, 109 Pa. 165, at the bottom of Page 170).

In 1885, the Supreme Court, in said case of *Commonwealth vs. Pattison*, 109 Pa. 165, referred to an opinion of Attorney General George Lear, given to Governor Hartranft in 1877, which I have been unable to discover and in which the Attorney General advised that the expression in Section 16 of the Schedule adopted at the same time with the Constitution of January 1, 1874, by the use of the words "oldest in commission", referred to the judge who was "oldest in continuous service", and not to the judge whose commission at the moment was the oldest, and for that reason would first expire. With regard to this opinion of the Attorney General, the Supreme Court in the *Pattison* case says:

"So far as we know, this construction, *as to the correctness of which we entertain no doubt*, has ever since been adhered to by the executive department."

It is a present rule of the Department of Justice, that unless for very strong and compelling reason, it will not reverse or materially modify the opinions of previous Attorneys General, and this rule applies with great force when any such opinion has been referred to specifically by the Supreme Court, and unequivocally approved.

The opinion of the Supreme Court in the *Pattison* case (1885) did not turn merely upon the question as to the meaning of the expression "oldest in commission" as used in Section 16 of the Schedule attached to the Constitution. If it had depended merely upon the meaning of those words and said Section 16, by being a temporary measure, had become inoperative by the passage of time and by the disappearance of the reasons for its enactment, the Legislature would have had the right to provide for the succession to the position of President Judge, as it attempted to specifically in 1901 and again in 1921, in terms which, if the Legislature had the right and power to provide for filling a vacancy in the position of President Judge, would have supplanted the Attorney General's opinion of 1877, and the Supreme Court decision in the *Pattison* case, in 1885, no longer applicable.

The Supreme Court, however, decided in unequivocal terms in the *Pattison* case, at Page 171, that the provision in Section 16 of the

Schedule which reads: "After the expiration of the term of any President Judge of any Court of Common Pleas in commission at the adoption of this Constitution, the judge of such Court, learned in the law and oldest in commission shall be President Judge thereof", does not provide a special and temporary rule only for succession to the the position of President Judge in the single instance in each case when the term of a President Judge "in commission at the adoption of this Constitution" shall come to an end. The Court holds that the word "after" refers to all future time, at least (we can infer) until the Constitution is amended. Whether dictum or not, how can we ignore the plain meaning of Judge Sterrett's words, beginning at the middle of page 171:

"Construing the fifteenth section, so far as it relates to president judges, in connection with the first sentence of the sixteenth section, we have substantially this provision, viz.: President judges in commission at the adoption of this Constitution shall hold their respective offices until the expiration of the terms which they were commissioned, *and thereafter the judge, of each court respectively, learned in the law and oldest in commission, shall be the president judge thereof.* \* \* \* We have no doubt this was what was intended, but the thought was not as clearly expressed perhaps as it might have been: It is a mistake to suppose the word 'after,' with which the sixteenth section commences, is employed in the sense of 'upon', thereby limiting the application of the rule of succession to the single event of the expiration of each commission in force at the adoption of the Constitution. It was evidently used in the sense of 'thereafter' referring *not only to the expiration of the respective commissions then in force but to the expiration of every subsequent commission.*"

That the Supreme Court was, at first impression, led to believe differently is shown in the Pattison case on Page 172, where it is stated:

"My first impression was otherwise, but a careful examination of all the provisions relating to the subject satisfied me that the framers of the Constitution intended to establish a uniform system, whereby the judge oldest in commission in each of the courts of Common Pleas should be president judge thereof, subject to the *temporary* qualifications that the president judges in commission at the adoption of the Constitution should continue to serve as such, notwithstanding they might have associates learned in the law, who were their seniors in continuous service."

In the light of the Pattison decision, it is not possible to hold that the Acts of 1901 and 1921 are constitutional to the extent that they attempt to provide, that in case of a vacancy, the judge whose

present commission will expire first, is entitled to be President Judge. In the Pattison case, at page 172, the Supreme Court states that the idea of this rule "by which the judge oldest in continuous service will be president of the court, is neither new nor unnatural." Again, the Court states on the same page that, by the use of "language that does not fairly admit of any other reasonable construction," the framers of the Constitution have provided for filling a vacancy of President Judge by commissioning the "judge oldest in continuous service."

A reading of the argument and decision of the Supreme Court in the Pattison case, gives a satisfactory reply to the question you ask, namely, that Honorable Edward C. Newcomb, being the judge in the 45th Judicial District "oldest in commission", namely, "oldest in continuous service", is President Judge of said 45th Judicial District, instead of Honorable George W. Maxey, even though Judge Maxey's present commission will be the first to expire; and that, therefore, it is the duty of the Governor to issue to Honorable Edward C. Newcomb, a commission as President Judge of the 45th Judicial District, thus conforming to the rule laid down by the Constitution for filling vacancies in the position of President Judge, said rule being confirmed by the decision of the Supreme Court in the Pattison case,—and also by the uniform practice of Governors of the Commonwealth from the Attorney General's opinion given in 1877 to the present time.

Yours very truly,

DEPARTMENT OF JUSTICE

GEORGE W. WOODRUFF,

*Attorney General.*

*Municipalities—Cities of the third class—Public officers—Aldermen—Elections—Acts of June 21, 1839, March 9, 1846, May 23, 1874, May 23, 1889, June 27, 1913, May 3, 1917, and July 27, 1917.*

1. Where, at a general election, a person is elected to the office of alderman in a city of the third class at a time when the city has but one ward, such person is entitled to his commission to office, although shortly thereafter and before his commission shall have issued the city is divided into two wards.

2. Since the Act of June 27, 1913, P. L. 568, a city of the third class may successfully function with one ward, and under the Act of May 23, 1874, P. L. 230, such city may elect one alderman for the city.

3. If the city, after such election, is divided into two wards the alderman elected is entitled to his commission and to serve in the ward in which he has his residence.

4. The certificate of election of an alderman by the return officers is *prima facie* title to the office. The commission issued by the Governor is only evidence of such title.

5. The Act of May 3, 1917, P. L. 143, relates to special elections in cases of annexation of territory and not to a case of a division of a city of one ward into two.

6. Where a portion of a township is annexed to a city, if a justice of the peace resides in the portion not annexed, his right to his office continues; if he resides in the portion annexed to the city, his right to his office ceases.

Department of Justice,  
Harrisburg, Pa., December 31, 1925.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg,  
Pennsylvania.

Sir: A protest has been filed against the issuance of a commission as alderman to B. B. Samuels, who has been returned as elected to that office for the City of Clairton, upon which protest a hearing was held on December 23, 1925, at which the protestant and Samuels appeared in person and by counsel, as also the City Clerk of Clairton.

The records of the Secretary of the Commonwealth show the following facts:

(1) The Boroughs of Clairton, North Clairton and Wilson, all of Allegheny County, were, by Letters Patent dated September 14, 1921, consolidated as the City of Clairton, a city of the third class, without division into wards.

(2) At the time of consolidation there were three and only three, duly commissioned acting Justices of the Peace within the three boroughs, the commission of each of whom expires January 1, 1926. No alderman was elected therein until November 3, 1925.

(3) At the election held on November 3, 1925, the electors of the City of Clairton elected B. B. Samuels as Alderman. The return of the Prothonotary of Allegheny County certifies that Samuels filed his acceptance as Alderman of the first ward of the City of Clairton, which was later amended so as to show his acceptance as Alderman of the City of Clairton.

At the hearing on this protest, a certified copy of the final Order of the Court of Quarter Sessions of Allegheny County, at No. 35, February Sessions, 1925, Miscellaneous Docket, was furnished this Department which will be filed with the Secretary of the Commonwealth. From said Order, the following facts appear:

(1) By Order of the said Court, a special public election was duly held in the City of Clairton on November 3, 1925, to secure the assent or dissent of the electors to a division of the city into two wards as previously recommended by commissioners duly appointed, said proceedings being under the provisions of the Act of 1913, P. L. 568, as amended by Act of 1917, P. L. 1019.

(2) The electors having assented to the same, the said Court on November 18, 1925, ordered and decreed that the said City should be divided into and consist of two wards, as designated in the Decree, to be known as the first and second wards.

It is admitted by all parties concerned that B. B. Samuels is a resident of the second ward of Clairton.

The protestant contends (1) that the election of Samuels was not in conformity with the constitutional requirement that aldermen shall be elected in the several wards, districts, boroughs, and townships by the qualified electors thereof because the City of Clairton was not divided into wards at the time of the election; (2) that he is not entitled to his commission because he was not elected by the electors of the second ward, as subsequently erected, within which and for which he must now serve, if commissioned; (3) that because of the creation of new wards in the City of Clairton, ward officers, including aldermen, could be elected only at a special election called for that purpose and that no such special election was called; (4) that Jefferson Township, a portion of which was annexed to Clairton in 1924, and is now included within its second ward, had at the time of annexation, two duly commissioned and acting Justices of the Peace, the term of one of which does not expire until January 1, 1926.

These objections will be considered in numerical order.

1. Did the City of Clairton on November 3, 1925, comprise one ward or district within the contemplation of Article V, Section 11 of the Constitution?

That Section provides, *inter alia*, "Except as otherwise provided in this Constitution, Justices of the Peace or Aldermen shall be elected in the several wards, districts, boroughs or townships by the qualified electors thereof at the municipal election in such manner as shall be directed by law and shall be commissioned by the Governor for a term of six years \* \* \* No person shall be elected to such office unless he shall have resided within the township, borough ward or district for one year next preceding his election."

It is contended that because the City of Clairton on November 3, 1925, was not divided into two or more wards, and that because its charter does not specify that the whole city comprises one ward, it does not contain a ward or district within the contemplation of the above quoted Section of the Constitution, and is, therefore, not entitled to elect an alderman. There is no reason or authority to support that position. The Third Class City Acts of 1874, P. L. 230, 1889, P. L. 277 and 1913, P. L. 568 nowhere specify a minimum number of wards, but each one presupposes one or more wards. This is illustrated by the fact that each of said Acts provides for the division of wards, and the creation or erection of a new ward out of parts of two or more wards. (Article II, Section 1, Act of 1913, as amended by Act of 1917, P. L. 1019). No doubt prior to the Act of 1913 provision was made at the time of incorporation of such cities for two or more wards, because of ward representation in councils, but since that Act a city may successfully function with only one ward, inasmuch as all city officers are elected at large.

We are of the opinion that on November 3, 1925, the whole of the City of Clairton constituted one ward or district.

Therefore, the commissions of all Justices of the Peace in the district out of which Clairton was created being about to expire, and there being no alderman therein, the electors of the whole city were authorized to elect one alderman for the city at the election of November 3, under the provision of Section 32 of the Act of May 23, 1874, P. L. 230 (Pa. Stat. 4406), which is as follows: "Each of the wards of each of the said cities (third class) shall be entitled to elect one alderman \* \* \* and said alderman shall be elected at the municipal election next preceding the expiration of the commission of the Justice of the Peace, resident in the district out of which the said ward shall be created".

This provision is applicable to cities incorporated under subsequent acts. (Commonwealth ex rel vs. Hastings, 16 Pa. C. C. 425, Harris Application 4 D. R. 320).

Samuels was duly elected to the office of alderman for the City of Clairton, filed his acceptance within the required time and the prothonotary has certified both the election and acceptance to the Secretary of the Commonwealth, and his commission must issue unless the division of the city into two wards defeats his right thereto.

2. Effect of the division of the city into two wards upon the right of Samuels to be commissioned.

Samuels, having been duly elected by the electors of the city at large, the subsequent procedure to be followed before he takes office is set forth in the Act of April 21, 1915, P. L. 142, which requires each alderman-elect, within thirty days after the election, if he intends to accept said office, to file his acceptance with the prothono-

tary of the Court of Common Pleas of the proper county, and requires the prothonotary to certify such election and acceptance to the Secretary of the Commonwealth, and proceeds "whereupon, the Governor shall commission for the full term, such persons as shall appear to be duly elected and accepting."

We are convinced that the right of Samuels to this office, and to his commission for the same, was fixed and determined by the electors at the election. His certificate of election by the return judges constituted a prima facie title to the office (*Kerr vs. Trego*, 47 Pa. 292, 296; *Commonwealth ex rel vs. Reno*, 25 C. C. 442, 444, 446). "The acceptance of the office \* \* \* is an after matter, having no bearing on the merits or regularity of the election". *Battis vs. Price*, 2 Pearson 456, 459. It is merely a formal statement of record that the alderman elected will accept the office and does not care to exercise his right to decline. The commission issued by the Governor is not the title to the office but only evidence of it. (*Commonwealth ex rel vs. Lentz*, 13 D. R. 388, 389).

It is conceded that Samuels resided for one year preceding the election in that portion of the City of Clairton which now constitutes the second ward.

The division of Clairton into wards did not become effective until November 18, 1925, the date of the final decree, which was after Samuels' right and title to the office of alderman had been determined.

His right to continue to exercise his office after the second ward was created is governed by Section 1 of the Act of March 9, 1846, P. L. 105, which provides, inter alia, "In all cases of the creation of any new \* \* \* ward in any city \* \* \* the commissions of \* \* \* alderman, within the respective territories out of which such \* \* \* ward has been or may be created, shall continue for the proper \* \* \* ward, in which such \* \* \* aldermen may respectively reside, for the balance of the official term".

Terms of aldermen are fixed by the Constitution and cannot be lessened by the Legislature, hence the usual provisions for holding over where consolidation or subdivision of districts is provided. (*Commonwealth ex rel vs. McAfee*, 237 Pa. 320).

Samuels' right to his commission having been determined as of November 3, 1925, it will be considered as if issued for the whole City of Clairton and, the second ward having been created out of the whole city, his commission shall continue for the ward in which he resides, to-wit, the second ward.

His right to exercise the office is also limited by Section 13 of the Act of June 21, 1839, P. L. 376 (Pa. Stat. 13007) which provides that during the continuance in office of aldermen, they shall respectively keep their offices in the ward for which they shall have been elected.

So long as he continues to reside in the second ward of Clairton and therein keeps his office, he shall be maintaining his office "in the ward for which (he) shall have been elected", to-wit, the one ward which comprised the whole of the city at the time of his election.

The division of the City of Clairton into two wards subsequent to Samuels' election as alderman, does not affect his right to a commission, but restricts the locality in which he must maintain his office to the second ward, in which he must continue to reside in order to retain his commission.

3. It was not necessary that a special election be called for election of alderman or that an alderman be elected at a special election.

Section 3 of the Act of May 3, 1917, P. L. 143 (Pa. Stat. 4166), cited by protestant, provides that the court in its decree of annexation of land to a city of the third class, shall make such order as will give the people of the annexed territory representation in the government of the said city by including said territory within the limits of an adjoining ward or wards, or by creating a new ward or wards thereof; and "shall, in case of the creation of new wards or ward, appoint the election officers and place for holding the first election of ward officers; and for that purpose may order a special election, if said court shall deem the same necessary".

This Act does not apply to this situation. The calling of a special election is wholly discretionary with the court and was not done in this case for the purpose of electing ward officers; it would not have applied to Samuels, even if called, because he had already been elected; an alderman is not a ward officer within the contemplation of this Act (*Commonwealth ex rel vs. Cameron*, 259 Pa. 209, 212, 213; *Commonwealth ex rel Snyder v. Machamer*, 5 D. R. 560); the Act is limited to cases of annexation of territory, while the decree of the court in the Clairton case was for the division of one ward into two wards.

4. We do not know whether the Justices of the Peace for Jefferson Township, acting at the time of the annexation of a portion of that Township to Clairton, resided in the portion so annexed or in the portion that remained in the Township. If the latter, they continued to act for and within the Township; if the former, their right to hold and exercise the office ceased with the annexation. (*Commonwealth ex rel vs. Cameron*, 259 Pa. 209).

5. Several opinions of this Department, particularly *Stidfole's* case 28 Pa. P. C. C. 389, are cited as sustaining the contention that this Commission should be refused and the claimant to the office be put to a writ of mandamus to compel its issuance. Those opinions may be differentiated, because the records of the Secretary of the Commonwealth showed that there was no vacancy in the office for which the commission was sought. They involved the question of law as to how many Justices of the Peace the respective boroughs were

entitled to, and the Department contended, and the court afterwards found, that no vacancies existed and, therefore, no commission could be issued.

On the other hand, this Department ruled, in Mutchler's case, 45 Pa. C. C. 274, that such commissions should issue where the records of the Secretary of the Commonwealth show a vacancy to be filled and the election and acceptance of the applicant for the commission. In an opinion of this Department, dated December 15, 1917, reported in the Opinions of the Attorney General for 1917-1918, the following facts appeared: Meyer "was elected an alderman for the City of Coatesville, without reference to any wards", and at the same election, the city was divided into five wards. Held that a commission should issue to Meyer for the ward in which he resided and that vacancies existed in all of the other wards in Coatesville which, under the provisions of Section 3 of the Act of March 22, 1877, P. L. 12, were to be filled by appointment of persons residing in such other wards.

You are, therefore, advised that a commission should issue to B. B. Samuels as alderman for the second ward of the City of Clairton, and that after January 1, 1926, a vacancy will exist in the office of alderman for the first ward of the City of Clairton, which may be filled by the appointment by the Governor of one who resides in the said ward and who has resided therein for one year next preceeding such appointment.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

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*Joint or concurrent resolutions—Approval by Governor.*

A concurrent resolution of both Houses of the Legislature calling upon the Auditor General to transmit to each House a statement of the total receipts from all sources and the total expenditures of the Commonwealth during the present administration and during each of the four preceding administrations, beginning Jan. 1, 1907, does not require the signature of the Governor in order to become effective.

Department of Justice,

Harrisburg, Pa., February 3, 1926.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg, Pa.

Sir: I have before me from the Secretary of the Commonwealth a concurrent Resolution adopted February 1, 1926, by both Houses of the Legislature calling upon the Auditor General to transmit to each House a statement of the total receipts from all sources and the total expenditures of the Commonwealth during the present Administra-

tion and during each of the four preceding Administrations beginning January 1, 1907.

You have asked concerning this concurrent Resolution whether it requires the signature of the Governor in order to be effective.

On June 6, 1915, Honorable Francis Shunk Brown wrote an opinion taking up about eighteen joint Resolutions and concurrent Resolutions, passed at the 1915 Session of the Legislature, and discussed both generally and with regard to each Resolution the question as to whether all joint or concurrent Resolutions need to be acted upon by the Governor before they can become effective; and also whether each one of the Resolutions taken up by him needed the approval of the Governor.

Basing his opinion upon *Commonwealth vs. Griest*, 196 Pa. 396, *Russ vs. Commonwealth*, 210 Pa. 544, and pertinent decisions of other States, the Attorney General concluded that *some* Resolutions adopted by both Houses, whether in the form of joint Resolutions or concurrent Resolutions, need not be presented to the Governor nor receive his approval or disapproval before they are complete.

Attorney General Brown's opinion is very complete and carefully considered, and there is no change in our Constitution, or laws, which would warrant my taking it up for review. Therefore, it will continue to be the opinion of the Department of Justice—

“\* \* \* that not all joint or concurrent resolutions passed by the Legislature must be submitted to the Governor for his approval, but only such as make legislation or have the effect of legislating, i. e., enacting, repeating or amending laws or statutes or which have the effect of committing the State to a certain action, or which provide for the expenditure of public money. Resolutions which are passed for any other purpose such as the appointment of a committee by the legislature to obtain information on legislative matters for its future use or to investigate conditions in order to assist in future legislation are not required to be presented to the Governor for action thereupon.”

The concurrent Resolution of February 1, 1926, now before me, clearly falls under the head of those which are merely adopted by the Legislature “to obtain information on legislative matters for its future use, or to investigate conditions in order to assist in future legislation”.

Therefore, said concurrent Resolution of February 1, 1926, is not legislation such as must be presented to the Governor and does not need to be approved or disapproved by you.

Yours very truly,  
DEPARTMENT OF JUSTICE,  
GEORGE W. WOODRUFF,  
Attorney General.

*Police—Coal and iron police—Appointments—Removal—Power of Governor—Act of April 11, 1866.*

Under the Act of April 11, 1866, P. L. 99, relating to coal and iron police, the Governor may decline to make appointments to such police force, and he may also revoke commissions, and, when conditions in respect to the use of special police by any mining company demand it, he may decline to make any appointment whatever and revoke all commissions.

Department of Justice,  
Harrisburg, Pa., April 10, 1926.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg, Pa.

Sir: I have your inquiry concerning the status of "Coal and Iron Police" as related to your power of appointment and removal, and also to the question of their powers and duties, under the Act of April 11, 1866, P. L. 99.

In the Department of Justice opinion of February 24, 1926, the statement is made that the provisions of the Act of February 27, 1865, P. L. 225, creating "Railway Police", have been extended by later laws to other corporations than railroads. That opinion does not take up specifically the question of "Coal and Iron Police", concerning which you are now making inquiry, and I will confine myself to this latter class of special policemen.

"Coal and Iron Police" are clearly given, by the Act of 1866, the powers possessed by policemen of the city of Philadelphia, and are also allowed to exercise these powers "in the several counties in which they shall be so authorized to act as aforesaid". These powers they have had and have exercised for sixty years. The Department of Justice opinion of February 24, 1926, necessarily recognized that fact, but neither it nor this opinion can in any wise increase or diminish the powers granted by law.

Before being able to exercise these powers in any county, however, they must have been appointed by the Governor; received a commission from him; taken the oath required from all public officers by Article VII of the Constitution; and recorded said oath and also a certified copy of the commission in each and every county where the company for which they are acting as special policemen has mining property, and where it is desired that the special policemen shall exercise their powers.

If there is any failure to thus record the oath and commission in any county the special policemen would be acting illegally there, and be liable to prosecution for "false arrest".

So much for the similarity between "Railway Police" and "Coal and Iron Police". We note, however, a very different attitude of the Legislature concerning the latter compared with the former by contrasting the Act of 1866 with that of 1865.

In the Act of 1865 there is not one word concerning the right of the

Governor "to decline to make any such appointment" and his right "at any time to revoke the commission."

In the Act of 1866, however, after extending wholly the provisions of the Act of 1865 to the appointment and powers of "Coal and Iron Police", the Legislature provided for a much greater control over "Coal and Iron Police". This is indicated by the following words added to Section 1 of the Act of 1866:

"And provided further, That the Governor shall have power to decline to make any such appointment, sought to be made, under the provisions of this supplement, whenever the circumstances of the case, in his opinion, do not require it, and at any time to revoke the commission of any policeman appointed hereunder."

From time to time for the past sixty years, there have been and may continue to be complaints that "Coal and Iron Police" are being used in a way to harass and oppress the striking miners of certain parts of the Commonwealth.

The Legislature with wise foresight realized that special police chosen and paid by large coal companies for their own private purposes, might become a force and power usable, even to the extent of grave oppression, against other interests opposed to the desires of the coal operators. To have means for control of this power the above quoted proviso was adopted.

Governors of the Commonwealth are bound by their oath of office and by specific other provision in the Constitution to "take care that the laws be faithfully executed", and therefore, when asked to appoint, and after appointment of, "Coal and Iron Police", they should take care that the powers expressly given in the above quoted provision are used for the protection of the general people.

The clear intent of the Legislature as voiced in the above proviso is that you, as Governor, have the power and duty to control, even to the extent of elimination, the question as to whether any one man or any number of men may hold commissions as "Coal and Iron Police" or continue to exercise the powers if granted to them.

It would be proper for you either to decline to appoint as a matter of precaution, or to require assurance both as to the character of the persons proposed and as to the intent of the company proposing the persons for appointment.

The power and, if the public welfare requires it, the duty to decline to make appointments and to revoke commissions, extends not only to individual nominees and appointees; but also, when conditions in respect to the use of special police by any company demand it, the power and duty is given to decline to make any appointment whatever and to revoke all commissions.

One particular abuse you should always stand ready to correct

by means of your removal power, is any attempt to use these special police to interfere with lawful action of members of the public.

The exercise of the power and duty imposed on you by the above quoted proviso is, in my opinion, entirely within the discretion of the Governor.

Yours very truly,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,  
*Attorney General.*

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*Public officers—Notary public—Qualification—Membership of Bar of United States District Court—Constitutional law—Act of May 15, 1874, P. L. 186.*

1. Membership in the bar of a United States court is not such an "office or appointment of trust or profit under the United States" as will disqualify a person from holding or exercising the office of notary public.

2. Where there is a doubt or uncertainty regarding the compatibility of offices, such doubt is to be resolved in favor of the compatibility.

Department of Justice,  
Harrisburg, Pa., May 3, 1926.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg, Pa.

Sir: It appears that George K. Englehart, of Fullerton, Pa., has made application for his appointment as a Notary Public. In his application, in answer to a question contained in the form used as to whether or not he holds any office or appointment of trust or profit under the United States, he has answered that he is a member of the Bar of the United States District Court. The question is whether the membership in the Bar of a United States Court disqualifies him for appointment as a Notary Public.

Article XII, Section 2, of the Constitution of Pennsylvania provides that:

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

The Act of May 15, 1874, P. L. 186 (Pa. Stat. 17832), was passed in conformity with this constitutional provision. It provides that "Every person who shall hold any office, or appointment of profit or trust under the Government of the United States, \* \* \* who is or shall be employed under the legislative, executive or judiciary depart-

ments of the United States, \* \* \* is hereby declared to be incapable of holding or exercising, at the same time, the office or appointment of \* \* \* notary public \* \* \*."

Thus it appears that the contemporaneous interpretation of this section of the Constitution made by the Legislature was that the office referred to under the United States was an employment under one of the branches of the Government. A member of the Bar is in no sense employed by the judiciary department.

The General Assembly has never declared the office of attorney at law or membership in the Bar of any Court to be incompatible with any office except that of inspector of the county prison. (Act of 1874, *supra*.)

Admission to the Bar of a United States Court is based upon the admission to the Bar of the highest Court of the State of residence of the applicant. The office of attorney at law has never been considered incompatible with any other public office. If Mr. Engelhart were precluded by the fact of his admission to practice law before the United States District Court from exercising the office of Notary Public, then necessarily, one who is authorized to practice law before the United States Supreme Court, the United States Circuit Court of Appeals, or the United States District Court would be precluded from holding the office of Attorney General of this Commonwealth. Such would create an anomalous situation. The duties of the Attorney General require frequently his appearance in the United States Courts, and yet the very fact of being qualified there to appear would, under this rule, prohibit his acting as Attorney General. This would result in his inability to represent the Commonwealth in important cases involving the constitutionality of Pennsylvania statutes with reference to the United States Constitution. He would be charged with the duty of maintaining the constitutionality, in the United States Courts of State statutes there under attack, and yet he would be disqualified from becoming a member of that Bar without which he could not there appear as a representative of the Commonwealth.

The United States Constitution in Article I, Section 6, Clause 2, provides that:

"\* \* \* No person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

Since the earliest days of this government, many of the foremost lawyers practicing before the United States Supreme Court have been members of the United States Senate or House of Representatives, and I believe that no question has ever arisen as to the incompatibility of such office with membership in the Bar of that Court.

It is also to be noted that the definitions of the term "office" involve the clothing of the incumbent with some part of the sovereignty and

that the duties thereof shall be of a continuous character. (*Curtin v. State* (Cal.) 214 P. 1030, Am. Dig. Vol. 17 A 1923 title "officers" sect. 1; *State ex rel. v. Hackman* (No.) 254 S. W. 53, Am. Dig. Vol. 18 A, title "officers" sect. 1; *High on Receivers*, Par. 625 and *Friedman on Municipal Corporation*, Ed. 1894, as cited in *Com. v. Murphy*, 25 Pa. C. C. 639; *Commissioner, etc. v. Garrett* (Tex.) 236 S. W. 970, Am. Dig. Vol. 14 A, 1922, title "officers" sect. 1).

The terms "office" and "appointment" as used in Article XII, Section 2 of the Constitution, are synonymous. An "office" is an appointment with a commission; an "appointment" is an office without one. The distinction is immaterial. *Com. ex rel. v. Binns*, 17 S. & R. 219, 243.

A member of the Bar of a Court is not clothed with any part of the sovereignty.

Where doubt exists as to the compatibility or incompatibility of offices, it should be resolved in favor of the compatibility.

"The question of the incompatibility is no new question. The established rule is to give the strictest possible construction to every part of the Constitution, and to every Act of Assembly, declaring state offices incompatible with offices or appointments under the federal government, or declaring different state offices incompatible with each other, and never to hold anything to be within the prohibition unless expressed and named; and to take in no possible case by construction."

*Com. ex rel. v. Binns*, 17 S. & R. 219, 226.

Where there is a doubt or uncertainty regarding the compatibility of offices, such doubt is to be resolved in favor of the compatibility. *Com. ex rel. v. Binns*, *supra*, on page 230.

I am, therefore, of the opinion that membership in the Bar of a United States Court is not such an "office or appointment of trust or profit under the United States" as will preclude the holding or exercising of an office in this State; and that so far as this objection is concerned, the appointment of Mr. Englehart as a Notary Public may issue.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

*Primary elections—Loan elections—Assistance at primary elections—Acts of July 12, 1913, P. L. 719, and June 25, 1919, P. L. 581.*

1. Where a loan election relating to local bond issues is held on the same day as a primary election for the nomination of candidates to public office, the election officers must, with respect to the marking of loan ballots, comply with and enforce the laws regulating municipal elections, and in regard to the primary elections, they must comply with and enforce the laws regulating primary elections.

2. No elector may have assistance in marking his primary ballot, unless he has made and filed with the judges of the election an affidavit that he cannot read the name on the ballot, or that, by reason of physical disability, he is unable to mark his ballot.

3. In case of the loan elections, the voter may have assistance in marking his loan ballot without having filed such an affidavit, if he otherwise complies with the law.

Department of Justice,  
Harrisburg, Pa., May 12, 1926.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg,  
Pennsylvania.

Sir: We have your request to be advised whether the provisions of the Primary Act of 1913 with respect to the right of electors to receive assistance are inoperative in political subdivisions of this State in which by local action special elections relating to bond issues or other matters have been fixed for the same day on which the primary election is held. You desire to know particularly whether in Philadelphia the fact that by action of City Council Tuesday May 18, 1926 has been fixed as the date for holding an election on increasing the City's indebtedness will enable electors at the primary to receive assistance under the provisions of the municipal election laws rather than under the provisions of the Primary Act of 1913.

Section 11 of the Act of July 12, 1913, P. L. 719, provides that

*"Primaries shall be conducted in conformity with the laws governing the conduct of general elections, in so far as the same are not modified by the provisions of this Act or are not inconsistent with its terms; Provided that no elector shall be permitted to receive any assistance in marking his ballot, unless he shall first make an affidavit that he cannot read the names on the ballot, or that by reason of physical disability he is unable to mark his ballot."*

Section 23 of the same Act provides appropriate penalties for the violation of this provision by persons receiving assistance, by persons giving assistance and by judges of election.

Article III, Section 7 of the Constitution of Pennsylvania provides that the General Assembly cannot pass any local or special legislation "for the opening and conducting of elections \* \* \*;" and Article VIII, Section 7, that "All laws regulating the holding of elections by

the citizens or for the registration of electors shall be uniform *throughout the State*; \* \* \*"

Under the constitutional provisions quoted, particularly Article VIII, Section 7, we are unqualifiedly of the opinion that the Legislature could not by law permit assistance to be given in cities of any class or in any city or cities within a class under circumstances different from these obtaining in all cities of the Commonwealth. We are unqualifiedly of the opinion that the constitutional provisions apply as well to primary elections as to municipal or general elections and that therefore even if the Legislature had undertaken so to do, it could not validly have provided that under any circumstances or for any reasons, electors in the City of Philadelphia or in any other city or cities should have more liberal treatment with regard to assistance at primary elections than that accorded to electors in other parts of the State. The assistance provisions of the Primary Law must, therefore apply uniformly throughout the State, and under no circumstances can any elector be allowed to have assistance in marking his primary ballot unless he shall have made the affidavit required by the Act of 1913.

However, the Legislature has never either expressly or by implication undertaken to say that under any circumstances the provisions "that no elector shall be permitted to receive any assistance in marking his ballot unless he shall first make an affidavit that he cannot read the names on the ballot, or that by reason of physical disability he is unable to mark his ballot" should be inapplicable in any particular city or cities.

It is true that under the City Charter of 1919, the City Council of Philadelphia may fix the date of a primary election as the date for holding an election to obtain the consent of the electors to incur new debt or increase indebtedness (Article XVIII, section 8 of the Act of June 23, 1919, P. L. 581), that whenever the date of an election is thus fixed by the City Council the election is to be held "at the place, during the hours and under the regulations, provided by law for holding municipal elections \* \* \*;" and that under the laws regulating the holding of municipal elections, assistance may be rendered to electors upon the mere declaration by the elector that by reason of disability the elector desires assistance.

The right thus conferred upon City Council does not, however, either expressly or impliedly permit City Council by its action to substitute the municipal election laws for the primary election laws, as the laws governing the marking of primary ballots. All that the Legislature has rendered it possible for City Council to do, is to compel the election officers presiding over the primary election and the loan election to enforce two acts of laws regulating elections at

the same time and at the same place. With respect to the marking of primary ballots, the election officers must comply with and enforce the laws regulating primaries; and with respect to the marking of loan ballots, the election officers must comply with and enforce the laws regulating municipal elections.

As we have already pointed out, under no circumstances could the Legislature, even had it so desired, permit the Council of the City of Philadelphia by any action which it might take, to render the provisions for assistance of electors at primaries held in Philadelphia less stringent than those applicable in other parts of Pennsylvania. It is therefore absolutely clear than an elector in Philadelphia (or in any other city or political subdivision holding a loan election on the date of the primary election) cannot be permitted to have assistance in marking his primary ballot unless he has filed the affidavit required by the Primary Law. If he is unable truthfully to take the required affidavit but nevertheless desires to take advantage of the more liberal assistance provision of the laws regulating municipal elections for the purpose of having assistance in marking his loan ballot, he must in our opinion, enter the voting compartment twice. He may enter the compartment with his loan ballot and receive assistance in marking it, but he cannot take the primary ballot with him when he thus marks his loan ballot. He must leave the booth, deposit his loan ballot and re-enter the booth with his primary ballot to mark it without assistance. Or if he prefer, he may enter the booth with both his primary ballot and his loan ballot, but in this event he must mark the primary ballot unassisted, leave the booth, deposit the primary ballot, and re-enter the booth to mark the loan ballot with assistance. He cannot under any circumstances be permitted to enter the voting compartment accompanied by any other person if he has in his possession both the primary and the loan ballot, unless he has first made and filed the affidavit of disability required by the Primary Law.

To summarize, we advise you:

**FIRST:** That under no circumstances can any elector anywhere in Pennsylvania be permitted to have assistance in marking his primary ballot unless he has made and filed with the judge of elections an affidavit that he cannot read the names on the ballot or that by reason of physical disability he is unable to mark his ballot; and

**SECOND:** That if in any political subdivision of Pennsylvania a loan election or any other special election is held on the date of the primary election, a voter may have assistance in marking his loan ballot without having filed such an affidavit if, and only if, he enters the voting compartment twice,—once without the primary ballot in

his possession and once with the primary ballot in his possession. When he enters the compartment with the primary ballot in his possession, no other person may lawfully enter the compartment with him.

Very truly yours,

DEPARTMENT OF JUSTICE

GEORGE W. WOODRUFF,  
*Attorney General.*

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*County Controller—Vacancy in Allegheny County—Appointive Power—Governor—Judges—Acts of 1861, 1895 and 1901.*

The Act of June 27, 1895, P. L. 403, as amended by the Act of May 8, 1901, P. L. 140, relating to vacancies in the office of county controller, repeals the Act of May 1, 1861, P. L. 450, so that vacancies in that office are now filled by appointment by the Governor instead of the judges of the county.

Department of Justice,  
Harrisburg, Pa., June 5, 1926.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg,  
Pa.

Sir: On account of the death of John P. Moore, Controller of Allegheny County, on June 3, 1926, and the resulting vacancy in the office of Controller of Allegheny County, you have asked me the following question:

Have you, as Governor, the power and duty to appoint a Controller for Allegheny County to fill the vacancy caused by the death of John P. Moore?

Prior to the Act of June 27, 1895, P. L. 403, as amended by the Act of May 8, 1901, P. L. 140, vacancies in the position of Controller of Allegheny County would have been filled pursuant to the Act of May 1, 1861, P. L. 450, by the Judges of Allegheny County.

Section 16 of said Act of 1915, as amended in 1901 provides that:

“The Governor shall appoint a person in each county wherein this act is or becomes operative, to act as controller of such county until his successor in office is duly elected and installed, and shall also appoint a suitable person to fill any vacancy that may occur by death, resignation or removal from office of controller in any county wherein this act is or becomes operative.”

There has been argument to the effect that the Act of 1895, as amended in 1901, did not repeal the Act of 1861 as far as Allegheny County was concerned.

This claim, however, has been finally disposed of by the decision in *Commonwealth ex rel. Hyatt M. Cribbs v. John P. Moore*, 255 Pa. 402. In that decision the Supreme Court says concerning the contention that the Act of 1861 was not repealed as far as Allegheny County was concerned:

“There is certainly no ‘clearly apparent’ intent in the Act of 1895, that a local act shall not be repealed. On the contrary, it contains the provision that ‘all acts or parts of acts inconsistent herewith are hereby repealed’. It would be difficult to find anything to which this language can apply, unless it be the Act of 1861. \* \* \*

“Our conclusion is that the Act of 1895 covers the subject-matter of the Act of 1861, in so far as it relates to county controllers, and that the later act embraces new provisions which plainly show that it was intended as a substitute for the earlier act. The judgment of the court below should be sustained on the ground that the provision of the Act of 1861, which is alleged to affect the eligibility of respondent, has been repealed by the Act of 1895. \* \* \*”

The Act of 1861 having been repealed as determined by the Supreme Court, the only law which provides for filling of the vacancy created by the death of Mr. Moore is Section 16 of the Act of June 27, 1895, as amended in 1901, which clearly directs the Governor to “appoint a suitable person to fill any vacancy that may occur by death \* \* \* of controller in any county wherein this act is or becomes operative.”

Pursuant to that direction you have the power and duty to appoint a controller for Allegheny County to fill the vacancy caused by the death of John P. Moore.

Yours very truly,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General.*

*Public officers—Recorder of deeds—Vacancy by death—Appointment by Governor—Interim appointment—Acts of July 2, 1839, May 15, 1874, and March 17, 1897.*

Under the Acts of July 2, 1839, P. L. 559, May 15, 1874, P. L. 205, and March 17, 1897, P. L. 4, and article xiv, section 2, and article iv, section 8, of the Constitution. where a vacancy occurs by death in the office of recorder of deeds, the Governor may, by appointment, fill the vacancy until the proper time for election to the office arrives and the newly-elected recorder is qualified.

Department of Justice,  
Harrisburg, Pa., July 10, 1926.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg,  
Pennsylvania.

Sir: Some question has arisen as to your authority to fill by appointment, the vacancy created in the office of Recorder of Deeds at Erie County by reason of the death of Mr. F. M. Plate, the late incumbent.

The precise question involved is whether this vacancy, resulting from the death of Mr. Plate after entering upon his duties, may be filled by appointment up to the time that the election provided by law under such circumstances can be held, and the newly elected Recorder qualified, or whether such vacancy may be filled only as a result of such election.

Section 2 of Article XIV of the Constitution of Pennsylvania provides, with reference to county officers, that "all vacancies, not otherwise provided for, shall be filled in such manner as may be provided by law."

Assuming that Section 4 of the Act of July 2, 1839, P. L. 559, which provided as follows:

"That whenever any vacancy occurs in any of the said officers, the qualified electors of the proper county, shall, at the next annual election thereafter, elect for the term of three years, a successor to fill the said vacancy, in the same manner, as is hereinbefore provided in other cases,"

applied at the time of the adoption of the present Constitution to the filling of any vacancy occurring in the office of Recorder of Deeds by requiring the filling of such office "at the next annual election thereafter", it still failed to make provision for the filling of said office during the interim, between the death of the incumbent and such election. This interim, therefore represented a vacancy "not otherwise provided for", and the Act of May 15, 1874, P. L. 205, which reads as follows:

"That in case of vacancy happening by death, resignation or otherwise, in any office created by the constitution or laws of this Commonwealth, and where provision is not already made by said constitution and

laws to fill said vacancy, it shall be the duty of the Governor to appoint a suitable person to fill such office, who shall be confirmed by the senate, if in session, and who shall continue therein and discharge the duties thereof till the first Monday of January next succeeding the first general election which shall occur three or more months after the happening of such vacancy."

provided the manner of filling such vacancy within the meaning of that part of Section 2 of Article XIV which reads, "in such manner as may be provided by law."

It seems clear that the said Act of May 15, 1874, was passed to assist in carrying out the above provision of the Constitution and that such provision had in contemplation a situation similar to the present, which appears not to be "otherwise provided for." It likewise was passed to supplement and assist in carrying out that part of Article IV, Section 8 of the Constitution which empowered the Governor "to fill any vacancy that may happen, \* \* \* in any \* \* \* elective office which he is *or may be* authorized to fill."

The same reasoning likewise applies after the passage of the Act of March 17, 1897, P. L. 4, which amends Section 4 of the said Act of 1839 so as to read as follows:

"That in case of the death of any person elected to any of the said offices before entering upon the duties thereof, it shall be the duty of the Governor to appoint a suitable person to fill such office, who shall be confirmed by the Senate if in session, and who shall continue therein and discharge the duties thereof until the first Monday of January next succeeding the first general election which shall occur three or more months after the appointment of such officer and until his successor shall be duly qualified; and whenever any vacancy in any such office shall otherwise occur, a successor shall be elected at the next general election which shall occur three or more months after the happening of such vacancy, who shall hold his office for three years, and until his successor shall be qualified."

While the Act of 1897 is admittedly not drawn in such manner as to render the meaning of certain of its provisions free from all doubt, the fact still remains that in the case of a Recorder of Deeds who has died *after* entering upon his duties there is an interim up to the time of the election of his successor, in accordance with Article IV, Section 8 of the Constitution, as amended, when there is a vacancy, provision for filling which is "not otherwise provided for", and it is, therefore, proper to fill it in "such manner as may be provided by law", which manner is specified in the said Act of May 15, 1874. It is no answer to this to say that the filling of such interim vacancy is "otherwise provided for" by the qualification of the

Deputy Recorder under the terms of the Act of February 12, 1874, P. L. 43, since this Act simply provides that such Deputy shall "discharge the duties imposed by law upon his principal *until* the *appointment* and qualification of his (the principal's) successor".

Furthermore, the Acts of May 15, 1874, and March 17, 1897, are clearly in *pari mataria*; the latter is not an amendment of the former, and I am of the opinion that there is no such necessary inconsistency in their provisions as to result in a repeal by implication of the former by the latter. In brief, the Act of March 17, 1897, provided for the filling of vacancies in certain county offices, including that of Recorder, by election, and the Act of May 13, 1874, provided for the filling of such vacancies by appointment during the interim elapsing up to the time of filling the office as the result of such election. An examination of the last half of Section 8 of Article IV of the Constitution likewise reveals adequate provision for this same method of filling vacancies in elective offices.

While it is not, of course, in itself conclusive, it has been the unchallenged practice for years to fill such vacancies as the one in the instant case by appointment until the proper time for election to the office arrives and the newly elected Recorder is qualified.

You are, therefore, advised that you have authority to fill by appointment, the vacancy now existing in this office, the newly appointed Recorder, in case you do appoint, to remain in office until his or her successor can be and is elected and qualified in the manner provided by law.

Yours very truly,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,  
*Attorney General.*

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*Humane Society—Cruelty to Animals—Agents Duly Appointed—Powers as Special Officers—Commission—Act of 1891, P. L. 378.*

Any society duly incorporated under the laws of the Commonwealth having for its purpose the prevention of cruelty to animals has the right to appoint agents, who shall have the powers conferred by Section 2 of the Act of 1891, P. L. 378, and these agents acting as special officers are not required to hold commissions from the Governor.

Department of Justice,  
Harrisburg, Pa., August 18, 1926.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: The Secretary of the Western Pennsylvania Humane Society has asked whether agents duly appointed by the Society to act in the capacity of Police Officers in cases of cruelty to animals are required to hold commissions from the Governor.

The Act of March 4, 1869, P. L. 22 is entitled:

“An Act for the punishment of cruelty to animals in this Commonwealth.”

Section 5 of this Act, as supplemented by Section 2 of the Act of 1891, P. L. 378, provides as follows:

“That any policeman or constable of any city or county, or any agent of any society or association for the prevention of cruelty to animals, duly incorporated under the laws of this Commonwealth shall upon his own view of any such misdemeanor make arrests and bring before any alderman or magistrate thereof, offenders found violating the provisions of this Act: Provided, That any person convicted under the provisions of this act to which this is an amendment, shall have the right to appeal to the court of quarter sessions of the proper county.\* \* \*”

The officers of the Humane Society have raised the question above referred to because of the provisions of Section 1 of the Act of 1885, P. L. 167 and of its amendatory Act of 1913, P. L. 901, which respectively provide as follows:

“Section 1. Be it enacted, etc., That, whenever any incorporated or unincorporated association, heretofore or hereafter organized in this Commonwealth, for any charitable purpose, shall apply to the Governor of this Commonwealth for the appointment of any special officer or policeman for such association, the Governor may and he is hereby empowered to appoint any person designated by such association, to act as special officer or policeman for such association, and shall issue to any person so appointed, a commission to act as such special officer or policeman.”

“Section 2. Every person, so appointed and commissioned by the Governor to act as such special officer or policeman, shall, before entering upon the duty of his office, take and subscribe the oath required by the seventh article of the Constitution, before the recorder of the county in which said corporation or association as aforesaid is located; which oath, after being duly recorded by said recorder, shall be filed in the office of the Secretary of the Commonwealth; and every such special officer or policeman, so appointed, commissioned and qualified, shall possess and have the right to exercise full power to arrest, upon view, any person for the commission of any offense against the laws of this Commonwealth, when such arrest is made in the interest of the association for which such special officer, policeman, is appointed; or, upon warrant drawn by the proper officer, in any county in this Commonwealth; and keepers of jails or lockups or station-houses or houses of detention, in any county in this Commonwealth, are required to receive all persons so arrested by any such special officer or policeman, to be dealt with according to law.”

The Act of 1885, P. L. 167 applies to all charitable organizations. It grants to such organizations the right to apply to the Governor for the appointment of persons named by them to act as special policemen, and the Governor in such case has the power to issue commissions to such persons.

The Act of 1869, P. L. 22, as amended, grants to any society or association for the prevention of cruelty to animals which is duly incorporated under the laws of the Commonwealth of Pennsylvania, the right to appoint agents who shall have the power upon view to arrest any person committing a misdemeanor, as set forth under the provisions of the Act and its amendments.

I am of the opinion that there is no conflict between the provisions of the Act of 1869 P. L. 22, and its amendments, and the Act of 1885, P. L. 167, and its amendments, and that the Western Pennsylvania Humane Society, (being a Society duly incorporated under the laws of the Commonwealth having for its purpose the prevention of cruelty to animals), has the right to appoint agents who shall have the powers conferred by Section 2 of the Act of 1891, P. L. 378, and these agents acting as special officers are not required to hold commissions from the Governor. But these special officers because of the prescribed powers granted them should exercise special precaution in making arrests to avoid danger of either criminal or civil prosecution.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,,

*Deputy Attorney General.*

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## OPINION TO THE SECRETARY OF HEALTH

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## OPINION TO THE SECRETARY OF HEALTH

*Advertisements—Illegal advertisements—Diseases of generative organs—Cures—  
Diagnosis—Acts of March 16, 1870, July 21, 1919, and April 21, 1921.*

An advertisement of a diagnosis of a disease of the generative organs, and not a cure thereof, is not within the prohibition of the Acts of March 16, 1870, P. L. 39, July 21, 1919, P. L. 1084, or April 21, 1921, P. L. 242.

Department of Justice,  
Harrisburg, Pa., October 27, 1926.

Doctor Charles H. Miner, Secretary of Health, Harrisburg, Pennsylvania.

Sir: The memorandum of October 26, 1926, from Doctor Everhard of your Department, to which was attached an advertisement that appeared in the Philadelphia Inquirer of October 20, 1921, has been carefully considered with a view to adequately answering Doctor Everhard's question as to whether or not that, and similar advertisements, furnished grounds for a successful prosecution under some one of the Acts of Assembly making it an offense for anyone to advertise directly or indirectly, the cure of diseases of the generative organs.

The earliest Act on this subject is that of March 16, 1870, P. L. 39. It relates solely to advertisements of "medicines, drugs, nostrums or apparatus." Obviously the advertisement now under consideration does not fall within the purview of this Act. The present advertisement is one for blood examination, either by X-Ray or by the Wasserman Test.

The next Act on the subject is that of July 21, 1919, P. L. 1084, which prohibits advertisements relating to the treatment of diseases of the generative organs. Under that Act, an advertisement containing the photograph of the so-called specialist and emphasizing the administration of the 606 blood treatment and containing the statement that "any disease or ailment any man has is what I treat" was held sufficient not only to justify a prosecution, but to sustain a verdict of guilty. The latter conclusion was reached, however, because the Commonwealth introduced expert testimony as to the nature and principal use of the 606 treatment; Commonwealth vs. Redmond, 30 D. R. 470. In other words, the advertisement for which the accused was there prosecuted, on its face indirectly fell within the prohibition of the Act of July 21, 1919, and by positive and competent testimony, was shown to be a direct violation of that Act. Such a conclusion cannot be reached with regard to the advertisement presently under consideration. It does not stress treatment, but primarily relates to diagnosis.

In an opinion which this Department, on June 26, 1922, (2 D. & C. 339) rendered the Bureau of Medical Education and Licensure, on the subject of the revocation of a physician's license where the offending physician was charged with illegal advertising under the Act of July 21, 1919, just referred to, it was said "All penal statutes are to be strictly construed, and particularly where a special penalty is prescribed"; and, therefore, the conclusion was reached that the Bureau had exceeded its authority in revoking the license of the physician in question because of his violation of the Act under consideration.

The most recent Act on the general subject is that of April 21, 1921, P. L. 242, prohibiting advertisements of cures or medicines relating to venereal diseases. The Superior Court has recently, in the Appeal of Allison and Miller, 86 Pa. Super. Ct. 451, said that an advertisement of a patent medicine known as "Vitazone" by one Walker, furnished abundant cause for his prosecution. There, however, the thing advertised was a patent medicine and not a method for ascertaining whether or not men or women were suffering from venereal diseases. I repeat that the advertisement in question, is not of a treatment or cure but of a diagnosis only.

The distinction between the kind of advertisement forbidden by statute and that which you present is very clear and, therefore, you are advised that the advertisement to which you very properly object does not furnish ground for a successful prosecution of the advertiser. If advertisement of methods of diagnosing diseases of this kind should be prohibited, it will be necessary for the Legislature to act further.

Yours very truly,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

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OPINIONS TO THE DEPARTMENT OF HIGHWAYS

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## OPINIONS TO THE DEPARTMENT OF HIGHWAYS

*State Highway System—"Highways of the Commonwealth"—Amendment to Constitution—Section 4, Article IX—Statutory Requirements.*

The expenditure of the \$50,000,000 authorized by the Amendment to the Constitution of Pennsylvania, Section 4, Article IX, is not restricted by the Constitution itself nor by the laws now on the statute books to the State Highway System, but is available in conformity with the law on the subject of "improving and rebuilding the highways of the Commonwealth," for improving and rebuilding any of the public highways within the boundaries of the Commonwealth, whether part of, or not part of, the "State Highway System."

Department of Justice,  
Harrisburg, Pa., March 13, 1925.

Honorable Paul D. Wright, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: I have your inquiry for an opinion on the following question:

Would it be legal, under the Constitution and laws of the State in force at this date, for the Department of Highways to use part of the Highway Bond money to rebuild or improve public highways within the State which are not included in the State Highway System?

A: AS REGARDS THE CONSTITUTION.

By the Constitutional amendment outlining the borrowing of the additional \$50,000,000. for highway purposes within the Commonwealth, which was adopted by vote of the people at the election of November 6, 1923, this additional \$50,000,000 is to be used "for the purpose of improving and rebuilding the highways of the Commonwealth" (Section 4 of Article IX of the Constitution as amended November 6, 1923). Section 5 of said Article IX of the Constitution provides:

"All laws, authorizing the borrowing of money by and on behalf of the State, shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for the purpose specified and no other."

Therefore, the answer to your question must be found by determining the following two points:

1. Does the purpose for which Section 4 of Article IX may be used, extend to public roads other than the roads of the State Highway System as established by law?

2. If said Section 4 of Article IX of the Constitution does permit the legislature to authorize expenditure of the Highway Bond money in the improvement and rebuilding of public roads other than those on the State Highway System, are there any laws of the Commonwealth now in existence, which permit the Department of Highways to expend said funds on public roads which do not form part of the State Highway System?

As to the first question, it is a well settled rule of construction that in the absence of ambiguity the provisions of the Constitution must be read and construed in the light of the general understanding of the words used in the Constitution itself. The purpose for which the \$50,000,000 may be borrowed and expended must be for "improving and rebuilding the highways of the Commonwealth."

It is evident that the Acts of "improving and rebuilding" are just as applicable to public roads of the Commonwealth which do not form a part of the State Highway System as those which do form a part of the said System.

Therefore, the question, as far as the force of the Constitution is concerned, must hinge upon the meaning of the expression "highways of the Commonwealth". Rules of construction require that words used in the Constitution, in view of the fact that they are adopted by the vote of the people generally, must be given the meaning people generally would attribute to the particular words. No matter what may have been in the minds of the officials of the Highway Department, or other executive departments of the State Government, and no matter what may have been in the minds of this and that Legislator when he voted for the joint resolution proposing the Constitutional amendment in question, the meaning of the phrase "highways of the Commonwealth" should be determined by what the general run of intelligent voters would naturally think that it meant at the time they voted "Yes" or "No" for the amendment. The State Highway System is a technical legal expression with an arbitrary meaning. Some voters are familiar with the meaning of that phrase. Many others have only a shadowy idea of what constitutes the State Highway System. All voters know that in the absence of a technical application of the phrase "highways of the Commonwealth" it would mean, in effect, "any or all of the public roads within the Commonwealth of Pennsylvania." As between a technical expression having its exact meaning only because of its use in certain laws and by the technical employes of a certain executive department, and the general broad meaning which existed before the passage of those laws, and must have persisted in the minds of the general run of ordinary citizens, we are compelled to believe that the voters did not mean "Pennsylvania State Highway System" when they voted for the amendment of Article IX, Section 4 on November 6, 1923, but they intended to mean that the \$50,000,000 loan should be available for "the highways of the Commonwealth" in the general broad meaning of "all the public roads within the Commonwealth of Pennsylvania."

According to this reasoning, then the answer to the first point set forth above is that as far as the Constitution is concerned the \$50,000,000 authorized by amended Section 4 of Article IX of

the Constitution is not restricted by the Constitution itself to the State Highway System, but is available in conformity with the law on the subject "of improving and rebuilding the highways of the Commonwealth" for improving and rebuilding any of the public highways within the boundaries of the Commonwealth, whether part of, or not a part of the "State Highway System."

B: AS REGARDS THE STATUTES.

The laws now on the statute books concerning the improving and rebuilding of highways by the Department of Highways, do not confine such activities and the use of the funds available therefor to the State Highway System.

In order that there shall be road construction otherwise than on the State Highway System, as established by Acts of the Legislature, it is necessary that there shall be appropriation of funds by the Legislature for the purpose, and it is also evident that such appropriations may be made out of the \$50,000,000 authorized to be borrowed "for the purpose of improving and rebuilding the highways of the Commonwealth."

The Enabling Act for the issuance of bonds, under authority of the amendment of Section 4 of Article IX of the Constitution, which has just been approved by the Governor, specifically appropriates the money derived from the sale of such bonds for the purpose of improving and rebuilding the Highways of the Commonwealth. This appropriation makes the fund available for the construction of highways regardless of whether they are, or are not, part of the State Highway System provided for by the Act of May 31, 1911, P. L. 468, as supplemented and amended. Such improving and rebuilding must of course be in conformity with the laws pertaining to the Highway Department and its activities.

Yours very truly,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General.*

*Pennsylvania National Guard—Right of employes of the Commonwealth, who are members of the Guard, to leave of absence, with pay, for the purpose of attending the National Guard Encampment—"State Employee" defined—"Leave of Absence" defined—Act of May 7, 1921, P. L. 869, Section 68.*

Members of the Pennsylvania National Guard in the employ of the Commonwealth at the time of the commencement of such active National Guard service are entitled to a leave of absence, without loss of pay or efficiency rating, on all days during which they shall, as members of the Guard, be engaged in the active service of the Commonwealth or in field training ordered or authorized by law.

Employes of the Commonwealth are such as are engaged by competent authority to perform some service for the Commonwealth for a fixed compensation, exclusive of casual employment, and irrespective of the time for which engaged or the manner or method of the payment for services rendered.

"Leave of absence" contemplates a return to the service of the Commonwealth after the expiration of the encampment, and the fact of such return or a readiness to return, should be considered in determining whether or not the employment is such as is contemplated, in order that the employe may be entitled to pay during such absence.

Department of Justice,  
Harrisburg, Pa., August 28, 1925.

Honorable P. D. Wright, Secretary of Highways, Harrisburg, Pa:

Sir: You have requested an opinion from this Department as to the right of employes of the Commonwealth, who are members of the Pennsylvania National Guard, to leave of absence with pay, for the purpose of attending the National Guard encampment, with particular reference to the limitations, if any, upon such right, due to the length of time any such employe has been in the State's service, prior to such encampment, or due to the fact that such employe is paid on an hourly or daily basis.

Section 68 of the Pennsylvania National Guard Act of May 17, 1921, P. L. 869, 892, provides:

"All officers and employes of the Commonwealth of Pennsylvania, members of the Pennsylvania National Guard shall be entitled to leave of absence from their respective duties, without loss of pay, or efficiency rating, on all days during which they shall, as members of the Pennsylvania National Guard, be engaged in the active service of the Commonwealth or in field training ordered or authorized under the provisions of this Act."

The only question that has arisen in the interpretation of this section, as I understand it, is the scope of the term "employes of the Commonwealth". It appears that certain members of the National Guard were engaged by the Maintenance Superintendent of your Department to do certain work for the Commonwealth, at a certain rate per hour, for an indefinite time; that such men continued to perform such duties until the period of encampment

which they attended; and that upon the completion of the encampment, they returned to the work with your Department where they continued, some to the present time, and others until relieved, due to lack of the specific character of work upon which engaged, or for other reasons.

“Employee is the correlative of employer. Neither term is restricted to any particular employment or service. To employ is to engage or use another as an agent or substitute in transacting business or the performance of some service. It may be skilled labor or the service of the scientist or professional man, as well as servile or unskilled manual laborer, servant or other person occupied in an inferior position.”  
*Anderson's Law Dictionary.*

The question as to whether or not a man is an employe of the Commonwealth, within the terms of the aforesaid section, is not based upon the length of time during which he renders service, the length of time for which he is engaged, or the method by which he is paid, but is to be determined by the fact of his engagement to render service to the Commonwealth at a wage, and the fact of the actual performance of such service up to the time of the annual encampment, and the return to the service of the Commonwealth at the expiration of the encampment, unless relieved by the circumstances of the individual case. If the Legislature had intended to require a certain term of service, or that wages be paid monthly, in order that a man rendering service to the Commonwealth should be classed as an employe, the Act would have contained some provision to that effect. If a certain term of service, prior to the encampment, is to be required, what is to be the length thereof, and who is to determine what term shall be required? If it can be made one month, it may as well be made six months or twelve months.

You are therefore advised that (1) Members of the Pennsylvania National Guard, in the employ of the Commonwealth at the time of the commencement of such active National Guard service, are entitled to a leave of absence from their respective duties without loss of pay or efficiency rating on all days during which they shall, as members of the Pennsylvania National Guard, be engaged in the active service of the Commonwealth or in field training, ordered or authorized under the provisions of law.

(2) Employes of the Commonwealth are such as are engaged by competent authority to perform some service for the Commonwealth for a fixed compensation, in which the relationship of master and servant exists, but exclusive of casual employment, irrespective of the time for which engaged or the manner or method of the payment for services rendered.

(3) "Leave of absence" contemplates a return to the service of the Commonwealth after the expiration of the encampment, and the fact of such return or a readiness to return, should be considered in determining whether or not the employment is such as is contemplated, in order that the employe may be entitled to pay during such absence.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

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*Secretary of Highways—Authority to inspect the records of mayors of third class cities and of burgesses of boroughs for the purpose of ascertaining the amount of fines collected by such magistrates for violation of the motor vehicle law, to which fines the Commonwealth is entitled—Acts of May 14, 1915, P. L. 312, Chapter 7, Article II, Section 11, May 27, 1919, P. L. 310, Section 23, June 30, 1919, Section 33, 34, June 14, 1923, P. L. 718, 748.*

The Secretary of Highways, in person or through his agents, has the right to make a general inspection of the above mentioned records for the purpose of ascertaining the amount, if any, of fines therein shown to have been collected for violation of the motor vehicle law, to which fines the Commonwealth is entitled, and to make copies of the relevant portions of such records. The inspection should be made at such reasonable times and under such reasonable regulations as may be agreed upon between the Secretary or his agents and the custodian of the records sought to be inspected, having regard to the safe keeping of the records and the prevention of unnecessary interference with public business.

Department of Justice,  
Harrisburg, Pa., August 27, 1925.

Honorable P. D. Wright, Secretary of Highways, Harrisburg, Pa.

Sir: You have requested an opinion as to your right, through your agents, to inspect the records of mayors of third class cities and of burgesses of boroughs for the purpose of ascertaining the amount, if any, of fines collected by such magistrates for violation of the motor vehicle law to which the Commonwealth is entitled. You state that, in a particular instance, while permission has been granted to make an inspection of the record of any designated case, you have been refused an opportunity to make a general inspection of such records because they contain other matters than violations of the motor vehicle laws.

Two questions are involved in this inquiry: (1) Are such records public records; (2) Are you personally or through your agents entitled to inspect the same and to make copies thereof.

(1) "A public record is a memorandum made by a public officer authorized to perform that function, or a writing filed in a public

office intended to serve as evidence of something written, said or done. Amer. & Eng. Ency of Law, Vol. 20 page 305." *Com. ex rel. Walton vs. Bair*, 5 Pa. Dist. Rep. 438; *Com. ex rel. Wilkins vs. Board of Revision of Taxes*, 23 Pa. Dist. Rep. 424.

The mayor of a third class city possesses the criminal jurisdiction of an alderman and is required to keep a docket and enter therein all actions and proceedings had before him, which docket, or certified copies of entries made therein, is admissible in evidence. Act of May 27, 1919, P. L. 310, Section 23.

The burgess of a borough is required to keep correct accounts of all fees, fines and costs received by him. Act of May 14, 1915, P. L. 312, ch. VII, Art. II Sec. 11, IV.

All mayors and burgesses have jurisdiction of those violations of the motor vehicle laws which are punishable by fine or penalty to be collected by summary conviction. (Sec. 33, Act of June 30, 1919, as last amended by Act of June 14, 1923, P. L. 718, 748a); and are required "in every case arising under (said) . . . Act, (to) make and preserve for the period of one year an exact record of the proceedings, showing the fine and costs paid, if any, which shall be subject to inspection on demand of any person," a violation of which duty is made a misdemeanor in office, punishable by fine and or imprisonment (Sec. 34, Act of 1919, as last amended by Act of 1923, page 748f); and are required to pay all fines and penalties so collected and all bail forfeited, with certain exceptions, to the State Treasurer for the use of the Department of Highways and to render sworn statements quarterly of all fines and penalties so collected, upon blanks to be furnished by the Department of Highways, to the Secretary of Highways. (Sec. 55, Act of 1919, as last amended by Act of 1923, page 748f).

Mayors and burgesses being required to keep records of proceedings in which they sit as committing magistrates and being specifically directed to keep records of such proceedings had under the motor vehicle laws, you are advised that such records are public records, irrespective of how informally they may be kept and notwithstanding the fact that other proceedings held before the mayor may be included therein.

(2) At common law any person is entitled to inspection, either personally or by his agent, of public records, including legislative, executive and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information, which interest must be direct and tangible. 23 *Ruling Case Law*, page 160, 162-163; 34 *Cyclopedia of Law & Procedure* 392; *Owens vs. Woolridge*, 22 Pa. Co. Court 237; *Com. ex rel. Milliken vs. Board of Revision of Taxes*, 23 Pa. Dist. Rep. 424.

Such right may be exercised through an agent, *23 Ruling Case Law*, page 160; *34 Cyclopedia of Law & Procedure* 592; *Clement vs. Graham* 78 Vt. 290, 63 Atl. 146; and includes the right to make copies thereof; *In re Backer*, 192 N. Y. S. 754; *Com. ex rel. Biddle vs. Walton*, 6 Pa. Dist. Rep. 287.

This rule is particularly applicable to records relating to revenues, fines and official acts generally, *23 Ruling Case Law*, page 160, and to records of municipal corporations and its officers. *23 Ruling Case Law* 157.

Such inspection by a citizen and taxpayer need not be confined to a particular portion of the record of a public officer, but may include a general examination thereof, if deemed important to the public interest, *23 Ruling Case Law*, page 163; and is authorized although the interest of the individual is common to all other citizens and taxpayers where it is done for the purpose of detecting irregularities and of curing the same by proper public action, *23 Ruling Case Law*, page 164; *Clement vs. Graham*, *supra*; and is authorized where the applicant for inspection may act in a suit as a representative of a common or public right, even though his interest is not such as will sustain a suit on his own personal behalf. *23 Ruling Case Law*, page 163.

The right to the inspection of public records is not to be defeated by the inclusion therein of matters outside of the scope of the proposed inspection, or of private matters or of matters alleged to be confidential, unless under the law such would be deemed confidential in the interest of the public. *23 Ruling Case Law*, page 157; *Egan vs. Board of Water Supply*, 205 N. Y. 147—157, 98, N. E. 467, *Ann. Cas.* 1913-E, 59.

And where the Statute expressly provides that records shall be open to the inspection of any person, it is not necessary that a person desiring to exercise such right shall show a particular interest therein. *34 Cyclopedia of Law & Procedure* 594; *23 Ruling Case Law*, page 164.

The right of the Secretary of Highways, who is the custodian of the reports of such fees collected, designated for the undoubted purpose of enabling him to verify the same, who has control of the Highway Patrol, a State-wide police force organized for the purpose of enforcing the motor vehicle laws, and who is charged with the expenditure of the fund in which such fees are desposited, to inspection of the records in question rises higher than that of an individual citizen. The necessity of such inspection by the Secretary of Highways, through his agents, for the benefit of the public is very apparent.

In the case of *Commonwealth vs. Simpson*, 14 Dist. Rep. 740, a peremptory writ of mandamus was issued directing a Justice of the

Peace to permit the proper officers of the borough, wherein the justice was located, to inspect the dockets kept by him in his judicial capacity, in order that they might ascertain what fines, if any, due the borough had been collected.

The following excerpt from the opinion of the Court in that case is applicable:

"If this writ is refused, the borough has no means of ascertaining what suits have been brought for penalties in which it is interested, what fines have been collected, or what are uncollected. The defendant answers by saying that the borough can have a transcript of any case on his docket by paying him the legal fees for it. This answer will not avail. Suit may be brought for penalties without the knowledge of the borough authorities, and if they are denied access to the record kept by the justice, they have no means of ascertaining what amounts have been collected, or what are due and uncollected, except as the justice shall choose to tell them. And they cannot order transcripts, because they may be unable to designate the cases in which the borough has an interest."

You are therefore advised that you have a right, either in person or through your agents, to make a general inspection of the above described records for the purpose of ascertaining the amount, if any, of fines therein shown to have been collected for violation of the motor vehicle law to which the Commonwealth is entitled, and to make copies of the relevant portions thereof; such inspection should be made at such reasonable times and under such reasonable regulations as may be agreed upon between you and the custodian of the records sought to be inspected, having regard to the safekeeping of the same and to the prevention of unnecessary interference with the due performance of public duties incumbent upon you and your agents and the custodian of such records.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

*Automobiles—Suspension of license—Intoxication—Act of June 14, 1923.*

1. Under the Act of June 14, 1923, P. L. 718, a license to operate an automobile cannot be suspended after the arrest of the operator on the charge of driving while under the influence of intoxicating liquor and pending final disposition of the case.

2. It is only after conviction of the offense that the Department of Highways may suspend or revoke the license.

Department of Justice,  
Harrisburg, Pa., August 31, 1925.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, Department  
of Highways, Harrisburg, Penna.

Sir: In your recent letter you state that one, whom we shall designate as "A," was arrested on a charge of operating a motor vehicle while under the influence of intoxicating liquor; that he has been held for Court to answer said charge, but has not yet been tried nor has his case been otherwise disposed of; that upon receipt of said information, accompanied by a Doctor's certificate attesting the truth of such charge, and after investigation, his license to operate a motor vehicle has been suspended by your Department, pending the disposition of his case, and until such suspension is lifted by your Department; and that protest has been filed, contesting your authority so to do until and unless "A" has been convicted of the charge.

You ask to be advised as to your authority to suspend an operator's license under these facts.

The authority of the Secretary of Highways to suspend or revoke a motor vehicle operator's license is based upon Sections 13 and 23 of the Act of June 30, 1919, as last amended by the Act of June 14, 1923, P. L. 718. (The Prohibition Enforcement Act of March 27, 1923, P. L. 34, provides for the revocation of a motor vehicle operator's license upon conviction of violation of certain provisions of that Act, which provisions are not applicable to the matter of your inquiry and so are not considered.)

Section 13 authorizes the Secretary, after hearing upon notice given, (1) to suspend the license of (a) a reckless or careless operator endangering the safety of the public, (b) an habitual violator of the provisions of that Act; (2) to suspend or revoke the license of any operator convicted of a misdemeanor or a felony in connection with the use of a motor vehicle.

It also authorizes him, upon investigation, to suspend the license of any such operator who has been involved in an accident resulting in injury to person or property, upon the sworn statement of two reputable persons that such accident was the result of recklessness or carelessness on the part of such licensee and directs the annulment of such license after hearing, if the evidence justifies such action.

Section 23 prohibits (a) the tampering with, making use of or operating a motor vehicle without the knowledge or consent of the owner or custodian thereof, (b) the operation of a motor vehicle while under the influence of intoxicating liquor or any narcotic or habit producing drug or the permitting of any such person to operate such vehicle, (c) taking part in any race or speed contest for a price or wager upon a public highway or attempting to establish or lower any speed record upon a public highway, (d) turning off the lights of a motor vehicle for the purpose of avoiding identification or arrest; said Section required any operator of a motor vehicle who shall have injured a person or property of any other user of the highway to stop and render such assistance as may be necessary and to give, upon request, his name and address to the injured party or his proper representative.

This Section, after providing that violation of any of its provisions shall constitute a misdemeanor and after providing penalties upon conviction thereof, contains the following clause:

“\* \* \* and the clerk of the court in which such conviction is had shall certify forthwith such conviction to the commissioner, who shall suspend or revoke the license issued to such person, and no other license shall be issued to such person for a period of one (1) year following such suspension or revocation.”

The authority given in these Sections to revoke the operator's license for violation of any of the provisions of said Section 23, including that of operating a motor vehicle while under the influence of intoxicating liquor, is based upon a conviction of the offense charged, and there is no authority given to either suspend or revoke a license for such cause until and unless the operator is convicted, nor is there any authority to suspend such license after arrest, pending final disposition of the case.

You are, therefore, advised that the suspension of the operator's license of “A” was without authority, and the same should be immediately reinstated.

If “A” is convicted of the offense charged, it will then be the duty of the Secretary to revoke his license, upon receipt of the certificate of the clerk of the courts evidencing such conviction.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

*Transfer—Assignment—Title—Operation of Law—Acts of 1923 and 1925.*

Under the Act of April 27, 1925 (P. L. 286), amending the Act of 1923, P. L. 425, the fee for issuing new certificates of title to motor vehicles is \$2 where the title or right of possession of the vehicle has been transferred by operation of law and the pre-existing certificate duly assigned, is presented with the application for the new certificate. If the pre-existing certificate, duly assigned, is presented with the application, the fee is fifty cents.

Department of Justice,  
Harrisburg, Pa., September 1, 1925.

Hon. Benjamin G. Eynon, Registrar of Motor Vehicles, Department  
of Highways, Harrisburg, Penna.

Sir: You have called the attention of this Department to the fact that Act No. 162, approved April 27, 1925, amends Sections 2 and 3 of the Title Registration Act of 1923, P. L. 425 by reducing the charge to a manufacturer, jobber and dealer for certain certificates of title for motor vehicles from \$2.00 to 50 cents, but that the fee of \$2.00 provided in Section 8 of said Act of 1923 for certificates issued under its provisions has not been specifically reduced by any amendment to that section, and you have asked to be advised whether or not the reduction provided for in said Act of 1925 affects the fee as provided for in Section 8 of the Act of 1923.

Section 2 of the Act of 1923 applies to (a) original certificates of title, (b) corrected originals issued upon proof of the satisfaction of liens or encumbrances shown on the original, and (c) new certificates issued to a dealer upon assignment of an original certificate direct to him by a jobber or other dealer.

That section provided for a fee of \$2.00 for all certificates except that in the case of a jobber or dealer acquiring a new or rebuilt motor vehicle for which no certificate of title had been issued and, except that in the case of a dealer acquiring a new or rebuilt motor vehicle upon assignment of the original certificate direct to him by a jobber or other dealer, the charge should be fifty cents.

As amended by the Act of 1925, this portion of said Section 2 reads "the charge for each original certificate of title so issued shall be two (\$2) dollars, except in the case of a manufacturer, jobber or dealer acquiring a new, rebuilt or used motor vehicle *for which no certificate of title has been issued*, when the charge for each *original* certificate of title shall be fifty (50c) cents, and except in case of a dealer acquiring a new, rebuilt or used motor vehicle from a jobber or other dealer to whom the original certificate of title has been issued and by whom it has been directly assigned to said dealer, in which case the charge for the certificate shall likewise be fifty (50c) cents."

Section 3 of said Act of 1923 applies to a new certificate issued under the authority of an assignment of a pre-existing certificate

endorsed on the back thereof by the original holder of said pre-existing certificate.

That section provided for a fee of \$2.00 for all such new certificates.

The amendment of 1925 adds to said Section 3, as an exception to the charge of \$2.00, the following: "except that in the case of a manufacturer, jobber or dealer, the fee shall be fifty (50c) cents for each such certificate \* \* \*."

Section 8 of said Act of 1923 applies to new certificates issued without assignment by the holder of the pre-existing certificate where title or right of possession to the vehicle has been transferred by operation of law, including repossession upon default in the performance of the terms of a lease or other contract of conditional sale.

This section provides for a fee of \$2.00 for all such new certificates. There is no provision for the special fee of fifty cents to manufacturer, jobber or dealer, or to any one, for such certificates.

Thus it appears that each of these sections deals with a different kind of certificate; that those to be issued under Sections 2 and 3 are such as ordinarily require no examination or investigation by your Department outside of an examination of the regular form of application and, in cases involving the issuance of a new certificate, an examination of the returned certificate, including the regular form of assignment; but that those to be issued under Section 8 require the submission to you of proof that the title of the motor vehicle, as evidenced by the certificate outstanding, has been regularly vested in the applicant for the new certificate by operation of law, and requires on your part an examination of such proof with the necessity of frequently calling for additional proof and in some instances of making independent investigation.

In the case of those to be issued under Section 2, there is either no outstanding title, the vehicle being one for which there has not been theretofore a certificate issued, or else the outstanding certificate is delivered to you duly assigned; in the case of those to be issued under Section 3 the pre-existing certificate is delivered to you duly assigned before the new certificate is issued; while in the case of those to be issued under Section 8 the outstanding certificate is either not delivered or, if delivered, is unassigned. The last case mentioned thus necessitates greater labor and care in your Department than in either of the former.

It is to be presumed that the Legislature had these conditions in mind in reducing the cost of the new certificate issued under Sections 2 and 3 and in failing to reduce the cost of those issued under Section 8. In any event the certificates to be issued under the provisions of Section 8 are to be issued under different circumstances and upon different proof than those to be issued under the provisions of Sections 2 and 3.

You are therefore advised that the fee for issuing new certificates of title to motor vehicles is \$2.00 where the title or right of possession of the vehicle has been transferred by operation of law and the pre-existing certificate, duly assigned, is not presented with the application for the new. If the pre-existing certificate, duly assigned, is presented with the application for the new certificate it may be treated as coming within Section 3 of the Act and issued for fifty cents, even though there has been a transfer of title or of the right of possession of the vehicle by operation of law.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

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*Construction and Equipment of Camps for Employes—Sparsely Populated Districts—Assignment of Wages—Public Policy.*

There is no authority in statutory law empowering the Department of Highways to erect buildings, purchase beds, bedding, kitchen and dining-room utensils for the use of men employed in the construction of State highways in sparsely populated districts, where accommodations for the gangs of men employed thereon cannot be obtained readily.

The Department of Highways may accept assignments of a portion of the wages of employes engaged in the construction of State highways, deduct the amount from the money due them and pay the same over to the assignee named in said assignments, who shall be the person or persons operating a commissary for the benefit of said employes. This does not constitute a loaning of the credit of the Commonwealth, as the Commonwealth is not bound to do anything except pay over money, if and when earned, to the person designated by its creditor. Whether such assignment would be void on the ground of public policy is a question for the Courts, and any doubt as to its validity must be determined by the assignor and assignee.

Department of Justice,  
Harrisburg, Pa., December 16, 1925.

Honorable W. H. Connell, Deputy Secretary of Highways, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your inquiry as to your authority (1) to erect buildings and purchase beds, bedding, kitchen and dining-room utensils necessary in the operation of a com-

missary for the use of employes of your Department while engaged in road construction and (2) to accept assignments made by employes of your Department engaged in said work of a portion of their wages, to deduct the same from money due such employes and to pay the same over to the assignee named in said assignment, who shall be the person or persons operating a commissary for the benefit of said employes.

The reason for this unusual proceeding is that you contemplate constructing with your own forces a section of State highway in a sparsely settled community where it will be necessary to import labor and also necessary to provide special sleeping and commissary accommodation for such labor. You have experienced difficulty in persuading anyone to provide these accommodations unless they are assisted and protected in some such way as is suggested in your inquiry.

1. Authority to Erect Buildings and to Purchase Beds, Bedding, Kitchen and Dining-room Utensils.

The Administrative Code of 1923, P. L. 498 in Section 1903 provides that "The Department of Highways shall have the power and its duty shall be: (a) To purchase and maintain all machinery, implements, tools and materials and all other equipment of every and any kind incident to or necessary in the construction, building, rebuilding and maintaining of State highways \* \* \*."

This is a re-enactment of Section 3 of the Act of 1911 as amended by the Act of 1919, P. L. 428 with the addition of the words "and all other equipment" after the word "materials."

"In accordance with what is commonly known as the rule of ejusdem generis, where, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class or nature as those specifically enumerated unless there is a clear manifestation of a contrary purpose. \* \* \* In accordance with the rule of ejusdem generis, such terms as 'other,' 'other things,' 'others' 'any other,' when preceded by a specific enumeration, are commonly given a restricted meaning and limited to articles of the same nature as those previously described." 25 R. C. L. page 996.

According to this rule we think the general words "and all other equipment" refers to equipment such as "machinery, implements, tools and materials, \* \* \* of any and every kind (that is) incident to or necessary in the construction" etc. of State highways and so does not include buildings, beds, bedding, dining-room or kitchen utensils.

These latter things are not incident to or necessary in the construction of highways as are machinery, tools and materials. They

may be necessary to the men who build them but certainly highways may be and are constructed without the direct use of beds and cooking utensils and buildings to contain them.

Your Department is authorized to construct State highways with your own forces (Section 3, Act of 1911 as amended by Act of 1919, P. L. 428) and the Motor License Fund is appropriated for the purpose of the construction of State and State-aid highways, for the purchase of materials and equipment, for the erection of buildings, and for any and all other expenses of every kind and description necessary to effectually carry on the work of the Department of Highways as described in the Act of May 31, 1911, its amendments and supplements.

The above comments on the authority granted by the quoted section of the Code apply to these provisions of the appropriation of the Motor License Fund. The application of the Fund is limited to those things which are incident to and necessary in carrying out the work of your Department.

The Legislature never intended to authorize you to erect camps and to conduct commissary departments wherever road construction and maintenance is being carried on.

We find no statutory authority in the Department of Highways to purchase beds or bedding, dining-room or kitchen utensils or to erect buildings for use in furnishing sleeping and commissary accommodations.

## 2. Assignments of Future Wages for the Payment of Board and Lodging.

Is an assignment of wages to be earned in the future binding upon the assignor where the assignment is made for board and lodging during the time of the employment in which the wages assigned are to be earned, the assignment is accepted by the employer and the board and lodging are furnished on the security thereof.

The Act of June 4, 1913 P. L. 403, which impliedly authorized an assignment of wages, to be earned in the future, to secure a loan, by providing that no such assignment shall be valid until accepted in writing by the employer, was held to be unconstitutional by Judge Sulzberger in the case of Forster's Application 23 Pa. Dist. Rep. 858, 568 as controvening the first section of the Bill of Rights inasmuch as the right to earn a living by his labor and to apply such earnings to the support of himself and family is fundamental and cannot be waived by the laborer.

The text of that decision seems to be broad enough to prescribe every assignment of wages to be earned in the future whether the assignment is accepted or not and notwithstanding the purpose for which assigned.

An examination of the cases cited and relied upon by Judge Sulzberger established the following principals:

(a) The exemption from attachment in the hands of the employer of the wages of any laborer or the salary of any person in public or private employment, as contained in the Act of 1845 P. L. 459, has been consistently maintained, the cases holding that the exemption cannot be waived as to do so would be against public policy. *Firestone vs. Mack* 49 Pa. 387, *Sweeney v. Hunter*, 145 Pa. 363, *Steele vs. McKerrihan* 172 Pa. 280, *Little v. Balliette* 9 Pa. Super. Ct. 411.

In *Sweeney v. Hunter* the Court says:

"The exemption must therefore be regarded as grounded on public policy, looking to the protection of laborers and their families, even against their own voluntary acts."

In *Little v. Balliette* the Court says:

"It was not intended to confer a personal privilege upon laborers merely, but was enacted for the protection of their employers as well. For this reason, as well as upon grounds of public policy, it was held that the laborer could not waive its provisions, and thereby subject his employer to the liability, to the expense and annoyance of attachments,"—which is cited with approval in *Box Board Company vs. Rossiter* 30 Pa. Super. Ct. 25, 26.

(b) The Act of 1887, P. L. 164 prohibiting the assignment by a citizen of this State of a claim against a resident of this State for the purpose of having the same collected by attachment in the Courts of another State, with the intent of depriving the debtor of his right of exemption, has been upheld as constitutional. *Sweeney vs. Hunter supra*, *Steele v. McKerrihan supra*.

(c) An assignment of wages not yet earned is invalid where it appears that it has not been accepted by the employer although he had notice thereof before payment. *Jermyn v. Moffitt* 75 Pa. 399.

(d) "An assignment of his wages by a laborer, executed when he is not engaged in, and not under contract for, the employment in which the wages are to be earned, is too vague and uncertain to be maintained as a valid assignment and transfer of property." *Lehigh Valley Railroad Co. v. Woodring* 116 Pa. 515.

In this case an assignment of wages to be earned in the future was made in favor of a storekeeper for groceries supplied. At the time of the assignment the assignor was not employed by the railroad company nor was there any contract of employment. Sometime later he entered such employ and notice of the assignment was served upon the employer.

(e) "An assignment, for a valuable consideration, of demands, having at the time no actual existence, but which rest in expectancy only, is valid in equity as an agreement, and takes effect as an assignment, when the demands intended to be assigned are subsequently brought into existence." *Ruple v. Bindley* 91 Pa. 296.

This was an assignment of the balance of the contract price for the building of a flight of stairs. The consideration was the furnishing of material and money for the purpose of doing the work. It may be inferred from the report of this case that Ruple himself did the work covered by the contract with Bindley and that his wages were included in the amount assigned which amount also included the cost of materials. There is nothing in the report to indicate that the question of the right to assign wages as distinguished from the right to assign money due for other purposes was considered.

We are not convinced that the assignment of wages such as you propose for the purpose stated cannot be enforced as an equitable assignment.

In the case of *Ruple v. Bindley*, supra on page 300 the Court in reaffirming the case of *Jerwyn v. Moffitt* says with reference to the latter:

"Jermyn's name was not in the instrument; Leslie, the assignor, had no contract with him, was not then in his employ, and consequently, there was neither a present or expectant fund on which the assignment could attach. On the trial, the point that 'an assignment can only be made of moneys due or owing and not in future of moneys to be earned' was refused with answer that 'a party is competent to assign wages to come due if the vested rights of third parties are in nowise prejudiced thereby'; and this Court said there was no error in that."

The Act of June 29, 1881 P. L. 147 which required payment of employes in cash or in orders redeemable in cash, was held unconstitutional in the case of *Godcharles v. Wigeman* 113 Pa. 431 as an infringement on the right to contract.

In that case orders had been given by the employer to the employe on different parties for the purchase of coal and other articles, which orders were honored by the drawee and paid by the employer.

The Court says (page 437),

"He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."

The Act of May 20, 1891, P. L. 96, required payment of wages in certain industries semi-monthly and prohibited the assignment of future wages as payable.

In the case of *Showalter v. Ehlen* 5 Pa. super. ct. 242 the said Act of 1891 was held unconstitutional as interfering with the right to contract.

If this assignment is not void as against public policy we know of no reason why the Secretary of Highways of the Commonwealth may not accept such an assignment nor why its fiscal officers may not honor the accepted assignment. It does not constitute a loaning of the credit of the Commonwealth as the Commonwealth is not bound to do anything except pay over money, if and when earned, to the person designated by its creditor.

You are therefore advised that you may accept assignments of wages as outlined in your second inquiry, any doubt as to the validity of such assignments must be determined by the assignor and the assignee.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

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*Automobiles—Motor-vehicle certificates—Issuance of certificates to bailors—Repossession—Act of May 24, 1923, P. L. 435.*

1. A bailor of an automobile is not entitled to a new certificate of ownership merely because the bailee has violated some provision of the bailment contract.

2. In such case, it must appear that the bailor has actually retaken possession of the vehicle, or that the circumstances are such as to relieve him from the necessity of repossession as a preliminary requisite to the issuance of a new certificate.

Department of Justice,  
Harrisburg, Pa., April 8, 1926.

Mr. Benjamin G. Eynon, Registrar of Motor Vehicles, Department of Highways, Harrisburg, Penna.

Sir: This Department is in receipt of your request to be advised as to whether or not a new certificate of title to a motor vehicle should be issued to the applicant therefor under the following circumstances:

"A", a motor vehicle dealer, leased a motor vehicle to "B" upon a bailment contract, which was afterwards assigned to "C", a finance company. "C" has made application for a new certificate of title, alleging in his application that "B" has defaulted in pay-

ments provided for under the terms of the bailment contract, and has filed with his application a certified copy of the bailment contract, which contains the usual provisions authorizing repossession upon failure to make payments as stipulated. "C" has not presented to you the original certificate of title nor has he actually repossessed the motor vehicle in question nor taken any other action for the purpose of obtaining possession thereof.

You state that you are of the opinion that a number of lessors under bailment contracts are filing applications for new certificates of title immediately after the execution of the bailment contract, alleging violations of some provision of the contract for which the remedy of repossession is given, but before the motor vehicle described in the contract is actually repossessed.

The Title Registration Act of May 24, 1923, P. L. 425, provides a system of registering titles to motor vehicles for the protection of owners and to facilitate the recovery of motor vehicles stolen or unlawfully taken. It defines the term "owners" as including "the person or persons having a motor vehicle in his or their possession, custody or control under a lease or contract of conditional sale or other like agreement" (Sec. 1).

It requires every owner of a motor vehicle to make application for an official certificate of title to the same and requires the Secretary of Highways to issue such certificate when satisfied that the applicant therefore is entitled thereto (Sec. 2).

In the case to which you refer the bailee was the "owner" of the motor vehicle in question under the terms of this Act and as such made application for and received a certificate of title to the same.

The Act provides for the issuance of a new certificate of title in two, and only two, classes of cases: (1) "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" upon the presentation of such original duly assigned to the purchaser (Sec. 3), and (2) in the case of the transfer of ownership or possession by operation of law (Sec. 8).

The case concerning which you inquire does not come within the first class. If "C" is entitled to a new certificate of title he must have brought himself within the provisions of Section 8 of the Act, which reads in part 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 con-

*ditional 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. \* \* \**

While the way is left open, in this section of the Act, for the issuance of a new certificate when the old is not surrendered and when the right of possession only is shown, yet such are exceptional cases, and the Act contemplates the actual repossession of the vehicle by the bailor where the right to a new certificate is claimed because of default in performance of the terms of a bailment contract.

In the second place, the Act treats the bailee as the owner, and the provision for repossession by the bailor upon default in the performance of the terms of the contract is a contractual obligation (*Cobb & Chase vs. Deiches & Co.*, 7 Pa. Super. Ct. 252, 256), which does not render the contract void, but renders it voidable and requires affirmative action by the bailor. The mere application for a new certificate of title does not constitute sufficient affirmative action.

In the third place, without there having been actual repossession or other affirmative action by the bailor, the bailee has not been accorded an opportunity to defend his right to continued possession either on the ground of performance; of a modification of the terms of payment (*Whitehill vs. Schwartz*, 27 Pa. Super. Ct. 526, 530); of a subsequent agreement changing the tenor of the alleged bailment contract (*Goss Printing Press Co. vs. Jordan*, 171 Pa. 474); or on the ground that the contract is not a bailment contract but one of conditional sale (*Jones vs. Wands*, 1 Pa. Super. Ct. 269, 274); or that the stipulation for repossession is invalid for any other reason.

For these reasons you are advised that a new certificate should not be issued upon the present state of the record in the instant application, because it does not appear that the vehicle has been repossessed by the bailor or that the circumstances are such as to

relieve the applicant from the necessity of repossession as a preliminary requisite to the issuance of a new certificate.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

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*Secretary of Highways—State Highway Patrol—Motor License Fund.*

Authority of the Secretary of Highways to equip training quarters of State Highway Patrol, said equipment to be paid for from the Motor License Fund.

Department of Justice,  
Harrisburg, Pa., April 30, 1926.

Honorable W. H. Connell, Acting Secretary of Highways, Harrisburg, Pennsylvania.

Sir: We have your request for advice as to your authority to purchase kitchen utensils, bedroom supplies and gymnasium fixtures for the use of the State Highway Patrol at its training quarters.

We understand that you have organized a training school for the purpose of training State Highway Patrolmen, to which applicants for positions on that force are detailed for instruction prior to being sent out on active duty, and that such training has been heretofore obtained in quarters furnished with equipment borrowed from the Pennsylvania State Police.

The State Highway Patrol has been organized under the authority of Section 12 of the Motor Vehicle Law of 1919, as amended by the Act of June 14, 1923, P. L. 736, for the purpose of carrying out and enforcing the provisions of that Act, its amendments and supplements; also by the Act of May 24, 1923, P. L. 425, known as the Title Registration Act, Section 13 of which contains general authority to appoint such employes as are necessary to carry out and enforce the provisions of that Act.

The Motor License Fund was established and appropriated under the provisions of Section 12 of the Act of 1919, P. L. 678, as last amended by the Act of 1925, P. L. 282, and also under the provisions of Section 13 of the Act of 1923, P. L. 425, as last amended by the Act of 1925, P. L. 286. Each of these Acts of 1925 contains the following provisions with respect to the appropriation of this Fund:

The Fund is appropriated to the Department of Highways "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 \* \* \* for the payment of the traveling and other expenses of the Secretary of Highways and the other officers and employees of the Department \* \* \* for the payment of rentals of branch offices or any other grounds, buildings or quarters necessary for the work of the Department; \* \* \* and for any and all other expenses of every kind and description, necessary to effectually 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 and for that purpose the commissioner is hereby authorized to appoint such employes as in his discretion are necessary."

Thus it appears that your Department is charged with the enforcement of the penal provisions of the Motor Vehicle Law for which purpose you are authorized to appoint the necessary employees (State Highway Patrolmen); that the members of this force are to be paid out of the Motor License Fund, out of which are also to be paid their necessary traveling and other expenses. It also appears that you are authorized out of this fund to pay rentals of buildings or quarters necessary for the work of your Department; and also to pay all expenses necessary to carry out and enforce the provisions of the Motor Vehicle Law which you are directed to enforce.

It is necessary in your judgment, in which there could surely be no disagreement, that the members of this Patrol shall be specially trained in the work which they are to undertake, trained in a knowledge of the Motor Vehicle Law, of the general duties of police officers, in the use of the motor vehicle equipment with which they are equipped and so forth. This training is, therefore, necessary, in order to carry out and enforce the provisions of the Motor Vehicle Law. It is your judgment also, that this special training must be procured in a training school conducted and operated by the officers of the force, and that such training should be given after the men receiving it have so far become a part of the Patrol that they are subject to the control and under the discipline of the officers of the Patrol. This necessitates sending these men to some designated point away from their homes, where they remain for a varying period of time. The expenses incurred in such work are, under all general rules, included within traveling and maintenance expenses of the employes of the State when absent from their homes on State business, within the scope of their duties. If these expenses must be paid by the State, and it is necessary or desirable in your discretion that these men be maintained under the same roof in the buildings which you have obtained for their instruction, I see no reason why you may not equip such building for such purposes so far as is

reasonably necessary out of the provisions of the Motor License Fund. Such a policy certainly is in the interest of economy and efficiency, and in my opinion permissible under the appropriation of the Motor License Fund.

And you are so advised.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

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*Department of Highways—Motor License Fund—Installation of Electric Wiring.*

The Department is authorized to purchase through the Department of Property and Supplies as purchasing agent, such materials, supplies and equipment as are necessary to make electrical wiring installation in a certain building, the same to be paid for out of the Motor License Fund.

Department of Justice,  
Harrisburg, Pa., October 13, 1926.

Mr. W. H. Connell, Acting Secretary of Highways, Harrisburg, Pa.

Sir: In your recent letter with reference to the installation of electric wiring by your Department in the house it occupies as a tenant of Mrs. Emma F. Engle there are two main questions involved:

1. Was lessor required under the written lease to furnish this electrical equipment?

2. If not, was the Department of Highways authorized to do so, either directly or through the Department of Property and Supplies?

1. There is no provision of the lease whereby the lessor undertook to furnish electrical equipment other than that which was installed at the time of making the lease, or whereby she warranted, either directly or impliedly, the electric equipment then installed to serve the purpose for which the building was leased.

There being no such agreement or warranty, it is well settled that the lessor could not have been compelled to make the repairs and is not liable therefor.

2. Your authority to install the equipment.

Presumably the lessor agreed to the installation and is making no claim for damage on account of the trespass. The question is raised by the Auditor General whether or not he should approve the requisition.

I understand that you were using this building as a testing laboratory for the purpose of testing materials used in the construction and maintenance of State, and State-aid, highways, which required an

electrical testing equipment, lights, etc., and necessitated a wiring that would carry a considerable electrical load, and that after you had occupied the building and operated it for such purposes for a time it was discovered that the wiring was not sufficient to carry the load required in the use to which the building was being put, and for that reason it was unsafe and a menace not only to the building but to those members of your Department working therein.

There is no authority in your Department to install this electrical equipment unless it can be found in the appropriation of the motor license fund (Section 12 of the Act of 1919, P. L. 678, as amended by Act of 1925, P. L. 282) which appropriates the fund to your Department, *inter alia*,

“For the purchase, through the Department of Property and Supplies as purchasing agency, all \* \* \* supplies, materials, equipment \* \* \* necessary for the conduct of the work of the Department \* \* \* for the erection and repairs of buildings; \* \* \* and for any and all other expenses of every kind and description necessary to effectually carry on the work of the Department of Highways, as described in the Act of Assembly approved the 31st day of May, one thousand nine hundred and eleven, known as the State Highway Act, and the amendments and supplements thereto, and to carry out and enforce the provisions of the Act to which this is an amendment, and all amendments and supplements thereto \* \* \*.”

The words “supplies”, “materials” and “equipment”, as used in the above quoted part of this Act, seem to be limited only by the qualification that they shall be for the purposes of your Department as those purposes are specified in the statutes defining our powers and duties. That they are not limited to such as are directly used in connection with construction and repair appears from the subsequent provision on page 235, which also clearly indicates that the words include additional supplies, materials and equipment to that used in such road work.

“Provided, however, that it shall not be necessary for the Department of Highways to purchase through the Department of Property and Supplies as purchasing agency materials, supplies and equipment necessary to the construction and repair of highways, but all *other* materials, supplies and equipment shall be purchased through the Department of Property and Supplies as heretofore provided.”

Thus, it clearly appears that the intent was to use the words “supplies, materials and equipment” in the former quotation from the Act of 1925, in the broad sense of including all such necessary to enable your Department to perform properly the duties assigned to it.

There is no doubt as to the authority of your Department to purchase the materials, supplies and equipment used in repairing the electrical wiring of the Engle house.

This equipment having been installed by your men, no question arises as to your authority to pay for its installation.

In this case you had a building rented which was adapted for your use, except as to this wiring, and for which the Commonwealth was obligated to pay at least \$1,890.00 (\$210 per month for nine months). After discovering that the building was not safe unless the electrical wiring was done you were faced with the problems of making that installation, or discontinuing the use of the building and obtaining quarters elsewhere which would have involved a loss to the Commonwealth of \$1,890.00, provided the quarters you found could be obtained at the same rental. If you were required to pay more for the new quarters than for the Engle property the loss to the Commonwealth would have been increased by such additional amount.

Where it becomes necessary to repair rented properties after the lease has been made it appears to me that the preferable plan is to persuade the landlord to make the repairs and to provide for reimbursement by a new lease at a reasonable increase in rent. However, in the emergency situation which confronted you, we think you had authority to make this installation.

In addition to the above reasons given sustaining this claim we refer you to two opinions of this Department, one addressed to Honorable Paul F. Wright, Secretary of Highways, under date of June 15, 1924, and the other addressed to the Honorable S. S. Lewis, Auditor General, under date of February 13, 1925, in each of which it was held that the appropriation to the Motor License Fund was broad enough to include expenditures of every kind and description necessary to effectually carry on the work of your Department, and that the question as to whether or not any individual item of expense was necessary to effectually carry on that work is a matter that is within the discretion of the Secretary of Highways. Under the authority of these opinions this expenditure seems to be justified and authorized.

Therefore, we advise you that you were authorized to purchase through the Department of Property and Supplies as purchasing agency such materials, supplies and equipment as were necessary to make the electrical wiring installation in the Engle building and that you were authorized to make such installation, the cost of the same to be paid out of the Motor License Fund.

Yours very truly,  
DEPARTMENT OF JUSTICE,  
JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

*State Officers—Money Held in Official Capacity—Attachment—Act of June 16, 1836—Act of May 8, 1876—Act of April 10, 1905.*

Wages of an employe of the Commonwealth in the possession of an officer of the Commonwealth and so held in his official capacity are not subject to attachment on a judgment against the employe, nor can the Commonwealth or its officers as such be made garnishees in an execution attachment.

Department of Justice,  
Harrisburg, Pa., November 16, 1926.

Honorable W. H. Connell, Acting Secretary of Highways, Harrisburg, Pennsylvania.

Sir: In response to your recent inquiry you are hereby advised that wages of an employe of your Department in the possession of an officer of the Commonwealth and so held in his official capacity, are not subject to attachment on a judgment against the employe nor can the Commonwealth or its officers as such be made garnishee in an execution attachment. In the course of that opinion the Court emphasizes the great public inconvenience if such a proceeding were authorized and says, "if a precedent of this kind were set, there seems to be no reason why the State or county treasurers, or other fiscal officers of the Commonwealth, or of municipal bodies, may not be subjected to the levying of attachments, which has never been attempted nor supposed to come within the attachment law."

In the City of Erie vs. Knapp, 29 Pa. 173 (1857) it was held that a municipal corporation may not be made a garnishee upon an execution attachment under the Act of June 16, 1836. In the course of its opinion the Supreme Court says,

"An execution attachment is often substantially but the commencement of the suit; and it always imposes upon the garnishee duties and obligations of a somewhat difficult character to perform. He must appear to the writ and answer the interrogatories propounded. He may not pay the money to the original creditor after notice of the attachment nor can he safely pay it to the attaching creditor pending the litigation. If the debt has been assigned with notice to the garnishee before the attachment, he must either notify the assignee of the attachment, or plead the assignment in bar of the attachment; and if he is summoned by foreign attachment, he cannot even after judgment safely pay the debt to the attaching creditor, until bail to return has been duly given.

"The performance of public duties is sufficiently difficult on the part of fiscal officers without further complicating them by requiring such officers to become parties to questions and rights litigated in our courts of justice."

It was held by Judge Williams, of Allegheny County, in the case of Greer v. Howley, 1. P. L. J. 1 (1853), that a debt owed by a municipal corporation for work and labor done by a contractor in grading and paving one of its public streets is not liable to an execution attachment at the suit of a judgment creditor of such contractor.

In these cases it is held that the provisions of the said Act of 1836 with reference to the attachment of money in the hands of a corporation do not include municipal corporations, but that the word "corporation" there used refers manifestly to corporations other than those of a municipal character.

"A fund in the hands of the State Treasurer and alleged to be due from the State to defendant in attachment has been held not subject to attachment."

6 G. J. 209, Sec. 390.

The authority for this statement in the text is the case of *Lodor v. Baker*, 39 N. J. L. 49, 50, wherein the reason given for the rule is that such an attachment involves the garnishee in litigation and is tantamount to a suit against the State which is prohibited under our Constitution unless there is specific authority under general legislation for such proceedings.

The only remaining matter for consideration is whether or not wages in the hands of a public officer may be attached under the Act of May 8, 1876, P. L. 139, which provides for the attachment of wages due to such persons as may be indebted to proprietors of hotels, inns, boarding-houses and lodging-houses for boarding not exceeding the amount of four weeks.

This Act of 1876 was amended by Act of April 10, 1905 P. L. 134 and by Act of May 1, 1913, P. L. 132. The principal change made in the original act by the amendments was in providing for the issuing of an attachment as original process.

These Acts of 1905 and 1913 have been held unconstitutional and the original Act of 1876 has been held constitutional (*Schmidt vs. Schmidt and Erie R. R. Co.*, 83 Pa. Super. Ct. 125-1924).

The applicable portions of the aforesaid Acts of 1836 and 1878 are as follows:

Section 35 of the Act of June 16, 1836, provides inter alia as follows:

- "In the case of a debt due to the defendant \* \* \* the same may be attached and levied in satisfaction of the judgment, in the manner allowed in the case of a foreign attachment, but in such case, a clause, in the nature of a scire facias against a garnishee in foreign attachment, shall be inserted in such writ of attachment, requiring

such debtor \* \* \* to appear at the next term of the Court \* \* \* and show cause why such judgment shall not be levied of the effects of the defendants in his hands."

The Act of May 8, 1876 provides inter alia.

"\* \* \* All proprietors of hotels, inns, boarding-houses and lodging houses in this Commonwealth, in addition to the remedies now provided by law, shall have the right to attach wages due or owing to such persons as may be indebted to them for boarding not exceeding the amount of four weeks, and any sum so due may be attached but shall not be paid to the defendant until the judgment so had for such amount as may be due upon such attachment shall be satisfied, and justices of the peace shall have jurisdiction of attachment in such case for such purpose."

We fail to see any such difference in the provisions of the Act of 1836 and that of the Act of 1876 as would justify such a construction of the latter so as to include the right to attach wages in the hands of a public officer in view of the fact that the former has been construed so as to exclude the right to such attachment.

The same reasons against including the right under the former apply with respect thereto under the latter. In view of the interpretation of the Act of 1836, as contained in the above authorities, it would require express provision in the Act of 1876 for the attachment of money held by public officials as such before it could be construed as including such right. No such provision appears.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

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**OPINION TO THE SECRETARY OF INTERNAL  
AFFAIRS**

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## OPINION TO THE SECRETARY OF INTERNAL AFFAIRS

*Bureau of Standards—Authority to Approve a Certain Submitted Type of Scale Design for Selling Ice Cream at Retail—Acts of April 15, 1834, P. L. 524; May 11, 1911, P. L. 276; July 24, 1913, P. L. 960; June 2, 1919, P. L. 361; May 5, 1921, P. L. 389.*

The Secretary of Internal Affairs must determine, in the first instance, whether a type of scale facilitates the perpetration of fraud; he must determine, as a question of fact, whether or not a type of scale is reasonably permanent in its indication and adjustment.

The type of scale design submitted is not such type as should be approved.

Department of Justice,  
Harrisburg, Pa., June 3, 1925.

Honorable James F. Woodward, Secretary of Internal Affairs, Harrisburg, Pennsylvania.

Sir: In your recent letter to this Department you state that there has been presented to you for your approval a type of scale designed for selling ice cream at retail; that it is a combined spring and lever fan-shaped computing scale, the unit of measure of which is what the inventors designate as a "Kil-Am"; that the scale registers " $\frac{1}{2}$ ", "1", " $1\frac{1}{8}$ ", and "2" "Kil-Ams"; that a "Kil-Ams" is stated to equal twenty three and one quarter ounces avoirdupois; that there is nothing about the scale to show the relation of a "Kil-Am" to ounces, pounds or any other recognized standard of weight; and that there is no other designation about the scale excepting the word "Kil-Am", which appears under the figure one in the center of the fan-shaped dial.

You further state that the word "Kil-Am" is without meaning excepting as a trade-mark, and that the purchaser of a commodity measured by this scale must depend entirely upon the vendor's statement or explanation as to what constitutes a "Kil-Am."

You request an opinion as to whether or not the scale, so described, is such as the Bureau of Standards is required to approve.

Section 2 of the Act of May 8, 1921, P. L. 309 provides as follows:

"The Bureau of Standards of the Department of Internal Affairs is authorized to pass upon each type of weight and measure and weighing and measuring device manufactured, offered or exposed for sale or sold or given away, for the use in trade or commerce, or used in trade or commerce, in the Commonwealth of Pennsylvania, and to approve or disapprove of said type. The said bureau shall approve each type of weight and measure and weighing and measuring device, submitted to it for approval by any person, if

such type is so designed and constructed that it conforms to, or gives correct results in terms of, standard weights or measures or in terms of values derived therefrom, and is reasonably permanent in its indication and adjustment, and does not facilitate the perpetration of fraud, otherwise the bureau shall disapprove the same."

There are, then, three conditions that must be met by every type of scale before it can be approved:

(1) It must be so designed and constructed that it conforms to or gives correct results (a) in terms of "standard weights or measures," or (b) in terms of values derived from "standard weights or measures;"

(2) It must be reasonably permanent in its indication and adjustment; and

(3) It does not facilitate the perpetration of fraud.

These three conditions will be discussed with reference to the scale in question under the above enumeration. But, before doing so it is desirable (a) to review the law with reference to weights and measures and (b) to consider the practical results of the adoption of the plan involved in the approval of the scale in question.

A. Following the provision in Magna Charta that there should be but "one weight and measure throughout the Kingdom", therein inserted because of grievances owing to differences in weights and measures (28 Ruling Case Law, page 2) there were brought to this country certain well defined standards which were incorporated into our statute law by the Act of April 15, 1834, P. L. 524.

That act provided that the standard of measurement should be the yard,—of measure, the gallon or bushel,—and of weight the pound, either Troy or avoirdupois, the latter being based upon the Troy pound in the ratio of 7,000 to 5,760. It also provided for the denominations or subdivisions of these various standards specifying the relations thereof to the respective standard and to each other, the Troy pound being subdivided into grains, pennyweights, and ounces and the denominations of the avoirdupois pound being declared to be drams, ounces, quarters, hundreds and tons. These units have never changed or added to (unless it be the authorization of the use of the metric system by Act of Congress under authority granted it by Article I, Section 8, clause 5 of the Federal Constitution) although the dimensions in cubic inches or the contents in pounds have been changed with respect to certain commodities.

The "Kil-Am" was not known at the Common law as a unit of weight nor has it ever been adopted or authorized as such either by Federal or State legislation.

The Act of 1834 directed the procurement of positive standards of the yard, gallon, bushel and the Troy pound, (which was directed to be an authenticated copy of the Troy pound of the Mint of the United States and was declared to constitute the positive standard of weight of this Commonwealth). It also provided for the care and preservation of these positive standards and directed that each County should be furnished with positive standards of weight and measure compared with such State standards to be used as standards for the adjustment of weights and measures.

The chief of said Bureau of Standards and his deputies are authorized to test all instruments and devices used in weighing or measuring commodities for sale and to condemn and seize any false or illegal instrument or device so used or intended to be used (Act of June 2, 1919, P. L. 361). The same authority has been delegated to the various sealers of weights and measures for cities and counties (Act of May 11, 1911, P. L. 276, as amended by Act of July 24, 1913, P. L. 960).

The use of any weighing device after it shall have been condemned and before it shall have been adjusted and sealed constitutes a misdemeanor (Act of July 24, 1913, P. L. 960).

Section 2 of the Act of July 24, 1913, P. L. 965 requires all liquid commodities, when sold in bulk or from bulk, to be sold by weight or liquid measure. The standard of which measure had been previously established by the Act of April 15, 1934, P. L. 528 (Murphy vs. Atlantic Refining Co. 74 Pa. Super. Ct. 166, 169).

Such was the condition of the law when the Act of May 5, 1921, P. L. 329 was passed and in the light of which such act must be construed.

It is to be noted that the word "standard" is used in these acts of Assembly in two different senses, first, as referring to the yard, bushel, or pound as the unit of weight or measurement, and second, as referring to the positive standard of each as found in the archives of the State. The term standard weight or standard of weight always refers to the pound never to ounces or any other subdivision or denomination thereof.

3. If this scale is approved and adopted it must be tested from time to time by the various sealers of weights and measures throughout the State. They have no positive standard or denomination thereof with which it can be tested. It is said that the "Kil-Am" is the equivalent of a certain number of ounces, the number selected being purely arbitrary. If the "Kil-Am" is adopted as a legal weight, there is nothing in the laws that would prohibit changing the number of ounces thus arbitrarily adopted. The sealer has no criterion as his guide except the statement of the owner of the scale. Even if the number of ounces comprising a "Kil-Am" is shown on the scale there is no provision of the law that would re-

quire different scales to be uniform in this respect or that would prohibit a change from time to time in the number of ounces comprised in a "Kil-Am". There would be no standard to govern the action of the sealer in performing his duties.

If the "Kil-Am" may be adopted as the unit of weight by which ice cream is sold then other arbitrary units of weight, called by other names, may be adopted for selling ice cream and other commodities so that the public will be confused by finding many different standards in use in the sale of commodities by weight.

If the "Kil-Am" may be adopted as a standard of liquid weight, various arbitrary units may be selected as standard of measurement and measure and of dry weight. The dry goods merchant may sell cloth by some other measure than the yard, the grocer may sell potatoes by a measure other than the bushel and vinegar by one other than the gallon.

These various standards of measure, measurement and weight may be multiplied as many times as there are stores within which such commodities are handled. The result would be confusion worse confounded and the opening of the doors wide to possibilities of fraud upon the purchasing public.

It should be noted in this connection that in the large exhibit of scales and measures in your Department containing a sample of every modern unit of measure, measurement and weight there does not appear any such unit which is in other than terms of the yard, gallon, bushel or pound or the subdivisions or denominations thereof as provided in the Acts of Assembly.

(1-a) The "Kil-Am", being the unit of weight appearing on the scale submitted for approval, and such unit not constituting a standard weight, the scale is not so designed and constructed that it gives correct results in terms of "standard weights or measures."

(1-b) The term "value" ordinarily means worth according to some standard or, the ratio in which one thing is exchanged against another. Such standard may be in money or in commodities. It is apparent that neither of these is the standard here used as the very object of adopting those standards of weight and measure is to obtain a universal and uniform basis upon which commodities may be exchanged for money or for another commodity. The standard of comparison here used is the yard, bushel, gallon or pound, as the case may be, each one of which must correspond to the respective positive standard in your possession.

In view of the prior legislation upon the subject of weights and measures and of the unbroken commercial practice of more than a century, it is our opinion that the phrase "in terms of values derived therefrom" as used in Section 2 of the aforesaid Act of 1921, means in terms of the values designated by law as derived from

such standards of weights and measures as have been or shall hereafter be adopted by law; that the standard of liquid weight is the pound and the values derived therefrom are the grain, or penny-weight, the dram, quarter, hundred, or ton.

It is contended that the submitted scale gives correct results in terms of values derived from pounds or ounces because the "Kil-Am" represents a certain number of ounces. The Legislature having prescribed the subdivisions or denominations of the various adopted standards, i. e. having prescribed what values are to be derived from such adopted standards, you are not at liberty to approve other subdivisions or denominations.

This interpretation of the phrase now under consideration will conform with the prior legislation on the general subject and with the common practice of long standing, while the one contended for would reverse such legislative and commercial practice and result in great confusion. The addition of a statement on the scale setting forth the value of the "Kil-Am" in ounces would not affect these conclusions.

You are therefore advised that the above described type of scale is not so designed and constructed that it conforms to or gives correct results in terms of standard weights or measures or in terms of values derived therefrom and cannot be approved.

(2) Whether or not a type of scale is reasonably permanent in its indication and adjustment is a question of fact to be determined by you.

(3) You must determine in the first instance whether a type of scale facilitates the perpetration of fraud.

Irrespective of your conclusion as to questions "2" and "3" (See directly above) it is our opinion that the scale in question, called the "Kil-Am", is not a scale which you have the legal right to approve (See discussion of "1-a" and "1-b", above).

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First 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

*Building laws—Lodge halls—Lighting—"Public"—Acts of May 3, 1909, and May 11, 1921.*

1. A lodge hall used for the assemblage of the members of a lodge, not leased or rented for entertainments and in which the general public does not assemble after dark, is not required, under the Acts of May 5, 1907, P. L. 417, and of May 11, 1921, P. L.—, to be provided with an emergency electric lighting circuit independent of its main lighting circuit.

2. The word "public," as used in the act, was intended to signify the general public as distinguished from those who are resident in a building or are admitted because of membership in a lodge.

Department of Justice,  
Harrisburg, Pa., March 26, 1925.

Hon. Richard H. Lansburgh, Secretary of Labor and Industry, Harrisburg, Pa.

Sir: You have asked for a construction of that portion of Section 1 of the Act of May 3, 1909, P. L. 417, as last amended by the Act of May 11, 1921, which reads:

"All ways of egress or means of escape in said buildings wherein persons are employed after darkness or the public assembles after darkness shall be provided with a reliable emergency electric lighting circuit of a type to be approved by the Commissioner of Labor and Industry."

Your question is: Does the above quoted clause refer to lodge halls in which persons congregate who are members of a fraternal or similar order, and which are not leased or rented for entertainments?

The purpose of the Act, as gathered from its title, is to protect persons from fire or panic in certain buildings by providing proper exits and fire escapes.

Section 1 specifies five classes of buildings to which the requirements of the Act shall apply:

(1) Certain public or office buildings, sanitariums, hospitals, school houses, hotels, etc.;

(2) "Every building (in this Commonwealth other than buildings situated in cities of the first and second classes) used, or hereafter to be used, in whole or in part as a theatre, moving picture theatre, public hall, lodge hall, or place of public resort."

(3) Certain factories, workshops and mercantile establishments:

(4) Certain boarding, lodging, tenement and apartment houses;

It then provides that all such buildings

"Shall be equipped either with an automatic sprinkler system or with an automatic fire-alarm system, \* \* \* and in all cases shall be provided with proper ways of egress or means of escape from fire, sufficient for the use of all persons accommodated, assembled, employed, lodged, or residing therein, and such ways of egress and means of escape shall be kept free from obstruction, in good repair, properly lighted and ready for use at all times,"

and then follows the provision that you have quoted requiring that all such ways of egress or means of escape in those buildings where persons are employed after darkness, or where the public assembles after darkness, shall be provided with an emergency electric lighting circuit.

Does the word "public" as used in the phrase "where the public assembles after darkness" signify the general public or does it include members of a lodge when assembled in their lodge hall?

It is defined in the Century Dictionary as follows:

"Of or belonging to the people at large; relating to or affecting the whole people of a State, nation or community; opposed to private \* \* \* \* \*; open to all the people; shared in \* \* \* \* \* or participated in or enjoyed by the people at large; not limited or restricted to any particular class of the community; as a public meeting; public worship; \* \* \* \* \* the general body of people constituting a nation, state, or community; the people indefinitely."

Webster's Dictionary states that in general "public" expresses something common to mankind at large, to a nation, state, city or town, and is opposed to "private" which denotes that which belongs to an individual, to a family, to a company or to a corporation.

"Public" may be properly applied to the affairs of a state, or of a county, or of a community. In its most comprehensive sense it is the opposite of "private". *Poor Dist. v. Poor Dist.*, 135 Pa. 393. The essential features of a public charity are that it is not confined to privileged individuals, but is open to the indefinite public, and it is this indefinite or unrestricted quality that gives it its public character. *Appeal of Donohugh*, 86 Pa. 306, 318. A Masonic Home, admission to which is determined by whether or not the applicant for admission is a Mason, is a private charity; when the right to admission depends on the fact of voluntary association with some particular society, then a distinction is made which does not concern the public at large. *Philadelphia vs. Masonic Home*, 160 Pa. 572.

These definitions of the word "public" indicate the intent of the Legislature to use it with reference to the "general public" in the Act in question, for the rule is "that in the construction of statutes

the terms and language thereof are to be taken and understood according to their usual and ordinary signification, as they are generally understood among mankind unless it should appear from the context and other parts of the statute to have been intended otherwise." *Commonwealth vs. Minnich*, 280 Pa. 263, 370.

Instead of indicating that the Legislature intended otherwise, the context of the statute supports the application of the above rule and indicates that the word "public" was intended to signify the general public as distinguished from those who are resident in a building or are admitted because of membership in a lodge.

Section 1 of the Act (lines 23-27) provides:

"And in all cases shall be provided with proper ways of egress or means of escape from fire, sufficient for the use of all persons accommodated, (referring to class 1 above, i. e. office buildings, hospitals, school houses, hotels), assembled, (class two, theatres, public halls, lodge halls), employed, (class three, factories), lodged or residing, (class four, lodging houses, apartments) therein."

In this clause when the intent was to include both the general public and the selected few; to include both those who assembled in theatres and those who assembled in lodge halls, the word "persons" was used; but in the next clause, the one under construction, the term used is "or the public assembles after darkness"; indicating the intent to use the word "public" to signify "all the people" of the community as distinguished from any particular class.

You are therefore advised that a lodge hall used for the assemblage of the members of the lodge, not leased or rented for entertainments, and in which the general public does not assemble after darkness, is not required to be provided with an emergency electric lighting circuit independent of its main lighting circuit.

Yours very truly,  
DEPARTMENT OF JUSTICE,  
JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

*Employment agency—License—Death of licensee—Continuance of the agency—Act of June 7, 1915, P. L. 888.*

It is not lawful for the executors or administrators of the estate of a licensed employment agent to conduct or operate the employment agency under the license of the decedent during the residue of the term of such license.

Department of Justice,  
Harrisburg, Pa., May 27, 1925.

Honorable R. H. Lansburgh, Secretary of Labor and Industry,  
Harrisburg, Pennsylvania.

Sir: You have advised this Department that a certain licensee who conducted a private employment agency under license granted by you died recently and the executors of his estate are desirous of continuing the operation of said agency under the license of the deceased. You have inquired whether it is lawful for the executors of the estate of the deceased licensee to conduct said private employment agency under the license of the decedent during the remainder of the term of said license, or until said estate is settled?

The licensing of employment agents or agencies is done under the provisions of the Act of June 7, 1915, P. L. 888. I find no provision in this act referring in any way to the rights under an employment agency license in case of the death of the licensee.

The Act of Assembly here in question was passed in pursuance of the police powers vested in the State Legislature in order to control and regulate the employment agency business to protect the public against the frauds that are readily possible in a business of this character. That this was the purpose of the act is conclusively shown by the provisions of the act itself. For instance, a bond is required to be furnished by the applicant to the amount of \$1,000, with proper surety, conditioned for the faithful observance by the employment agent of the provisions of the act and the rules and regulations issued thereunder, and that the employment agent shall meet all obligations, damage or loss accruing to any person dealing with the employment agent by reason of any contract of such agent, or resulting from any fraud, excessive charges, misrepresentations or wrongful act of such employment agent or his employes or agents, in connection with the business so licensed. Furthermore, the Secretary of Labor and Industry shall refuse to issue a license if he finds the applicant is unfit to engage in the business, or has had a license previously revoked, or that the business is to be conducted on or immediately adjoining unsuitable premises, or for any other good reason existing within the meaning of the law. In addition, the Secretary is authorized to revoke any license granted for violation of the provisions of the act or the rules and regulations issued thereunder. The employment agent is also held responsible for every untrue statement he or his agents make regarding any employment.

A license such as is granted under the provisions of this act is in the nature of a special privilege, and not a right common to all, *State vs. Hagood*, 9 S. E. 686; 3 L. R. A. 841. It is not a property right, *Littleton vs. Burgess*, 82 Pac. 864, or a contract, *Reser vs. Umatilla Company*, 86 Pac. 585. A license to pursue a given occupation or business is a personal privilege which terminates at the holder's death. It is not assignable by the holder, and at his death it does not go to his representatives. It is not an asset of his estate: *Blumington's petition*, 125, 412; *Bucks Estate*, 185, Pa. 57. There may be some modification to this rule under circumstances which would render a transfer equitable where the license fee is a special tax for a certain trade or business. This, however, is not applicable here because of the fact that the act here in question cannot be said to be a taxing act. The fee of \$50. required to be paid by the applicant is hardly more than necessary to meet the operating expenses of the State Bureau required to attend to the enforcement of the provisions of the act and the rules and regulations issued in pursuance thereof. The provisions of the act previously referred to, as well as other provisions of the act providing for the inspection of the agencies and the prohibition against various types of employment agency business conclusively indicate that the act was passed by the Legislature strictly as a police power measure. In addition, in Section 5 of the Act, it is provided that the license issued shall not be transferable.

Therefore, I am of the opinion, and so advise you, that it is not lawful for the executors or administrators of the estate of a deceased licensee to conduct or operate in any manner an employment agency under the license of the decedent during the residue of the term of such license.

Yours very truly,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,

*Deputy Attorney General.*

*Workmen's Compensation—Appointment—When Terms of Office Expire—Administrative Code of 1923.*

Under Section 207 of the Administration Code of June 7, 1923, P. L. 498, all workmen's compensation referees appointed since June 15, 1923 (the date when the code became effective), must be commissioned for terms expiring on the third Tuesday of January, 1927, and all referees appointed subsequent to the third Tuesday of January, 1927, will serve for terms of four years from the third Tuesday of January following the next election of a Governor, and until their successors shall have been appointed and qualified.

Department of Justice,  
Harrisburg, Pa., May 29th, 1925.

Honorable Richard H. Lansburgh, Secretary of Labor and Industry,  
Harrisburg, Pennsylvania.

Sir: We have your request to be advised when the terms of the present Workmen's Compensation Referees expire under the provisions of the Administration Code of 1923.

Section 202 of the Administrative Code (Act of June 7, 1923, P. L. 493) continued the Workmen's Compensation Referees as departmental officers within the Department of Labor and Industry. Section 207 of the same act provided that:

"Except as in this act otherwise provided \* \* \* departmental administrative officers shall hold office for terms of four years from the third Tuesday of January next following the election of a Governor and until their successors shall have been appointed and qualified: Provided, that the terms of any persons whose terms of office are fixed by this sub-section who are appointed prior to the third Tuesday of January one thousand nine hundred and twenty-seven shall expire upon that date."

Section 432 of the Code provides how the number of Workmen's Compensation Referees to be appointed shall be determined and fixes their rate of compensation but makes no provision with reference to their terms of office.

Section 2207 of the Code provides that:

"All appointive administrative officers holding office when this Act becomes effective, whose offices are not abolished by this act \* \* \* shall continue in office until the term for which they were respectively appointed shall expire, or until they shall die, resign, or be removed from office."

We understand that some of the Workmen's Compensation Referees now in office were appointed prior to the passage of the Administrative Code under the provisions of the Act of July 21, 1919, P. L. 1077, Section 9. The Act of 1919 while it provided for the appointment of Workmen's Compensation Referees did not provide for their

appointment for definite terms of years. Accordingly all the Referees appointed under that Act were commissioned to hold office during good behavior.

The Act of 1919 superseded and repealed the Act of June 2, 1915; P. L. 758 which also provided for the appointment of Workmen's Compensation Referees without specifying any terms of years during which they should serve. Any Referees appointed prior to the passage of the Act of 1919 were, therefore, also commissioned to serve during good behavior.

All Referees may, of course, "be removed at the pleasure of the power by which they shall have been appointed" (Constitution Article VI, Section 4). The Legislature could, also, have brought the terms of the Referees then in office to an end by an appropriate provision in the Administrative Code. It did not, however, see fit to do so, but adopted the policy declared in Section 2807 above quoted. It is, therefore, our opinion that all Workmen's Compensation Referees appointed prior to the effective date of the Administrative Code will continue in office "until they shall die, resign, or be removed from office"; and that the provisions of section 207 of the Code apply only to those Referees appointed subsequent to the effective date thereof.

Under Section 207 of the Code it is clear that any Referees appointed since June 15, 1923 (the date when the Code became effective) must be commissioned for terms expiring on the third Tuesday of January 1927 and that all Referees appointed subsequent to the third Tuesday of January 1927 will serve for terms of four years from the third Tuesday of January following the next election of a Governor, and until their successors shall have been appointed and qualified.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

*State Employee—Minor—Employment Certificate—Action at Law—Act of May 13, 1915, P. L. 286.*

The Workmen's Compensation Act of May 13, 1915, P. L. 286, did not apply where a minor, less than fourteen years of age and without an employment certificate was killed while employed by the State Department of Forests and Waters to fight forest fires, in that he was not capable of making a contract of hiring, and his employment was illegal.

Department of Justice,  
Harrisburg, Pa., August 14, 1925.

Honorable Richard H. Lansburgh, Secretary of Labor and Industry, Harrisburg, Pa.

Sir: Your letter enclosing accident report from the Department of Forests and Waters relating to a fatal accident to one, Anthony Karish, fourteen years of age, who, was employed by the Department of Forests and Waters to assist in fighting forest fires, has been received by this Department.

In your letter you state:

"The question at issue is that this boy was fourteen years of age and the Department of Forest and Waters did not have an employment certificate on file in accordance with the Act regulating the employment of minors,"

and ask if your Department is allowed to pay compensation under the provisions of the Workmen's Compensation Act.

As I understand the facts, Anthony Karish was employed by the Department of Forest and Waters to assist in fighting forest fires. On April 21, 1923 he became separated from his companions, and later in the same day his body was found, he having been burned to death. At the time of his death he was fourteen years old, and no employment certificate had been filed by the Department of Forests and Waters in accordance with the provisions of the Act of May 13, 1915, P. L. 286, regulating the employment of minors.

Section 8 of the Act of May 13, 1915, P. L. 286 provides:

"Before any minor under sixteen years of age shall be employed, permitted, or suffered to work in, about, or in connection with, any establishment, or in any occupation, the person employing such minor shall procure and keep on file, and accessible to any attendance officer, deputy factory inspector, or other authorized inspector, or officer charged with the enforcement of this act, an employment certificate as hereinafter provided, issued for said minor."

Anthony Karish was a minor fourteen years of age and was working at the time of his death for the Department of Forest and Waters. He was not a lawful employe. His employment was

especially prohibited unless certain conditions were complied with, and these conditions were entirely ignored by the employer.

*Sweeney, et al. vs. Fishel Company*, 1 Court Decisions, Workmen's Compensation Law 456.

When a minor is employed contrary to the Act of May 13, 1915, P. L. 286, and while thus employed is injured or killed the Workmen's Compensation Act does not apply and compensation cannot be recovered under that Act.

*Hegedus et al. vs. Macbeth, Evans & Co.*, 67 P. L. J. 726.

In *Ayres et al. vs. John Dunlap Co.*, 66 P. L. J. 17, it is held that one who employs a minor contrary to the Child's Labor Act of May 13, 1915 is liable for damages for injuries to such minor in an ffff13, 1915 is liable for damages for injuries to such minor in an pensionation Act of 1915. In that case the Court said:

"It is contended by counsel for defendant that inasmuch as the legislature has, in the Workmen's Compensation Act, defined the word 'employee', the Court is bound to adopt the definition, and if so, plaintiffs are precluded from maintaining this action. Section 104, so far as material to the present discussion reads:

'The term "employee" as used in this act is declared to be synonymous with servant and includes all natural persons who perform services for another for a valuable consideration,' etc.

This is a comprehensive definition and if taken literally embraces minors under fourteen years of age whose employment 'in and about or in connection with any establishment' is expressly prohibited by the Act of May 13, 1915 (P. L. 286), and minors under sixteen years of age who, by Section 5 of the Act, are prohibited employment in operating or assisting in operating stamping machines used in sheet metal manufacturing. Section 8 of the same Act provides that before any minor under the age of 16 years shall be employed, permitted or suffered to work in or about or in connection with any establishment or in any occupation, the person employing such minor shall procure and keep on file an employment certificate. In many States Workmen's Compensation Laws have been enacted which in their general scope and purpose are similar to ours, but in a large number the words 'lawfully employed', 'legally permitted to work under the laws of the State' or qualifying phrases of similar import are used.

Having at the same session (1915), enacted a law forbidding the employment of children under 14 years of age, and forbidding the employment of persons between the ages of 14 and 16 years in certain specified occupations and in others permitting their employment under certain restrictions, it is but reasonable to assume our legislators deemed it unnecessary to declare the Com-

penation Act applicable to persons 'lawfully employed'. The Act of May 13th, *supra*, declares it unlawful to employ, (a) minors under the age of 14; (b) minors between the ages of 14 and 16 in certain occupations, and (c) in permitted occupations between such ages, without first obtaining an employment certificate. The logical conclusion from defendant's contention is, 'the Workmen's Compensation Act applies to all employes regardless of age.' If this condition is sustained it emasculates the Child Labor Act to which attention has just been called, by declaring lawful that which, at the same session, was made unlawful. Not only so, but in the face of positive prohibitions in one Act the Court is asked to hold that in the other the legislature intended to, and did in fact, impose an inhibited contract upon persons incapable of making any contract. For if the word 'employee' includes, literally, 'all natural persons' and one who is employed contrary to law is declared an employee within the meaning of the Compensation Act, a child under 14 years of age may make a valid contract of employment. A construction which leads to such results cannot be adopted."

\* \* \* \* \*

"The several Acts relating to the general question herein discussed are either mandatory or inhibitory or both. Three parties are interested in and affected by these statutes—the employer, the employee, and the State; and the Compensation Act, referring as it does, to parties legally competent to contract, must not be construed as destructive of statutes enacted for the protection of employes of whom many are under legal disability."

\* \* \* \* \*

"Keeping in mind the trend of legislation relating to child labor, the conclusion is, it seems to me, irresistible that our legislature, notwithstanding the comprehensive terms used in defining 'employee' had in mind such persons as are by law capable to make valid agreements. The language employed in Sections 301 and 302 sustains this view. Section 301 refers to employer and employee who shall by 'agreement' accept the provisions of Article 3, Section 302, says:

'In every contract of hiring \* \* \* express or implied \* \* \* it shall be conclusively presumed that the parties have accepted the provisions of article three of this act and have "agreed" to be bound thereby, unless there be at the time of the making, renewal or extension of such "contract" an express statement in writing from either party to the other that the provisions of article three of the act do not apply.'

The act does not vest in minors power to contract. Whether it applies to persons over 16 years of age is not the question. The question is: Does it protect from suit

at common law an employer who engages the services of a minor contrary to law? To this question alone the arguments of counsel were directed and other and important questions which might have been raised were not considered. Keeping in view the manifest purpose in enacting laws relating to and directly affecting employer and employe, and especially the purpose to safeguard children under 16 years of age, the irresistible conclusion is, the words 'all natural persons' as used in Article 1, Section 104 of the Workmen's Compensation Act must be construed with reference to, and as affected by, the statutes relating to the employment of minors."

"Under any aspect of the Compensation Act, before the relation of employer and employe can be established, there must be a meeting of minds in a contract of employment."

*Bachman vs. State Prison Labor Commission, 6 Dep. Rep. 1409.*

In the case under consideration there could not have been "a meeting of minds in a contract of employment", as Anthony Karish was a minor not capable of making a contract of hiring.

Section 601 of the Act of June 3, 1915, P L. 797 gives the Fire Warden authority to employ such other persons as in his judgment may be necessary to render assistance in extinguishing fire, and if he can not secure a sufficient number of persons to assist, he is authorized to compel the attendance and assistance of persons in the extinguishment of fire.

This does not, however, relieve a Fire Warden from an observance of the law relating to minors and their employment; nor does it allow him to compel children to assist in a dangerous and hazardous work.

I am of the opinion, and therefore advise you, that the Workmen's Compensation Act does not apply in the case of Anthony Karish because he was a minor and not able to make a contract of hiring, and because his employment was illegal.

Yours very truly,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

*Labor laws—Employment of women—Foreign consul—Act of July 25, 1913.*

1. A consul or vice-consul, in the absence of special treaties, is not entitled to the same privileges and immunities as an ambassador or other public minister.

2. The Department of Labor and Industry has full legal authority to bring an action against any consul violating the provisions of the Act of July 25, 1913, P. L. 1024, relating to the hours of employment and welfare of women.

Department of Justice,  
Harrisburg, Pa., September 29, 1925.

Honorable R. H. Lansburgh, Secretary of Labor and Industry, Harrisburg, Penna.

Sir: In reply to your recent communication, inquiring whether your Department has jurisdiction in the case of an alleged violation by a foreign consul of the Act of 1913, P. L. 1024, relating to the hours of employment of women, I beg to submit the following:

Section 16 of said Act provides as follows:

"It shall be the duty of the Commissioner of Labor and Industry and his deputies to enforce all the provisions of this act. \* \* \* They shall investigate all complaints of violations of this act received by them, and shall institute prosecutions for violations of the provisions thereof."

Section 17 of this Act provides:

"All prosecutions for violations of this act shall be instituted by the Commissioner of Labor and Industry or his deputy, before a magistrate, alderman, or justice of the peace, \* \* \*."

This Section 17 has been declared constitutional by the Superior Court in *60 Pa. Super. Ct. 314*.

"A consul is an officer commissioned by a government to hold office and to reside at a particular place in a foreign country for the purpose of promoting and protecting its interests and those of its citizens or subjects."

*Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261; 26 U. S. L. Ed. 539.

Your question is not whether you have this right in the case of ordinary citizens, but whether you have this right in the case of violation by a foreign consul. The question resolves itself into whether the Courts of the State of Pennsylvania or of the United States have jurisdiction to determine cases affecting consuls of foreign countries or whether consuls have the same status as foreign ambassadors and other public ministers.

The general rule of the Law of Nations is that foreign ambassadors and other public ministers are exempt and immune from the jurisdic-

tion of the Courts in the country to which they have been sent as representatives.

*The Exchange vs. McFadden*, 7 Cranch 116; 3 U. S. L. Ed. 287.

*United States vs. Oretaga*, 6 U. S. L. Ed. 521.

The exception to this general rule are where certain crimes, such as murder, are committed by the ambassadors or other public ministers, this exception being based on the principle that the commission of these crimes revokes the privileges and immunities granted to them.

A consul or vice-consul, in the absence of special treaties, is not entitled to the same privileges and immunities as an ambassador or other public minister.

*DeLeon vs. Walters*, 163 Ala. 499.

*Wilcox vs. Luca*, 118 Cal. 639.

*In re Baiz*, 135 U. S. 403.

"The principle is well settled that a consul or vice-consul or similar commercial representative of a foreign power is not entitled by international law to the privileges and immunities of an ambassador or minister, but is subject to the laws and regulations of the country to which he is accredited. In civil and criminal cases, they are subject to the local law to the same extent as other foreign residents owing a temporary allegiance to the state. \* \* \*

#### 9 *Ruling Case Law*, p. 161.

The Constitution of the United States provides that "The judicial power of the United States shall extend \* \* \* to all cases affecting ambassadors or other public ministers and consuls"; to controversies between citizens of a State and foreign citizens or subjects; that "in all cases affecting ambassadors, other public ministers and consuls, \* \* \* the Supreme Court shall have original jurisdiction".

In the early Pennsylvania case of *Commonwealth vs. Kosloff*, 5 S. & R. 545, Judge Tilghman, of the Pennsylvania Supreme Court, held that "the United States Supreme Court shall have this original jurisdiction in all cases affecting the consul", and on that ground declared that the Pennsylvania Courts had no jurisdiction. In that case Kosloff, consul representing a foreign country, was indicted for rape and the indictment was quashed.

The Judiciary Act of 1789 gave to the United States Supreme Court exclusive jurisdiction, and it was not until the passage of a later statute (February 18, 1875), in which Section 711, Paragraph 8, of the United States Revised Statutes was repealed, that the State Courts had any jurisdiction in proceedings, civil or criminal, against the

consul or vice consul. This Section 711, Paragraph 8, had given Federal Courts jurisdiction in civil cases. The State Courts now have co-ordinate jurisdiction with the United States Courts in cases affecting a consul.

*Bors vs. Preston, 111 U. S. 252.*

*DeLeon vs. Walters, 163 Ala. 499.*

"\* \* \* But there is authority to the effect that this jurisdiction of the state courts is subject to the right of a defendant consul to have the judgment of the state court reviewed by the Supreme Court of the United States and the sufficiency of his defense determined by that tribunal."

*9 Ruling Case Law, p. 162.*

*Wilcox vs. Luca, 118 Cal. 639.*

I am of the opinion that a consul or vice-consul does not have the same status as an ambassador or other public minister, and is not entitled to the same privileges and immunities; that the Pennsylvania Courts have jurisdiction in the case of the violation of the Pennsylvania Act of Assembly by a consul, and, therefore, your Department has full legal authority to bring action against any consul violating the provisions of the Pennsylvania Act of 1913, P. L. 1024, relating to the hours of employment of and welfare of women.

Yours very truly,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*State Employees—Services—Benefits—Compensation—Administrative Code of 1923.*

As payments made to assist disabled persons in rehabilitating themselves are not payments for "services," a State employe who receives a fixed compensation and in addition thereto a payment to enable him to rehabilitate himself physically is not receiving special compensation for "extra services"; and Section 215 of the Administrative Code of 1923 does not, therefore, prevent State employes from enjoying the benefits of the Rehabilitation Acts of July 10, 1919, P. L. 1045, March 2, 1921, P. L. 12, and Section 1709 of the Administrative Code (Act of June 7, 1923, P. L. 498).

Department of Justice,

Harrisburg, Pa., October 22, 1925.

Honorable Richard H. Lansburgh, Secretary of Labor and Industry,  
Harrisburg, Pa.

Sir: We have your request to be advised whether a State employe is eligible to receive through your Department the benefits of the

several rehabilitation acts, namely, the Acts of July 18, 1919, P. L. 1045, March 2, 1921, P. L. 12 and Section 1709 of the Administrative Code (Act of June 7, 1923, P. L. 498).

You inquire specifically whether Section 215 of the Administrative Code renders State employes ineligible to receive rehabilitation benefits?

Section 215 of the Administrative Code provides that:

"No employe in any administrative department or independent administrative board or commission, employed at a fixed compensation, shall be paid for any extra services unless expressly authorized by the Executive Board prior to the rendering of such services."

The purpose of the several rehabilitation acts is the improvement, through the good offices of your Department in cooperation with the Department of Public Instruction, of certain physically handicapped persons. The Act of 1919 in Section 5 (a) provides that "any physically handicapped person who chooses to take advantage" of the rehabilitation facilities described in the act may register with the Bureau of Rehabilitation in the Department of Labor and Industry; and Section 4 of the same Act rendered it the duty of the chief of that Bureau to direct the rehabilitation of "any physically handicapped person: provided, That said duty of the Chief of the Bureau shall not be construed to apply to aged or helpless persons requiring permanent custodial care, or to blind or deaf persons under the care of any State or semi-State institution, or to any epileptic or feeble-minded person, or to any person who may not be susceptible to such rehabilitation".

The proviso just quoted contained the only limitation upon the scope of the rehabilitation service offered by the Act of 1919.

The Act of 1921 was enacted to enable this State to obtain the benefits of the Federal Rehabilitation Act of June 7, 1920. Its provisions are very similar to those of the Act of 1919. The cases in which the rehabilitation service may not be rendered are identical with those specified in the Act of 1919.

In the Administrative Code of 1923 there was no attempt to describe in detail the functions of your Department with regard to rehabilitation. They were merely outlined in a general way. It is sufficient to say that nothing in the Administrative Code narrowed the scope of the rehabilitation service authorized by the Acts of 1919 and 1921.

It is apparent that a disabled person's right to obtain from the Commonwealth rehabilitation assistance is not dependent on the question whether such person be employed or unemployed; nor is it material, if such person be employed, who the employer is; and nowhere in any of the acts is there the slightest intimation that the Legislature

intended to discriminate against State employes as far as this service is concerned.

Unless, therefore, Section 215 of the Administrative Code prohibits financial assistance to persons in need of physical rehabilitation, if such persons are employed by the State at a fixed compensation, clearly you may lawfully give to State employes the assistance contemplated by the various rehabilitation acts.

Section 215 of the Administrative Code forbids special payments, for any "extra services", to State Employes who receive a fixed compensation, unless such special compensation shall have been previously authorized by the Executive Board. The payments made to persons in need of rehabilitation are not payments for "services" rendered. Their purpose is not to compensate the persons receiving them, but to enable such persons by education or special training to equip themselves for more useful and remunerative employment.

As payments made to assist disabled persons in rehabilitating themselves are not payments for "services", a State employe who receives a fixed compensation and in addition thereto a payment to enable him to rehabilitate himself physically is not receiving special compensation for "extra services"; and Section 215 of the Administrative Code does not, therefore, prevent State employes from enjoying the benefits of the rehabilitation acts.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

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*Department of Labor and Industry—Jurisdiction of, with reference to Arthur Judson, et al., trading as Concert Management Arthur Judson, an alleged employment agency—Acts of June 7, 1915, P. L. 888, May 21, 1923, P. L. 298.*

Mischa-Leon entered into a contract with the Concert Management by the terms of which Leon constituted the Management sole agent to procure, and in his name, to enter into contracts for appearances in concerts, recitals, etc. Leon to receive a certain sum for concert engagements, the Management to receive a commission of twenty per cent (20%) on the gross amount payable to Leon for each concert, etc. The relationship between them is that of principal and agent and the Management therefore does not come within the jurisdiction of the Department of Labor and Industry by virtue of the provisions of the Act of 1923, supra.

Department of Justice,  
Harrisburg, Pa., November 19, 1925.

Honorable Richard H. Lansburgh, Secretary of Labor and Industry,  
Harrisburg, Pennsylvania.

Sir: In your letter of recent date, you request an opinion as to whether Arthur Judson, et al, trading as Concert Management

Arthur Judson, comes within the jurisdiction of your Department by virtue of the provisions of the Act of June 7, 1915, P. L. 888, as amended by the Act of May 21, 1923, P. L. 298, which defines and regulates employment agencies.

You submit a contract entered into by the said Concert Management and one Mischa-Leon, by the terms of which Leon constitutes the Management sole agent to procure, and in his name, to enter into contracts for appearances in concerts and recitals, alone or with other artists, and for performances for talking machine organizations, and so forth, Leon to receive \$750.00 for concert engagements, but to provide his own advertising, and the Management to receive a commission of twenty per cent. on the gross amount payable to Leon for each concert, and ten per cent. commission on the amounts received for each separate operatic appearance or commissions with talking machine companies. An accounting between the parties was to be had the first day of each month, and the contract to remain in force for a period of sixteen months. Leon, according to the terms of the contract, is required to appear and to fulfill all contract obligations entered into by the Management in his name. He agrees to remain in the United States, Mexico or Canada during the life of the contract.

Section 1 of the Act of 1923, P. L. 298, referred to above, provides as follows:

"The term employment agency as used in this Act shall mean every person \* \* \* engaged in the business of assisting employers to secure employes and persons to secure employment \* \* \* provided that no provisions of any section of this Act shall be construed as applying to Departments or Bureaus, which are maintained solely by and for persons, firms, corporations or associations of this Commonwealth for the purpose of obtaining employes for themselves, and which charge no fees to applicants for employment \* \* \*."

What is the relation existing between the organization for whose benefit Leon appears and Leon? Is it that of employer and employee, or is it that of employer and independent contractor? If the former, then the Management comes within the provisions of the Act referred to above, and is an employment agency; if the relationship is that of employer and independent contractor, then the Management does not come within the terms of the Act, and is not an employment agency.

"The vital test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Stated as a general proposition, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor."

*14 Ruling Case Law, page 67.*

"The control of the work reserved in the employer which makes the employe a mere servant is a control, not only of the result of the work, but also of the means and manner of the performance thereof; where the employee represents the will of the employer as to the means or manner of accomplishment, he is an independent contractor".

*14 Ruling Case Law, page 68.*

It is clear that the organization before whom Leon appears cannot control the means or manner of accomplishment of his performance, and the relation, therefore, existing between them is that of employer and independent contractor. If Leon is an independent contractor, he is not an employe in the general acceptance of the term, and, therefore, the Management in this case is not engaged in the business of assisting employers to secure employes. The relationship between the Management and Leon is that of principal and Agent, and while it is true that in this case the Management is engaged in assisting Leon to obtain contracts, the relationship between Leon and the parties with whom he contracts is not such employment as is contemplated by the Act.

I am, therefore, of the opinion that the Concert Management referred to in your letter does not come within the jurisdiction of your Department by virtue of the provisions of the Act of May 21, 1923, P. L. 298.

Yours very truly,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*Department of Labor—Public Service Commission—Jurisdiction—Inland Lakes—Federal Control—Acts of 1903, P. L. 201 and 1923, P. L. 251.*

The Department of Labor and Industry and not the Public Service Commission has the express duty of inspecting boilers on vessels navigating the inland lakes of Pennsylvania (except those subject to Federal inspection, if any such there be) either under the provisions of the Act of 1903, P. L. 201, or under the provisions of the Act of 1923, P. L. 251.

Department of Justice,  
Harrisburg, Pa., December 1, 1925.

Honorable R. H. Lansburgh, Secretary of Labor and Industry, Harrisburg, Penna.

Sir: Your communication of recent date addressed to the Attorney General, at hand. You asked whether responsibility for the inspection

of boilers on boats operating on inland lakes of Pennsylvania rests with the Department of Labor and Industry or with the Public Service Commission.

Section 1 of The Public Service Company Act of July 26, 1913, P. L. 1374, gives to The Public Service Commission "the power and authority to inquire into and regulate the \* \* \* safety, adequacy, and sufficiency of the facilities, plant, and equipment for the carrying on of their business by said public service corporations," (which include common carriers) but does not place upon the Commission the duty of making such inspection. The question remains, therefore, whether such duty is placed upon your Department.

The Act of 1903, P. L. 201, is the General Act regulating navigation upon inland lakes. Section 4 of this Act made it the duty of the Department of Factory Inspection to inspect boilers on every steam vessel engaged in carrying passengers for hire, or towing for hire, navigating the lakes within the jurisdiction of this Commonwealth, excepting vessels which are subject to inspection under the laws of the United States.

Section 23 of the Act of June 2, 1913, P. L. 396, provides:

"All of the powers and duties now by law vested in and imposed upon the Department of Factory Inspection, which is hereby abolished, are now hereby vested in the Department of Labor and Industry."

Therefore, the powers granted by the Act of 1903, P. L. 201, to the Department of Factory Inspection are now transferred to your Department. It is necessary, however, to inquire whether the Act of 1903, P. L. 201 is still in force. This Act of 1903, P. L. 201 provides specific methods of inspection and relates particularly to vessels. By the Act of 1905, P. L. 352, the Legislature provided that "all boilers used for generating steam \* \* \* in any establishment shall be inspected by a casualty company in which said boilers are insured or by any other competent person approved by the Chief Factory Inspector." This Act of 1905, P. L. 352, was amended by the Act of 1919, P. L. 924, and further amended by the Act of June 1, 1923, P. L. 751, and by the Act of April 23, 1925, P. L. 251, which provides, inter alia, as follows:

"Every boiler used for generating steam or heat in any establishment, as defined in section one of this act, shall be constructed, installed, and operated in accordance with the rules and regulations of the Department of Labor and Industry, and shall be inspected, as provided in this section, by a boiler inspector who holds a commission as a boiler inspector under the rules and regulations of said department. \* \* \* Nothing contained in this section shall apply to boilers subject to Federal in-

spection and control (including marine boilers, boilers of steam locomotives, and other self-propelled railroad apparatus)."

This Act of 1925, P. L. 251, unlike the Act of 1903, P. L. 201, which relates only to vessels, affects any establishment in the Commonwealth, which word establishment as defined in the Act of 1905, P. L. 352, means as follows:

"That the term 'establishment,' where used for the purpose of this act, shall mean any place within this Commonwealth other than where domestic, coal-mining or farm labor is employed; where men, women or children are engaged, and paid a salary or wages, by any person, firm or corporation, and where such men, women or children are employees, in the general acceptance of the term."

Three questions arise in the discussion of this subject:

1st—Does the Act of 1925, P. L. 251 clearly set forth the intent of the Legislature to repeal by implication the provisions relating to boiler inspection contained in the Act of 1903, P. L. 201?

2nd—If the Act of 1903, P. L. 201 is still in force is the definition of the term establishment as given in Section 1 of the Act of 1905, P. L. 352 (of which the Act of 1925, P. L. 251 is an amendment) broad enough to include vessels other than those whose inspection is provided for by the Act of 1903.

3rd—If both the Act of 1903 and 1925 are in force are there any vessels on inland lakes subject to inspection by the Federal Government?

In reference to the first question, certain general rules relating to the repeal of statutes by implication are applicable.

"It is a general 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."

*1 Sutherland Statutory Construction (2nd Ed.) Sec. 267.*

"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."

*1 Sutherland Statutory Construction (2nd Ed.) 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 v. Luzerne County*, 142 Pa. 113; *Commonwealth v. Lloyd*, 2 Pa. Super. Ct. 6, 17.

"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 be 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*, Sec. 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, Sec. 223.*

"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, Sec. 223.*

*1 Sutherland Statutory Construction, Sec. 274.*

*Commonwealth vs. Pottsville, 246 Pa. 468, 471.*

The Act of 1903 relates to a particular subject. The Legislature having in this Act dealt with a particular class of vessels, "it is not to be presumed that any later legislation should repeal this Act unless it is so declared in explicit language or unless the two Acts are irreconcilable or repugnant to each other." Such a condition does not exist in the reading of the Act of 1903 and the Act of 1925. The Act of 1903, *supra*, gives to your Department the right to inspect boilers on vessels on inland lakes carrying passengers for hire, or used for towing purposes, and under its terms you have very broad general powers relating to such inspection. The Act of 1923, *supra*, gives to your Department the right to inspect boilers generated by steam or heat in any establishment in the Commonwealth, and under this Act you have the right to make rules and regulations providing for the inspection of such boilers as may be located on vessels of other classes than those specified in the Act of 1903, P. L. 201, and its amendments, unless the vessel in question is subject to inspection under the laws of the United States Government. This is the proviso contained in both Acts.

The question might be raised as to whether the word "establishment" as defined in the Act includes vessels on inland lakes, but I am of the opinion that the definition as given by the Act classes such vessels within the term "establishment" as used in the Act, provided that on such vessels men, women or children are employed and paid in the general acceptance of the term employment.

In the case of *Commonwealth vs. Kebert, 212 Pa. 289, 291*, it is said:

"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."

Having established that both the Act of 1903, P. L. 201 and the Act of 1925, P. L. 251 are still in force, the remaining question is whether vessels on inland lakes are subject to inspection by the United States Government.

The Federal Act relating to boiler inspection provides as follows:

"All steam vessels navigating any waters of the United States which are common highways of commerce or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this title."

Revised Statutes, Sec. 4400, as amended by the Act of August 7, 1882, and amendments.

Revised Statutes, Sec. 4418, as amended by the Act of June 19, 1886, C. 421, Sec. 4, and the Act of March 3, 1905, C. 1456, Sec. 1, provide for the method of inspection by Federal Inspectors.

The question, therefore, now is whether inland lakes in the Commonwealth of Pennsylvania are navigable waters of the United States and common highways of commerce open to general or competitive navigation.

In *The Steamer Daniel Ball vs. United States*, 19 L. Ed. 999, one of the questions involved was whether the steamer was engaged in transporting merchandise and passengers on a navigable water of the United States within the meaning of the Acts of Congress. The Court held:

"\* \* Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

There is a further test laid down in *The Daniel Ball v. United States*, supra, which is, if the boat is engaged in transporting goods destined for other states or goods brought from without the limits of the State, and destined to a place within that State, she was engaged in interstate commerce and subject to the legislation of Congress.

In *United States v. Montello*, 20 L. Ed. 191, it was held:

"It can only be deemed a navigable water of the United States when it forms, by itself or by its connection with other waters, such a highway. (As de-

scribed in the case of *The Daniel Ball* quoted above). \* \* \* If, however, the river is not of itself a highway for commerce with other states or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the States, then it is not a navigable water of the United States, but only a navigable water of the state, and the acts of Congress, to which reference made in the libel, \* \* \* have no application. \* \* \*

Your question refers to all inland lakes of Pennsylvania. Each lake must, of necessity, be considered individually, but a conclusion can be reached by applying to the particular lake the test of the law laid down in the cases set forth above. If a steam vessel is engaged in navigation on any inland lake in Pennsylvania, which in its ordinary condition by itself or by uniting with other waters forms a continued highway over which commerce is or may be carried on with other states or foreign countries, in the customary modes in which commerce is conducted by water, or if the vessel is engaged in interstate commerce, then the boiler on the vessel navigating such water is subject to Federal inspection, and not to inspection by the State Department of Labor and Industry. I do not know of any such inland lake in Pennsylvania. But if by applying the test of the law laid down in the cases referred to above it is determined that the inland lake is a navigable water of the State, in contradistinction to navigable waters of the United States, then the Department of Labor and Industry has the authority and it becomes the duty of the Department to inspect the boilers on steam vessels navigating such inland lakes in the Commonwealth of Pennsylvania.

Therefore, I am of the opinion that upon the Department of Labor and Industry and not upon The Public Service Commission lies the express duty of inspecting boilers on vessels navigating the inland lakes of Pennsylvania (except those subject to Federal inspection, if any such there be) either under the provisions of the Act of 1903, P. L. 201, or under the provisions of the Act of 1925, P. L. 251.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

*Fire protection—Churches—Churches used for entertainment purposes—Acts of May 3, 1909, July 8, 1917, and May 11, 1921.*

1. Churches used primarily for the worship of God by their members and by those persons who, though not members, join in such worship are not public halls or places of public resort within the meaning of the Act of May 3, 1909, P. L. 417, as amended by the Act of May 11, 1921, P. L. 505.

2. Churches not leased or rented for entertainment, but used for the purpose of exhibiting moving pictures or for entertainments under the auspices of their own congregations, are not within the provisions of section 1 of the Act of May 3, 1909, P. L. 417, as amended by the Act of May 11, 1921, P. L. 505, nor of section 2 of the Act of May 3, 1909, P. L. 417, as amended by the Act of July 18, 1917, P. L. 1074.

Department of Justice,  
Harrisburg, Pa., December 18, 1925.

Hon. R. H. Lansburgh, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: In reply to your communication addressed to the Attorney General inquiring whether churches or places of worship in the following cases come under the provisions of the Act of 1909, P. L. 417, as finally amended by the Act of 1921, P. L. 505,—

- (a) When used exclusively for the purpose of worship,
- (b) When used as a place for the holding of entertainments or other public programs,
- (c) When used as a place for the exhibition of moving pictures.

The purpose of the Act as expressed in the title is to protect "persons from fire or panic in certain buildings, not in cities of the first and second class by providing proper exits, fire escapes, etc." \* \* \*

As stated in an opinion rendered to your Department on March 26, 1925, Section 1 of this Act specifies five classes of buildings to which the requirements of the Act shall apply:

- (1) Public buildings, office buildings, sanitariums, hospitals, school houses, hotels, etc.;
- (2) Every building in this Commonwealth (other than buildings situated in cities of the first and second classes) used, or hereafter to be used, in whole or in part as a theatre, moving picture theatre, public hall, lodge hall, or place of public resort;
- (3) Certain factories, workshops and mercantile establishments;
- (4) Certain boarding, lodging, tenement and apartment houses.

The Act then provides that all such buildings

"Shall be equipped either with an automatic sprinkler system or with an automatic fire-alarm system, \* \* \* and in all cases shall be provided with proper ways of egress or means of escape from fire, sufficient for the use of all persons accommodated, assembled, employed, lodged, or residing therein, and such ways of egress and means of escape shall be kept free from obstruc-

tion, in good repair, properly lighted and ready for use at all times." \* \* \*

The question is whether the words "public hall" or "place of public resort," (in Class 2), include a church used primarily for the worship of God by its members and by those persons who, though not members, join in such worship?

Again quoting the opinion referred to above, Webster's Dictionary states that in general "public" expresses something common to mankind at large, to a nation, state, city or town, and is opposed to "private" which denotes that which belongs to an individual, to a family, to a company or to a corporation.

"Public" may be properly applied to the affairs of a state, or of a county, or of a community. In its most comprehensive sense it is the opposite of "private." *Poor District vs. Poor District*, 135 Pa. 393. The essential features of a public charity are that it is not confined to privileged individuals, but is open to the indefinite public, and it is this indefinite or unrestricted quality that gives it its public character. *Appeal of Donohugh*, 86 Pa. 306, 318. A Masonic Home, admission to which is determined by whether or not the applicant for admission is a Mason, is a private charity; when the right to admission depends on the fact of voluntary association with some particular society, then a distinction is made which does not concern the public at large. *Philadelphia vs. Masonic Home*, 160 Pa. 572.

These definitions of the word "public" indicate the intent of the Legislature to use it with reference to the "general public" in the Act in question, for the rule is "that in the construction of statutes the terms and language thereof are to be taken and understood according to their usual and ordinary signification, as they are generally understood among mankind unless it should appear from the context and other parts of the statute to have been intended otherwise. *Commonwealth vs. Minnich*, 250 Pa. 363, 370."

Instead of indicating that the Legislature intended otherwise, the context of the statute supports the application of the above rule and indicates that the word "public" was intended to signify the "general public" as distinguished from those who have become associated in some form of membership with some religious organization as is the case of those, who by membership have joined a church for the purpose of worship.

Furthermore, the Act classifies the use to which the several buildings are put by giving such buildings their common descriptive term such as lodge room, theatre, etc., and does not include churches in this enumeration.

While it is true that the general public is welcome to attend the religious services conducted under the auspices of most religious organizations yet the place of building where such services are held

are not either public halls or places of public resort. They are erected primarily as places of worship for the members of the particular congregation; the voluntary admission of others who are not members is a means by which the doctrines of the particular religious organization are promulgated and its purpose promoted, but the voluntary admission of those not members does not mean that such a building should thereby be classed as one to be used by the general public.

I am therefore of the opinion that churches or places of worship, used exclusively for the purpose of the worship of God, do not come within the provisions of Section 1 of the Act of 1909, P. L. 417, as amended by the Act of 1921, P. L. 505.

In answer to your inquiries (b) and (c) as to whether such churches or places of worship come within the provisions of the Act when they are used for the exhibition of moving pictures or for the purpose of entertainment, I beg to advise as follows:

For the purpose of answering this question, a study of Section 2 of this Act of 1909, as amended by the Act of 1917, P. L. 1074, 1077, is necessary. A part of this section reads as follows:

"Section 2. In every theatre, moving-picture theatre, opera house, or other building, where stage scenery, moving-picture or other apparatus is used, or entertainments are given, there shall be provided one or more direct exterior doorways from the stage, and for dressing-rooms direct exterior doorways shall be provided, etc. \* \* \*.

"Neither on or about the stage, auditorium, or galleries, nor in any other part of the building in which the said theatre, moving-picture theatre, opera house, or public hall is located, shall any inflammable or explosive oil be used or stored." \* \* \*

A reading of this entire section in connection with the other sections of the Act leads to the conclusion that its provisions refer to such buildings as are used either in whole or in part for the purpose of giving exhibitions attended by the "general public" and does not refer to churches or places of worship used primarily for the religious teaching of its members.

I am therefore of the opinion that churches *not leased or rented* for entertainment, but used mostly as a place of worship do not come within the provisions of Section 1 of the Act of 1909, P. L. 417 as amended by the Act of 1921, P. L. 505, or of Section 2 of said Act as amended by the Act of 1917, P. L. 1074, referred to above, even though used for the purpose of exhibiting moving pictures or for entertainments, so long as such church buildings are not leased, owned or rented for the purpose of exhibiting moving pictures or for entertainments, and so long as said exhibitions and entertainments

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are conducted under the auspices of the particular congregation and the said building is used for the purpose of providing entertainment and religious instruction for its members and those of the general public who may join with them in such entertainments.

I realize that where there is a large assembly of people in a church building there is an ever present danger to life in case of fire or panic, and if you deem it essential to the safety of persons assembled in churches that such buildings should come under the provisions of the Act of 1909, P. L. 417, it might be well to have prepared for presentation to the next regular session of the Assembly an amendment to accomplish that purpose.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*Labor and Industry—National Guard part of United States Army while in Federal Service—National Guard—Member of—Workmen's Compensation Act of 1915, P. L. 736.*

The National Guard is a State organization and forms part of the United States Army only while in the service of the United States.

An employe of the Commonwealth who is a member of the National Guard injured while engaged in armory drills paid for from funds provided by the Federal Government is an employe of the Commonwealth and as such entitled to the benefits of the Workmen's Compensation Act.

Department of Justice,  
Harrisburg Pa., January 16, 1926.

Honorable Richard Lansburgh, Secretary of Labor and Industry,  
Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether or not Section 104, Act No. 338, June 2, 1915, P. L. 736, as amended, covers the case of Wendell Elkholtz, a member of the National Guard, injured while participating in an Armory drill for which he received pay from the U. S. Government but no compensation from the State of Pennsylvania.

It is necessary first to determine whether or not the National Guard is a State or Federal organization. If the National Guard of Pennsylvania is a part of the Federal army, and not an organization of the State Militia, it follows that a member of the National Guard is a federal employe and is not entitled to compensation from the state under the Workmen's Compensation Act. Prior to the National

Defense Act, enacted June 3, 1916, it is clear that the National Guard was a state organization then called the State Militia, organized primarily to suppress internal disturbances within the state. The Militia was organized and maintained under the authority guaranteed to the states under Article II of the Amendments to the Constitution, which provides:

“RIGHT OF PEOPLE TO BEAR ARMS.—A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

Congress passed the National Defense Act, approved June 3, 1916, and amended it by the following Acts: Acts approved August 29, 1916; Joint Resolution Approved September 8, 1916; Act Approved July 9, 1918; Act Approved February 28, 1919; Act Approved July 11, 1919; Act Approved September 29, 1919; Act Approved June 4, 1920; Act Approved June 5, 1920; Act Approved June 30, 1921; Act Approved March 1, 1922; Act Approved June 10, 1922; Act Approved June 30, 1922; Act Approved September 14, 1922; Acts Approved September 22, 1922; Act Approved February 24, 1923; Act Approved March 2, 1923; Act Approved March 4, 1923; Act Approved May 31, 1924; Act Approved June 3, 1924; Act Approved June 6, 1924; Act Approved June 7, 1924; and Act Approved February 28, 1925. This law contains provisions which, considered separately from the remaining provisions of the Act, indicate that Congress proceeded under its army power rather than the militia power. To ascertain the intention of Congress, the Act must be construed as a whole, bearing in mind its general spirit together with the objects and purposes which Congress desired to effect. It cannot be denied, that the Act wrought a material change with respect to the National Guard, in that it effected a unification of this organization with the Federal Army and strengthened it from the standpoint of efficiency. It did not, however, destroy or weaken its character as a distinctive state organization. In times of peace, the state retains precisely the same control over the National Guard as it did over the Militia. If Congress had intended to destroy the Militia which has existed as a distinct organization since the origin of our Government, it would have done so in express language and not by mere inference. The Supreme Court of Wisconsin, in passing on this question said:

“\* \* \* Nowhere in the act can be found a provision which in times of peace alters the control which the state has over the Guard. Had such an important and vital change been contemplated by Congress, affecting an institution having its origin at the very time of the inception of the government, and which had continued

for more than a century, it would not have left the matter subject to mere inference; on the contrary, it would by its legislation have in express terms wiped out the very existence of the National Guard as a state institution, and expressly made it a part of the federal army. The loyalty that we owe to the government and the respect which is due to Congress, a representative body of our people, forbid the unwarranted and violent assumption that under the National Defense Act any such radical change had been contemplated, based upon mere inference. Throughout this voluminous enactment, consisting of 128 sections, the retention of the Guard as a part of the militia is clearly made manifest."

Section 1 of the Act provides: "That the Army of the United States shall consist of the Regular Army, *the National Guard while in the service of the United States*, and the organized Reserves, including the Officers' Reserve Corps and the Enlisted Reserve Corps." Obviously, therefore, the National Guard is a part of the United States Army only while in the service of the United States, being in such service when called upon "to execute the Laws of the Union, suppress Insurrections and repel Invasions", as provided in Article I, Section 8, Subsection 15, of the Constitution of the United States, and while not in such service it is a state organization.

The Supreme Court of Nebraska in passing upon this question in the case of *Nebraska National Guard v. Morgan*, 199 N. W. 557 (July 7, 1924), said:

"While the Nebraska National Guard is subject to the call of the federal government and thereupon becomes a part of the national army, until so called it is essentially a state institution, subject to the call of the Governor as commander in chief for military service within the state in time of war, invasions, riots, rebellion, insurrection or reasonable apprehension thereof (Comp. St. 1922 Sect. 3322), and is a state governmental agency."

Likewise, the Appellate Division of the Supreme Court of New York in deciding that the state courts of New York had jurisdiction of a proceeding to secure the discharge of a member of the National Guard of that state, in *Bianco v. Austin*, 197 N. Y. S. 328 (Dec. 28, 1922), said:

"But in these contentions appellant loses sight of the fact that the National Guard is only a potential part of the United States Army, and does not in fact become a part thereof until Congress has made the requisite declaration of the existence of an emergency. The oath of allegiance on enlistment is both to the United States and to the state, and the promise to obey the orders of the President of the United States and of the Governor

of the state of New York (as well as of the soldier's officers) is because the Governor is commander in chief of the National Guard until Congress declares an emergency to exist and the Guard becomes an actual part of the National Army, when the President becomes commander in chief."

As a further indication that Congress had in mind its constitutional limitations on the subject, the only penalty that the act prescribed for the failure of the National Guard to comply with the orders, regulations and rules laid down by the President and Secretary of War in times of peace, is a forfeiture of the financial aid appropriated as an inducement for the National Guard to comply with federal regulations. Section 116 of the Act provides:

"Non-compliance with Federal Act.—Whenever any State shall, within a limit to be fixed by the President, have failed or refused to comply with or enforce any requirement of this Act, or any regulation promulgated thereunder and in aid thereof by the President or the Secretary of War, the National Guard of such State shall be debarred, wholly or in part, as the President may direct, from receiving from the United States any pecuniary or other aid, benefit, or privilege authorized or provided by this Act or any other law."

This is clear indication that Congress intended the Act to be optional and not compulsory and a failure to comply with the regulations of the President and the War Department would not eliminate the National Guard, but merely cause a withdrawal of federal aid.

The National Defense Act provides for the organizing, arming and disciplining, which powers are expressly conferred upon Congress by the Constitution. Article I, Section 8, Subsection 16, provides that Congress shall have power, "to provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." Congress has enacted the provisions referred to for the purpose of facilitating the unification of the National Guard with the other units of the National Army in time of emergency.

In times of peace, that is, when the National Guard is not in the service of the United States, the Governor has authority and is authorized and directed by Section 5 of the Act of May 17, 1921, P. L. 869, as amended by the Acts of May 16, 1923, P. L. 227, and March 5, 1925, P. L. 14, "to alter, increase, divide, annex, consolidate, disband, organize, or reorganize any organization, department, corps, or staff, so as to conform, as far as practicable, to any or-

ganization, system, drill, instruction, corps or staff, uniform or equipment, or period of enlistment, now or hereafter prescribed by the laws of the United States and the rules and regulations promulgated thereunder for the organization and regulation of the National Guard." Section 44 of the above Act confers additional powers upon the Governor in case of an emergency by providing: "When an invasion of or insurrection in the State occurs or is threatened or a tumult, riot, or mob shall exist, or there is imminent danger thereof, the Governor may, in his discretion, place the Pennsylvania National Guard, or any part thereof, on active duty." These provisions along with others might be commented upon to show that the National Guard is primarily and essentially a state organization. The Legislature of Pennsylvania enacted these provisions to promote the efficiency of this organization, when in state service, as well as when it may be called into national service, Congress having declared an emergency to exist.

Having determined that the National Guard is a state organization, it is necessary to decide whether a person injured in an Armory drill comes under that provision of Section 104 of Article I of Act No. 338, P. L. 1915, p. 736, which provides that, "persons whose employment is casual in character and not in the regular course of the business of the employer" are excluded from the Workmen's Compensation Act. "There are two necessary elements to constitute the exceptions: (1) The employment must be casual in character, and (2) it must be outside of the regular course of the business of employer \* \* \*". *Callihan v. Montgomery*, 272 Pa. 56.

It would not seem necessary to advance an argument to support the proposition that the National Guard has no trade, business or profession within the meaning of these terms as used in the statute, as they have reference to industrial concerns. However, it is not illogical to hold that an Armory drill is a part of the business or occupation of the National Guard. It is undoubtedly the highest duty of the Commonwealth to provide adequate protection for its subjects and insofar as an Armory drill contributes to that end it is in the business of the Commonwealth. The drills are arranged as part of a regular schedule of training of the Guardsmen. I am, therefore, of the opinion that an Armory drill is not an employment of such a character as to exclude an employe from the provisions of the Workmen's Compensation Act.

The next question to be determined is whether the fact that National Guardsmen engaged in Armory drills are paid from funds provided for that purpose by the Federal Government and not out of funds appropriated by the General Assembly of this Commonwealth, should exclude the Guardsmen from the benefits of the Workmen's Compensation Act. Section 104 of the Act provides

that, "the term 'employee' as used in this Act is declared to be synonymous with servant, and includes all natural persons who perform services for another for valuable consideration, \* \* \*". Every person enlisting in the National Guard signs the following enlistment contract:

"Every man enlisting in the Pennsylvania National Guard shall sign an enlistment contract, and take and subscribe to the following oath of enlistment: 'I....., born in....., in the State of....., aged..... years and.....months, and by occupation a....., do hereby acknowledge to have voluntarily enlisted, this..... day of....., 19.., as a soldier in the National Guard of the United States and of the State of Pennsylvania for a period of.... years, under the conditions prescribed by law, unless sooner discharged by proper authority; and I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of Pennsylvania, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and the Governor of the State of Pennsylvania and the officers appointed over me according to law and the rules and Articles of War.'"

*Section 25 of the Act of May 17, 1921, P. L. 869.*

Under this contract the promisor, the Guardsman, obligates himself to attend Armory drill as provided by Section 92 of the National Defense Act, which reads as follows:

"TRAINING OF THE NATIONAL GUARD.—Each company, troop, battery and detachment in the National Guard shall assemble for drill and instruction including indoor target practice, not less than forty-eight times each year and shall, in addition thereto, participate in encampments, maneuvers, or other exercises, including outdoor target practice, at least fifteen days in training each year, including target practice, unless such company, troop, battery, or detachment shall have been excused from participation in any part thereof by the Secretary of War: Provided, That credit for an assembly drill or for indoor target practice shall not be given unless the number of officers and enlisted men present for duty at such assembly shall equal or exceed a minimum to be prescribed by the President, nor unless the period of actual military duty and instruction participated in by each officer and enlisted man at each such assembly at which he shall be credited as having been present shall be of at least one and one-half hours' duration and the character of training such as may be prescribed by the Secretary of War."

This provision of Act of Congress and the rules and regulations promulgated thereunder have been adopted by the Commonwealth of Pennsylvania by the Act of May 17, 1921, P. L. 869, as amended by the Acts of May 16, 1923, P. L. 227, and March 5, 1925, P. L. 14. If the employee, the Guardsman, should fail to obey the orders of his superior officers by wilfully absenting himself from the drill he is subject to court-martial under the Articles of War, Article '61, Chapter I, Act of June 4, 1920, 41 U. S. Stat. 787. (Manual for Courts-Martial, 1921), which provides as follows:

"Absence without leave.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct."

National Guard Regulation (N. G. R.) No. 37 as issued by the Militia Bureau of the U. S. War Department on July 16, 1924, provides for COURT-MARTIAL IN THE NATIONAL GUARD WHEN NOT IN THE SERVICE OF THE UNITED STATES. Section 11 of N. G. R. 37, provides as follows:

"When trial should be had for absence without leave.—It should be borne in mind that absence from drill, camp, or other ordered duty, of itself debars the absentee from Federal pay for the period, without the sentence of a court-martial. This is not a punishment, but merely the withholding of money that has not been earned, which necessarily takes place whether the absence is with or without fault on the part of the soldier. If the absence is willful and unjustifiable the offender should be punished for the sake of the deterrent effect upon himself and others."

In order to secure a uniformity in punishment for particular offenses, Section 24, N. G. R. 37, provides a table of suggested maximum limits. For a failure to attend armory drill or instruction, or indoor target practice, a fine of four dollars for noncommissioned officers and three dollars for any other enlisted man.

Section 57 of the Act of March 5, 1925, P. L. 14, provides as follows:

"All courts-martial (including summary courts) of the Pennsylvania National Guard when not in the active service of the United States, shall have power to sentence to confinement in (lieu of) case of failure to pay the fines and costs, or any part thereof, authorized to be imposed: Provided, That such sentence of confinement shall not exceed one day of each dollar of fine

authorized and imposed: Provided further, That the sentence shall not become operative until after the approval thereof by the appointing power."

Therefore, it is clear that a National Guardsman is bound by his contract of enlistment to be present at armory drills such as Private Ekholm attended, and if he should fail to attend would be subject to a fine, and on failure to pay the fine, undergo imprisonment.

As a member of the National Guard is subject to the orders of his commanding officer or officers who are appointed by the Governor of Pennsylvania, it would seem that the fund from which he is paid for his services would not bar him from the benefits of the Workmen's Compensation Act. The Commonwealth of Pennsylvania, the employer in this case, retains the control over the Guardsman having authority to tell him when to report, the way in which he is to perform his duties, the instrumentalities that he is to use and when he is to cease work. The employer in this case has all the essential elements of control over the employee that constitute the authority of an employer or master growing out of the relationship of master and servant. This question does not appear to have been decided by the Courts of this State, yet under analogous statutes in other states their Courts have passed upon the question. California, in the case of Claremont Country Club vs. The Industrial Accident Commission, 174 Cal. 395; 163 Pacific 209, L. R. A. 1918; F. 177, decided that a Golf Club which, for the convenience of its members, provided caddies who are hired and supervised by its own employee, the club's caddy master, is the employer of a caddy injured while in the performance of his duties, within the operation of the Workmen's Compensation Act, although the club member who utilizes the services of the caddy directs his activities while so doing and furnishes the compensation therefor. Ohio in the case of Skinner vs. Stratton Fire Clay Company, Vol. 1 No. 7 Bul. Ohio Industrial Commission, p. 103 (for Ohio Workmen's Compensation Law see Volume 2, p. 1446, Bradbury's Compensation Law) decided that workmen engaged in mining coal are employees of the mine owner, although the mining operations are carried on under a contract with a third party who selects and pays the workmen, where the mine owner has official control and supervision over the working of the mine. New York, in Muller vs. New York (1919) 189 Appellate Division 363, 178 New York Sup. 416, decided that a laborer appointed, under a provision of the State Military Law, by a commanding officer of an organization of the State National Guard, and injured while engaged in his regular employment upon a farm owned by that organization, was in the military service of the State and not in the civil service of the City of New York, so as to render the city liable for his injury under the Workmen's Com-

pensation Act, although under the provision of the statute his compensation was paid by the city. It would seem, therefore, that the test of who is the employer is not determined by the fact that the employee's compensation is paid from a fund created by some one other than the employer, but whether or not the employer actually retains control over the employee in directing the manner and method in which the employee is to perform his services. The Commonwealth in this case, through its officer, did direct a time and place of employment, the duration of it, the manner of its performance, and in short, retained all those incidents of control that are customarily vested in an employer. The mere fact that the fund, from which the employee was paid, was created by an Act of Congress should not bar him from coming under the provisions of the Workmen's Compensation Law.

The accident report attached to your communication states that Wendell Ekholm, a member of the National Guard, was injured "on horse detail, returning to stables." If at the time he met with the accident, that is, "on horse detail, returning to stables," he was participating in an assembly for drill and instruction under the command of his superior officer, he would be entitled to compensation. However, if service rendered "on horse detail, returning to stables," is not a part of the assembly for drill and instruction, and he was not bound by orders to engage in this service, he would not be participating in any service of the employer for which he would be entitled to compensation.

I am of the opinion, and, therefore, advise you subject to this reservation above stated, that Wendell Ekholm, member of Troop "C" 103rd Cavalry, National Guard, is an employee of the Commonwealth, and that Section 104, Act 388, June 2, 1915, P. L. 736, as amended includes this case.

Very truly yours,

DEPARTMENT OF JUSTICE,

PENROSE HERTZLER,

*Special Deputy Attorney General.*

*Workmen's Compensation—State Insurance Fund—Surplus and Reserve Accounts—Subscribers—Distribution—Pro Rated—Act of June 2, 1915, P. L. 762.*

The income derived from the deposit and investment of money in the State Workmen's Insurance Fund, as provided for in the Act of June 2, 1915, P. L. 762, including such income from money in the surplus and reserve accounts, is to be included in determining the balance, remaining in such fund at the end of each year, for distribution among the subscribers to the State Insurance Fund. Subscribers whose policies have been cancelled for any reason prior to the end of the current year are entitled to participate in such distribution in proportion to the amounts paid into the fund.

Department of Justice,  
Harrisburg, Pa., March 8, 1926.

Honorable R. H. Lansburgh, Secretary of Labor and Industry,  
Harrisburg, Penna.

Sir: We are in receipt of your request for an opinion upon the two following questions: (1) Is income derived from the deposit and investment of money in the State Workmen's Insurance Fund, including such income from money in the surplus and reserve accounts, to be included in determining the balance, remaining in such Fund at the end of each year, for distribution among the subscribers thereto: (2) Are those subscribers to the Fund whose policies have been canceled for any reason prior to the end of the current year entitled to participate in such distribution?

The Act of June 2, 1915, P. L. 762, hereinafter referred to as the "Insurance Act", established the State Workmen's Insurance Fund, hereinafter called the "Fund", of which the State Treasurer is made custodian, for the purpose of insuring employes against liability under Article III of the Workmen's Compensation Act of 1915 and of assuring payment of the compensation therein provided.

This Fund is made up of premiums paid by those who become subscribers thereto for the purpose of insuring their liability under the Workmen's Compensation Act. Such premiums are to be ascertained under the provisions of Sections 5, 6 and 10 of the Insurance Act.

Section 8 of the Insurance Act, as amended by Act of 1917, P. L. 1139, provides for payment of the expenses of administration of the Act out of the Fund. Sections 20 and 23 provide for disbursements due employes of the subscribers to the Fund as determined under the provisions of the Workmen's Compensation Act. The Act of 1923, P. L. 698, provides for the payment out of the Fund of the costs of audits thereof made by the Auditor General.

Section 9 of the Act is as follows:

"The Board shall set aside five per cent of all premiums collected, for the creation of a surplus, until such surplus shall amount to one hundred thousand

dollars; and thereafter they may set apart such percentage, not exceeding five per centum, as in their discretion they may determine to be necessary to maintain such surplus sufficiently large to cover the catastrophe hazard of all the subscribers to the Fund, and to guarantee the solvency of the Fund."

Section 4 of the Act authorizes the State Treasurer, as custodian of the Fund, to deposit any portion thereof, not needed for immediate use, as other State funds are lawfully deposited and to place the interest received thereon to the credit of the Fund.

Section 12 authorizes the Board created by the Act to "invest any of the surplus or reserve belonging to the Fund" in certain securities and investments. The State Treasurer is directed to "collect the principal and interest thereof when due, and pay the same into the Fund", and to pay all vouchers drawn on the Fund for the making of such investments, when signed by two members of the Board and when accompanied by such securities and by a resolution of the Board authorizing the investment.

Section 11, as amended by Act of 1917, P. L. 1139, is as follows:

"\* \* \* The Board shall keep an accurate account of the money paid in premiums by the subscribers, and the disbursements on account of injuries to the employes thereof, and on account of administering the Fund; and if, at the expiration of any year, there shall be a balance remaining, after deducting such disbursements, the unearned premiums on undetermined risks, and the percentage of premiums paid or payable to create or maintain the surplus provided in section nine of this act, and after setting aside an adequate reserve, so much of the balance as the Board may determine to be safely distributable shall be distributed among the subscribers, in proportion to the premiums paid by them; and the proportionate share of such subscribers as shall remain subscribers to the Fund shall be credited to the instalment of premiums next due by them, and the proportionate share of such subscribers as shall have ceased to be subscribers in the Fund shall be refunded to them, out of the Fund, in the manner hereinafter provided."

We understand that the State Workmen's Insurance Board, under the provisions of Section 9, has determined upon a surplus of \$500,000 for the purpose of covering catastrophe hazards and a surplus or reserve of \$1,000,000 to guarantee the solvency of the Fund, and that each of these surplus accounts now contains the amount so authorized. We also understand that the income from the investment of the money in these two accounts amounts to something over \$300,000 per year, and that if such income is added to the respective accounts the principal thereof will soon be very much

greater than is necessary or justifiable for the purposes for which they are authorized.

The character of the Fund is described in an opinion of this Department rendered to the State Treasurer under date of December 9, 1915, as reported in Vol. 45, Pa. C. C. Rep., p. 79, as follows (p. 83):

"This fund is not a payment made to the State in satisfaction of any debt or obligation due to the State; it is a fund created through the machinery provided by the State for the purpose of enabling the State to further the efficient administration of workmen's compensation. No part of the fund belongs to the State."

To the same effect is an opinion rendered to the State Workmen's Insurance Fund, January 22, 1918, as reported in 27 Pa. Dist. Rep. 807, 810, wherein it is said that the Fund is not a department of the State, but is an operation of the State Government.

(1) It is to be noted that under the provisions of Section 4, with reference to interest received from the deposit of portions of the Fund, and under the provisions of Section 12, with reference to the receipt of income from the investment of the Fund, such income and interest is to be paid into the Fund. It is also to be noted that in Section 12 the investment authorized is of any surplus or reserve belonging to the Fund, and that such investments shall be made by the Board by drawing vouchers on the Fund.

It thus appears that all premiums paid by the subscribers, including the money in the surplus and reserve accounts, are included in the Fund, and that all income derived from investments or deposits of the money paid by the subscribers shall be returned to the Fund.

It is the Fund, as thus constituted, out of which the balance for distribution is to be determined under the provisions of Section 11 of the Act. The surplus and reserve accounts are to be fixed by the Board at a definite amount, to be retained at the total thus authorized until the Board in its discretion increases or decreases such total, not to be increased by adding thereto the income received from time to time upon the investment of such money.

Your first inquiry, therefore, is answered in the affirmative.

(2) The Fund, not being a State fund, belongs to the subscribers, subject to the demands thereon which are specified in the Insurance Act. All subscribers who have paid premiums into the Fund have an equitable interest in the balance for distribution, whether they have continued as subscribers throughout the year or have ceased to be subscribers during the year. This conclusion is placed beyond doubt by the last clause of Section 11 as above quoted, to wit, "the proportionate share (in the amount for distribution) of such subscribers in the Fund shall be refunded to them, \* \* \*."

The extent of each individual subscriber's interest therein is determined by the ratio which the total premiums paid by such subscriber during the distributive year bears to the total premiums paid by all subscribers during such year.

Your second inquiry is also answered in the affirmative, the subscribers described in your question being entitled to a pro rata share of the amount for distribution based upon the ratio of the premiums paid by them during the distributive year to the total premiums paid during such year.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

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*Public Schools—Workmen's Compensation—County Superintendents and Assistant County Superintendents—Compensation for Injuries Received in the Course of their Employment—State Appropriations—Jurisdiction.*

As to whether or not county superintendents and assistant county superintendents of public schools come under the provisions of the Workmen's Compensation Act is a question for the Workmen's Compensation Board and the court to decide. They being public or county officers, and not employes of any of the various departments of the Government of the Commonwealth, would not be entitled to payment out of the appropriation made to the Department of Labor and Industry by the Legislature for the payment of medical, surgical and hospital expenses as well as compensation to injured state employes, even though they come under the provisions of the Workmen's Compensation Act.

Department of Justice,

Harrisburg, Pa., March 9, 1926.

Honorable Richard H. Lansburgh, Secretary of Labor and Industry,  
Harrisburg, Pennsylvania.

Sir: Your letter in reference to county superintendents and assistant county superintendents of public schools has been received. In order to understand the information which you desire I quote from your letter:

"The county superintendents are elected and their salaries are fixed by the school directors in the various counties throught the State. Do these county superintendents and assistants come under the provisions of the Workmen's Compensation Law, and if so is the State, or County liable for the payment of compensation, as well as medical, surgical and hospital expenses, medicines and supplies in case of accidents sustained while these officials are in the course of their employment. If the State is liable, are payments to be made

out of the appropriation made to the Department of Labor and Industry by the Legislature for the payment of medical, surgical and hospital expenses, as well as compensation to injured State employes."

As to whether or not county superintendents and assistant county superintendents of public schools come under the provisions of the Workmen's Compensation Act is a question for the Workmen's Compensation Board and the Courts to decide. An opinion on the question from this Department would not be binding on anyone and might prove embarrassing in the future. If an opinion were given and the Workmen's Compensation Board disagreed with it, the opinion would not bind the Board and we would have one Department of the State Government overruled by another Department of the same Government. As only the Workmen's Compensation Board and Courts can finally decide this question we deem it advisable not to give any opinion on it.

If the State is liable, are payments to be made out of the appropriation made to the Department of Labor and Industry by the Legislature for the payment of medical, surgical and hospital expenses as well as compensation to injured State employes?

In an opinion dated January 6, 1906; in Attorney General's Opinions 1905-6, p. 202, Attorney General Carson speaking of the office of county superintendent of schools held:

"You ask whether section 3 of Article XIV of the Constitution of Pennsylvania applies to the office of county superintendent \* \* \*.

"The Constitution expressly says in the section and article above referred to that 'No person shall be appointed to any office within any county who shall not have been a citizen and an inhabitant therein one year next before his appointment.' There can be no doubt of the fact that the office of county superintendent is a county office. The act of 8th of May, 1854, in the 37th section (P. L. 628), provides that there shall be chosen, in the manner thereafter directed, an officer for each county, to be called the county superintendent; and it is further provided that it shall be his duty to visit, as often as practicable, the several schools of his county and to note the course and method of instruction and branches taught, and to give such directions in the art of teaching and the method thereof in each school as to him, together with the directors or comptrollers, shall be deemed expedient and necessary.

"It is clear from this definition of the duties imposed upon such county superintendent that his functions are to be performed within the county for which he is chosen, and no thought of extra-territorial duty can be inferred."

The School Code practically reenacts the provisions of the Act of 1854. It provides in Section 1105, that the school directors of each county of this Commonwealth in which a county superintendent is to be elected shall meet in convention at a time and place fixed by the Act, and, by a majority vote of those present, elect, as provided, one duly qualified person as county superintendent, and it is further provided in Section 1123, that it shall be the duty of the county superintendent to visit as often as practicable the several schools in his county under his supervision, to note the course and methods of instruction and branches taught, and to give such directions in the art and methods of teaching in each school as he deems expedient and necessary.

Bouvier's Dictionary defines a "public officer" as "one who is lawfully invested with an office." And again in *State ex rel, Mosconi vs. Maroney*, 90 S. W. 141, the following definition is given: "A public officer is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law."

In our own State the Supreme Court in *Richie vs. Philadelphia*, 225 Pa. 511, says:

"\* \* \* In every case in which the question arises whether the holder of an office is to be regarded as a public officer within the meaning of the constitution, that question must be determined by a consideration of the nature of the service to be performed by the incumbent and of the duties imposed upon him, and whenever it appears that those duties are of a grave and important character, involving in the proper performance of them some of the functions of government, the officer charged with them is clearly to be regarded as a public one. \* \* \* Where, however, the officer exercises important public duties and has delegated to him some of the functions of government and his office is for a fixed term and the powers, duties and emoluments become vested in a successor when the office becomes vacant, such an official may properly be called a public officer."

In an opinion written by Deputy Attorney General Collins, and reported in Attorney General's Opinions 1917-18, p. 541, this Department held that a county superintendent and assistant county superintendent of public schools are public officers.

Tested by the foregoing it is plain to be seen that a county superintendent and an assistant county superintendent of public schools are public officers. They fulfill every criterion of what has been held or defined to constitute a public officer. They are elected or ap-

pointed to office in a manner prescribed by law for a definite term and are clothed with and exercise functions of government delegated to them by law for the public benefit. The powers and duties attached to these offices are of a grave and important character.

In the General Appropriation Act of 1925, the appropriation made to the Department of Labor and Industry for the payment of medical, surgical and hospital expenses, as well as compensation to injured State employes is in the following language:

“For the payment of the statutory amounts of Workmen’s Compensation and of medical, hospital, surgical and burial expenses which may become due and payable during the period beginning June first, one thousand nine hundred and twenty-five, and ending May thirty-first, one thousand nine hundred and twenty-seven, to injured employes and dependents of deceased employes of the various departments of the government of this Commonwealth upon claims arising under the provisions of the Workmen’s Compensation Act of one thousand nine hundred and fifteen, its amendments and supplements.”

County superintendents and assistant county superintendents of public schools being public or county officers, and not employes of any of the various Departments of the Government of this Commonwealth, would not be entitled to payment out of the appropriation above mentioned, even though they come under the provisions of the Workmen’s Compensation Act.

Yours very truly,

DEPARTMENT OF JUSTICE,

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

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*Workmen’s compensation law—Exemptions from carrying insurance—Exemptions to be allowed by Department of Labor and Industry—Acts of June 2, 1915, P. L. 736, June 2, 1915, P. L. 758, July 21, 1919, P. L. 1077, and June 7, 1923, P. L. 498.*

The Department of Labor and Industry and not the Workmen’s Compensation Board is the agency which is charged by law with the responsibility of acting upon applications for exemptions from the duty of carrying workmen’s compensation insurance.

Department of Justice,  
Harrisburg, Pa., March 17, 1926.

Dr. Richard M. Lansburgh, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether exemptions from the duty of employers to carry Workmen’s Compensation Insurance

should be considered and granted or refused by the Department or by the Workmen's Compensation Board.

We understand that at the present time exemptions are granted or refused over the signature of the Workmen's Compensation Board. You desire to know whether this is the correct practice under the law as it now stands.

The duty of employers to carry workmen's compensation insurance is prescribed by Section 303 of the Act of June 2, 1915, P. L. 736, which provides that:

"Every employer liable under this Act to pay compensation shall insure \* \* \* in the State Workmen's Insurance Fund or in any insurance company authorized to insure such liability in this Commonwealth unless such employer shall be exempted by the Bureau from such insurance. An employer desiring to be exempt from insuring \* \* \* shall make application to the Bureau, showing his financial ability to pay such compensation, whereupon the Bureau, if satisfied of the applicant's financial ability, shall by written order make such exemption. The Bureau may, from time to time, require further statements of the financial ability of such employer, and, if at any time such employer appears no longer able to pay compensation, shall revoke its order granting exemption; \* \* \*"

Section 107 of the same Act defined "Bureau" as meaning the Bureau of Workmen's Compensation of the Department of Labor and Industry.

Both the Workmen's Compensation Board and the Bureau of Workmen's Compensation of the Department of Labor and Industry were originally created by the Act of June 2, 1915, P. L. 758. Section 2 of that Act created the Bureau and Section 3 created the Board "to supervise and direct the Bureau."

Section 13 of the same Act rendered it the duty of the Workmen's Compensation Board "to make all proper and necessary rules and regulations for the conduct of the Bureau."

In addition to creation of the Workmen's Compensation Board and the Bureau of Workmen's Compensation the Act of June 2, 1915, P. L. 758 provided for the appointment of a number of Workmen's Compensation Referees.

The Acts of June 2, 1915, P. L. 736 and P. L. 758 assigned certain duties to each, the Bureau of Workmen's Compensation, the Workmen's Compensation Board and the several Workmen's Compensation Referees. Clearly one of the duties assigned to the Bureau as distinguished from the Board was the consideration of applications for exemption from the duty of carrying workmen's compensation insurance. True the Board had the right to make rules and

regulations for the conduct of the Bureau in the exercise of this function, but it did not have the right under the two Acts cited to displace the Bureau entirely in the exercise of this function.

The Act of June 2, 1915, P. L. 768 was repealed by the Act of July 21, 1919, P. L. 1077. The latter Act like that which it superseded provided the governmental machinery for the administration of the Workmen's Compensation laws. Like the Act of 1915 it created both a Bureau of Workmen's Compensation and a Workmen's Compensation Board. It did not, however, create the Board with power "to supervise and direct the Bureau" as did the Act of 1915, nor did it give to the Board the unqualified right to make all proper and necessary rules and regulations for the conduct of the Bureau. On the contrary the power of the Board to make rules applicable to the Bureau was limited to the making of "all power and necessary rules and regulations for the legal and judicial procedure of the Bureau."

There was no further change in the law applicable to the subject-matter of your inquiry until the Administrative Code was enacted in 1923. That Act (Act of June 7, 1923, P. L. 498) in Section 2 abolished the Bureau of Workmen's Compensation and by Section 1701 conferred upon your Department the duty of continuing to exercise the powers and perform the duties by law vested in and imposed upon your Department, the several bureaus and divisions thereof and the Industrial Board, together with such additional powers and duties as the Code vested in and imposed upon your Department.

With respect to the powers and duties of the Workmen's Compensation Board, which was not abolished, section 1712 provided that "subject to any inconsistent provisions in this Act contained, the Workmen's Compensation Board shall continue to exercise the powers and perform the duties by law vested in and imposed upon the said Board."

Nowhere in the Code did the Legislature make any specific reference to the matter of granting exemptions from the duty of carrying workmen's compensation insurance.

The review of legislation which we have given leads inevitably to the following conclusions:

1. Under the Acts of 1915 the Bureau of Workmen's Compensation was the body charged by law with the duty of acting upon applications for exemption from the duty of carrying workmen's compensation insurance; but the Workmen's Compensation Board could through rules and regulations adopted by it in some measure at least control the action of the Bureau;

2. Under the Act of 1919 the ability of the Workmen's Compensation Board to control the action of the Bureau in dealing with

the matter of exemptions was limited to the Board's right to make rules and regulations governing the legal and judicial procedure of the Bureau. Whether the consideration of applications for exemption could possibly be regarded as either legal or judicial procedure is a question which for the purposes of this opinion is purely academic;

3. The Administrative Code of 1923 transferred to your Department all the powers formerly vested in the Bureau of Workmen's Compensation with regard to exemptions, without specifically giving to the Workmen's Compensation Board the right to make rules governing the conduct of your Department in any respect. In our opinion the Board's right to make rules and regulations governing the legal and judicial procedure of the abolished Bureau of Workmen's Compensation came to an end when the Bureau was abolished and the Board does not now have the right to make any rules or regulations governing the conduct of your Department.

Accordingly you are advised that your Department and not the Workmen's Compensation Board is the agency which under the present law is charged with the responsibility of acting upon applications for exemption from the duty of carrying workmen's compensation insurance.

It is of course true that under Section 205 of the Administrative Code you as the head of the Department of Labor and Industry may delegate any of the duties of the Department to deputies or the duly authorized agents or employes of the Department and that under Section 212 your Department, with the approval of the Executive Board, has the right to establish bureaus or divisions to carry on such portions of the work of your Department as may be assigned to them.

Very truly yours,

/ DEPARTMENT OF JUSTICE,

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

*Labor and Industry—Workmen's Compensation—Litigation relating thereto—Authority of Secretary—Act of 1925, No. 328A, Section 2, p. 205.*

The Commonwealth is a self-insurer of its liability under the Workmen's Compensation Act. The Secretary of Labor and Industry is the agent of the Commonwealth in the administration of the fund created to meet the liability of the State in compensation cases. As such, he or his agents may appear as a party in interest and participate in litigation relating thereto. It is his right to sign, answer or file petitions in the course of such litigation.

Department of Justice,  
Harrisburg, Pa., November 8, 1926.

Honorable Richard H. Lansburgh, Secretary of Labor and Industry,  
Harrisburg, Pennsylvania.

Sir: I have your request to be advised as to the proper procedure to be followed by your Department, where an employe of the Auditor General's Department who has been receiving compensation under an agreement approved by The Workmen's Compensation Board refuses to sign a final receipt at your request after you have convinced yourself by careful examination that the disability suffered by him has terminated. The Auditor General refuses to sign the proper petition presented to him for his signature in order to bring the case before the Referee.

The General Appropriation Act of 1925, No. 328A, Section 2, page 205, provides and appropriates:

"For the payment of the statutory amounts of Workmen's Compensation and of medical, hospital, surgical and burial expenses which may become due and payable during the period beginning June first, one thousand nine hundred and twenty-five, and ending May thirty-first, one thousand nine hundred and twenty-seven, to injured employes and dependents of deceased employes of the various departments of the government of this Commonwealth upon claims arising under the provisions of the Workmen's Compensation Act of one thousand nine hundred and fifteen, its amendments and supplements, 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, or at the option of the Secretary of Labor and Industry, with the approval of the Governor; for the payment of claims arising out of injuries sustained by State employes, including fatal accidents which occurred prior to June first, one thousand nine hundred and twenty-five, and for the payment of the premium or premiums upon an insurance policy or policies insuring the Commonwealth against Workmen's Compensation liability for injuries to or the death of State employes occurring during the period

beginning June first, one thousand nine hundred and twenty-five, and ending May thirty-first, one thousand nine hundred twenty-seven, or any part or parts thereof, two years, the sum of one hundred and fifty thousand dollars (\$150,000). All payments to State employes or their dependents out of this appropriation shall be made by the State Treasurer upon warrant of the Auditor General upon certificates furnished by the Secretary of Labor and Industry."

By virtue of the above you are placed in the position of administrator of this \$150,000 fund. The Legislature has expressly imposed this obligation upon you to deal with this fund for the benefit of a class of persons which come within the meaning of this Act and The Workmen's Compensation Act of 1915, as amended.

Your duly authorized agents in the Workmen's Compensation Bureau of your Department make the investigations in all cases of injured employes and the dependents of deceased employes and make recommendations as to the merits of their claims. The heads of the various Departments of the State Government have no such means of ascertaining the merits of these claims as you have. The Secretary of Labor and Industry or his duly authorized agent are the proper persons to sign any petition, dealing with the status of an employe with respect to his right to receive compensation in order that the case may be brought before a Referee for adjudication. Whether the employe is a member of the Auditor General's Department or any other Department of which the head is an elective officer is immaterial, inasmuch as the employer is in all cases the Commonwealth of Pennsylvania and you, as Secretary of Labor and Industry, are the agent of the Commonwealth for administering this fund for taking care of injured employes of the Commonwealth and of dependents of deceased employes who met death in the course of their employment.

The Commonwealth is, in effect, a self insurer of its liability under the Workmen's Compensation Act. The Courts of Pennsylvania have recognized the right of the insurance company to substitute itself as a real party in interest to the extent that it may file an answer to the claimant's petition, make the defense, take the appeal from the award of the Referee, and contest an appeal taken into the appellate courts. See *Chase vs. Emery Mfg. Co.* 271 Pa. 265. and *Wells vs. Frutchey et al.* 274 Pa. 305.

Therefore, you are advised that you not only have the right, but that you or your authorized agent are the proper persons to sign answers to claim petitions and also to sign petitions for review, modification or termination. You may, therefore, sign the petition

prepared in this case for the purpose of securing the termination of the agreement in order that the case may be brought before the Referee or the Workmen's Compensation Board of determination.

Very truly yours,

DEPARTMENT OF JUSTICE,

PENROSE HERTZLER,

*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—Qualifications of applicants for a mining inspector's certificate—  
"Coal miner defined"—Acts of June 2, 1891, P. L. 176—June 1, 1915, P. L. 712,  
Article XVIII—May 17, 1921, P. L. 831.*

In consideration of the meaning of the term "mines" as given in the Acts of 1891 and 1915 supra and the context of the Act of 1921 supra, we conclude that the Legislature intended the term "coal miner" as used in the latter Act to mean the person who cuts or blasts coal or rock at the face of the gangway, airway, breast, pillar or other working places in a mine as defined in Article XIII in the Act of 1915.

Department of Justice,  
Harrisburg, Pa., April 21, 1925.

Honorable Joseph J. Walsh, Secretary of Mines, Harrisburg, Penna.

Sir: In a recent communication to this Department you advise that under Section 3 of the Act of May 17, 1921, P. L. 831, it is provided that an applicant for a mining Inspector's certificate shall have had, inter alia, "at least ten years practical experience in the anthracite mines of this Commonwealth, five years of which shall be as coal miners in the anthracite mines of this Commonwealth," and you inquire whether to be a "coal miner" as therein referred to, it is necessary that one be engaged in the work of cutting or blasting coal or rock at the face of the gangway, airway, breast, pillar or other working places.

The Act in question provides for the appointment of an anthracite Mining Inspectors' Examining Board and, among other things, it prescribes the qualification of applicants for appointment as inspectors in anthracite mines. This Act does not define the meaning of the term "coal miner", nor do we find any provision in it beyond the words themselves assisting us in drawing the deduction between what it meant by the expression "at least ten years practical experience in the anthracite mines" and the expression "five years of which shall be as coal miners in the anthracite mines."

The Act of May 17, 1921, P. L. 831, repeals parts of certain sections of the Act of June 2, 1891, P. L. 176, as amended, which parts are inconsistent with it. We are entitled to look to this former act for assistance in determining the meaning of the term "coal miner" as used in Section 3 of said Act of May 17, 1921. In the first place, in an opinion by this Department (Attorney General's Opinions 1887-96, page 113) rendered October 24, 1895, it was determined the term "miner" under said Act of June 2, 1891, P. L. 176, includes all classes of miners who have had practical experience in working in a "mine", as defined by said Act of Assembly.

Later under Article 18 of the Act of June 1, 1915, P. L. 712, which amended said Act of June 2, 1891, we find the term "miner" defined as follows:

"'Miner' means the person who cuts or blasts coal or rock at the face of the gangway, airway, breast, pillar or other working-places; also any person engaged at general work in a mine, qualified to do the work of a miner."

We also find in the same Article the term "mine" defined as follows:

"'Mine' includes all underground workings and excavations, and shafts, tunnels and other ways and openings; also all such shafts, slopes, tunnels and other openings in course of being sunk or driven, together with all roads, appliances, machinery, and material connected with the same below the surface."

Under the definitions of said Act of June 1, 1915, it is readily seen that the term "miner" has been given a narrower meaning than it previously had under said Act of June 2, 1891. It now is limited at least to a person engaged in general work in a mine, *qualified to do the work of a miner*, which means in the first instance, as indicated a person who cuts or blasts coal or rock at the face of a gangway, airway, breast, pillar or other working-places.

As set forth in said Section 3 of the Act of May 17, 1921, P. L. 831, here in question, one of the qualifications necessary for the applicant for appointment as Mine Inspector is that he shall have had "at least ten years *practical experience in the anthracite mines* of this Commonwealth." In keeping with the meaning of the terms, as just indicated, and with the context of the Act itself the expression "practical experience in the anthracite mines" here referred to would include general work in a mine as defined in the Act, covering all classes of persons who have had practical experience working in a "mine" as so defined.

As to the next qualification of a Mine Inspector, the one in immediate question here, to wit, "five years of which (the ten years practical experience in the anthracite mines) shall be as coal miners in the anthracite mines of the Commonwealth," the Legislature must certainly have meant that the term "coal miner" should have a narrower meaning than what they meant by the expression "practical experience in the anthracite mines" or we reach an inconsistency or absurdity. It will readily be seen that if the term "coal miner" is to be given the meaning which the term "miner" originally had under the Act of June 2, 1891, P. L. 176, the Legislature would in effect have said in Section 3 of said Act of May 17, 1921, that the applicant for Mine Inspector shall have had at least ten years practical experience as a "miner" of this Commonwealth, five years of which shall be as

a "miner" of this Commonwealth. Certainly no such inconsistency could have been in contemplation here.

What, therefore, was the narrower meaning meant by the Legislature in the use of the term "coal miner?" What was the real intention of the Legislature? Considering the meaning of the term "miner" as given in said Act of June 1, 1915, P. L. 712, amending the Act of June 2, 1891, P. L. 176, and the context of the present Act itself no other consistent conclusion can be reached but that the Legislature intended the term "coal miner" as used in Section 3 of the Act of May 17, 1921, P. L. 831, to mean the person who cuts or blasts coal or rock at the face of the gangway, airway, breast, pillar or other working-places in a mine as defined in Article 18 of the Act of June 1, 1915, P. L. 712.

Yours very truly,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,  
*Deputy Attorney General.*

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*Mine Examining Board—Appointment of mine inspector fifty years old—Act of June 9, 1911, and May 17, 1921.*

Under section 3, article xix, of the Act of June 9, 1911, P. L. 756, and section 3 of the Act of May 17, 1921, P. L. 831, relating to the qualifications respectively of bituminous and anthracite mine inspectors, the Mine Examining Board, except in the cases covered by the provisions contained in the statutes, may not grant a certificate of qualification to a candidate for the office of mine inspector who has reached his fiftieth birthday, even though he possesses all the other qualifications required by the act.

Department of Justice,  
Harrisburg, Pa., June 9, 1925.

Honorable Joseph J. Walsh, Secretary of Mines, Harrisburg, Pa.

Sir: Your favor of the 13th ult., addressed to the Attorney General is at hand. You ask to be advised whether the Mine Examining Board is justified in refusing to grant a certificate of qualification to an applicant for the office of mine inspector who has reached his fiftieth birthday, even though he possesses all the other qualifications required by the Act.

Section 3, Article 19, of the Act of June 9, 1911, P. L. 756, relating to the qualifications of bituminous mine inspectors provides:

"The qualifications of candidates for the office of inspector shall be certified to the Examining Board, and shall be as follows:

"The candidates shall be citizens of Pennsylvania, of temperate habits, of good repute as men of personal integrity, in good physical condition, and shall be be-

tween the ages of thirty and fifty years: Provided, 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 3 of the Act of May 17, 1921, P. L. 831, relating to the qualifications of anthracite mine inspectors, provides as follows:

"\* \* \* They shall be citizens of this Commonwealth and residents of the anthracite region, of temperate habits, of good repute, of personal integrity, in good physical condition, and not under thirty or over fifty years of age: Provided, however, That any person who is now serving as inspector under the provisions of the act of June eight, one thousand nine hundred and one, \* \* \* and its amendments, shall be eligible for appointment, even if beyond fifty years of age, if in good physical condition."

The qualifications as to age in both of these Acts of Assembly are the same in effect and intent if not in language.

"When the word 'between' is used with reference to a period of time, bounded by two other specified periods of time, such as between two days named, the days or other periods of time named as boundaries are excluded."

*Richardson vs. Ford*, 14 Ill. 333.

*Winons vs. Thorpe*, 87 Ill. App. 297.

"The word 'between' when used in speaking of the period of time between two certain days generally excludes the days designated as the commencement and termination of such period."

*Kendall vs. Kingsley*, 120 Mass. 94.

*People vs. Hornbeck*, 61 N. Y. Supp. 978.

"'Between' when properly predicable of time is intermediate."

*Bouvier's Law Dictionary*, page 340.

The language of the Act of 1921, relating to anthracite mine inspectors clearly intends that a candidate shall not be more than fifty years of age. "The words of the statute if of common use are to be taken in their natural, plain, obvious and ordinary significance." *Philadelphia & Erie Railroad Company vs. Catawissa Railroad Company*, 53 Pa. 20. The ordinary acceptance of the use of the word "over" in connection with a term of years is "more than" or beyond. A man who has reached the fiftieth anniversary of his birth has lived more than or beyond fifty years and is, therefore, in the language of the Act over fifty years of age. Both of these

Acts of Assembly were passed for the purpose of providing for the health and safety of persons employed in and about the coal mines of Pennsylvania. The Legislature undoubtedly had this in mind in stating the qualification of the candidates for this office. Under the statutes quoted, it has stated that certain qualifications are necessary to those whose duty it is by inspection to properly safeguard the health and safety of those employed in and about the mines. A certain age is a necessary requirement for a person applying for qualification as a mine inspector.

Except in the case of the provisos contained in the Act, I am, therefore, of the opinion that the Examining Board cannot legally grant a certificate of qualifications to a candidate for the office of mine inspector who has reached his fiftieth birthday, even though he possesses all the other qualifications required by the Acts of Assembly referred to above.

Yours very truly,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*Mines and Mining—Applicability of Rules 17 to 21, inclusive, of Article XII, Act of June 2, 1891, P. L. 176, to persons who are hoisted from the mine to the surface and lowered into the mine from the surface, and persons hoisted from and lowered into a slope that is located within a mine and has no connection with the surface.*

The Act of 1891 above referred to, was intended to protect the safety of miners while being hoisted or lowered in any shaft or slope in any part of the mine.

Department of Justice,  
Harrisburg, Pa., October 26, 1925.

Honorable James J. Walsh, Secretary of Mines, Harrisburg, Pa.

Sir: In reply to your communication of recent date, inquiring whether Rules 17 and 21 inclusive of Article XII of the Act of June 2, 1891, P. L. 176 apply equally in the case where persons are hoisted from the mine to the surface and lowered into the mine from the surface, and where persons are hoisted from and lowered into a slope that is located within a mine and has no connection with the surface, I beg to submit the following:

The Act of 1891, P. L. 176 is entitled,

“An Act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and for the protection and preservation of property connected therewith.”

Rules 17 and 21 inclusive of this Act of 1891, all provide for the safety of miners while being hoisted or lowered *in any shaft or slope* in a mine. The entire purpose of the Act is expressed in the title.

The several rules in part provide as follows:

Rule 17. Not more than ten persons shall be hoisted or lowered at any one time *in any shaft or slope* and whenever five persons shall arrive at the bottom of *any shaft or slope* in which persons are regularly hoisted or lowered, they shall be furnished with an empty car or cage and be hoisted, etc.

Rule 18. An engineer placed in charge of an engine, whereby persons are hoisted or lowered *in any mine*, shall be a sober and competent person of not less than 21 years of age.

Rule 19. Every engineer shall work his engine slowly and with great care when any person is being lowered or hoisted in a *shaft or slope*, etc.

Rule 20. An engineer who has charge of the hoisting machinery by which persons are lowered or hoisted *in a mine*, shall be in constant attendance for that purpose, etc.

Rule 21. Whenever any person is about to ascend or descend *any shaft or slope*, etc.

All of these rules use the words *in a shaft or slope* without regard to whether the shaft or slope is connected with the surface.

The Act itself gives the following definitions:

"The term 'shaft' means a vertical opening through the strata and which is or may be used for the purpose of ventilation or drainage, or for hoisting men or material in connection with the mining of coal."

"The term 'slope' means any inclined way or opening used for the same purpose as a shaft."

"The term 'mine' includes all underground workings and excavations and shafts, tunnels and other ways and openings; also all such shafts slopes, tunnels and other openings in the course of being sunk, together with all roads, appliances, machinery and materials connected with the same below the surface."

In view of these definitions and in the absence of any express provision in the Act making a distinction in relation to these rules between shafts or slopes leading from the mine to the surface and those located within a mine and having no connection with the surface, it is evident that the Legislature by this Act of 1891 intended to protect the safety of miners while being hoisted or lowered in any shaft or slope in any part of the mine. To interpret the Act otherwise would mean that the Legislature intended to provide

for the safety of miners while in certain parts of the mine and to leave them unprotected while in other parts of the mine, where they might be in equal danger. Such an intention cannot be read into the provisions of this Act and I am, therefore, of the opinion that Rules 17 to 21 inclusive of the Act of 1891, P. L. 176 apply equally to the two cases referred to in your letter.

Yours very truly,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*Department of Mines—Mine Inspectors—Filling of vacancies—Act of 1921, P. L. 831.*

The Examining Board or the Secretary of Mines shall certify to the Governor the persons having the highest per centage in accordance with the terms of the Act and the commissions of those appointed by the Governor to fill vacancies shall be for a period of four years or until removed, as provided by Section 15 of the Act of 1921, P. L. 831.

Department of Justice,  
Harrisburg, Pa., March 19, 1926.

Honorable James J. Walsh, Secretary of Mines, Harrisburg, Pennsylvania.

Sir: You ask for an opinion as to how appointments shall be made for the several vacancies that exist in the present force of mine inspectors as provided by the Act of May 17, 1921, P. L. 831.

You state that the twenty-five inspectors in the anthracite region who were serving when the Act of May 17, 1921 was passed were reappointed in accordance with Section 4 of said Act. You also state that in four districts those appointed July 1, 1921 for various reasons did not finish their four year term and that the vacancies thus created prior to the expiration of the term have not been filled; and that in three districts those appointed occupied the office of mine inspector for the full term of four years but were not reappointed and these vacancies have not been filled.

Section 7 of said Act provides as follows:

"In order to make uniform the method of selecting mine inspectors for this Commonwealth, the term of office of inspectors of mines in the anthracite coal mines of Pennsylvania as heretofore existing, shall, upon the passage of this act, be terminated, and the Governor shall proceed to fill the offices of inspectors of mines in the anthracite coal region of this Commonwealth as provided for in this act."

Section 8 of said act provides as follows:

"If at any time a vacancy shall exist in the office of mine inspector in the anthracite coal region of Pennsylvania, the Governor shall, from the names certified to him by the Examining Board or by the chief of the Department of Mines, commission the person having the highest percentage, whose commission shall be for four years or until removed as provided by Section 15 of this Act."

It was under the provisions of Section 7 and 8 referred to above that the Governor appointed those whose commissions were dated July 1st, 1921 and were issued for a term of four years. Section 9 of said Act of 1921 provides as follows:

"When a vacancy occurs in the office of inspector by death or otherwise, the Governor shall commission, for the unexpired term, from the names of the successful applicants on file in the Department of Mines, the person having the highest percentage in the examination. When the applicants who have received an average of at least 90 per centum shall be exhausted, the Governor shall cause the Examining Board to meet for a special examination. Special examination shall be conducted in the same manner as required in this act for the conducting of regular examinations."

The term fixed by the act is four years from the date of the commission which in the case of those appointed under the provisions of the act were dated July 1, 1921, and expired July 1, 1925. All of the terms provided for by the commissions dated July 1, 1921 have therefore expired and there are no *unexpired* terms to be filled. The Governor according to the provisions of the act shall select from those who have received an average of at least 90 per centum the name of some person who has taken the examination required by the Board and appoint him to serve as mine inspector. If among those examined there are none who have received at least 90 per centum as required by the act the Governor shall then direct the Examining Board to meet for a special examination which examination shall be conducted in the manner provided for by the said Act of May 17, 1921 referred to above. The Examining Board or the Secretary of Mines shall certify to the Governor the persons having the highest percentage in accordance with the terms required by the act and the commissions of those appointed by the Governor shall be for a period of four years or until removed as provided by Section 15 of the Act of 1921, P. L. 831.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,

*Deputy Attorney General.*

*Mines and Mining—Mine Inspectors—Qualifications—Age Limit—Appointment—Act of 1911, P. L. 756 as amended by Act of 1915, P. L. 706.*

A person who at the time of his examination for mine inspector was under the age of fifty years may be appointed after reaching that age if he possesses the necessary qualifications and has successfully passed the examination. Failure to certify his name with those of other candidates does not affect his rights.

Department of Justice,  
Harrisburg, Pa., October 13, 1926.

Honorable Joseph J. Walsh, Secretary of Mines, Harrisburg, Pa.

Sir: This Department is in receipt of your recent letter in which you inquire whether an applicant for the office of mine inspector in the bituminous region, who fully qualified for examination before the Examining Board in July, 1925, and duly passed his examinations at that time, but was not certified as having so passed until May 6, 1926, without any fault for the delay on his part, is now eligible for appointment to the said office, even though the said applicant reached the age of fifty years on January 4, 1926?

This question calls for construction of the Act of June 7, 1911, P. L. 756, as amended June 1, 1915, P. L. 706, so far as it applies to the examination and appointment of mine inspectors. Section 3 of Article XIX of this Act provides for certain qualifications of candidates for the office of mine inspector to be certified to the Examining Board:

"The qualifications of candidates for the office of inspector shall be certified to the Examining Board, and shall be as follows:

"The candidates shall be citizens of Pennsylvania, of temperate habits, of good repute as men of personal integrity, in good physical condition, *and shall be between the ages of thirty and fifty years.*"

Section 5, Article XIX, provides as follows:

"The Governor shall, from the names certified to him by the Examining Board, commission one person to be inspector for each district, in pursuance of this Act, whose commission shall be for a full term of four years from the fifteenth day of May following the regular examinations."

Section 6, Article XIX, provides for filling vacancies in the following certain language:

"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."

The language of the Act in the provisions above referred to, clearly intends that certain qualifications must exist and be certified to the Examining Board before examination, among them being, "the applicant shall be between the ages of thirty and fifty years". The applicant in question was between the ages of thirty and fifty years at the time of the examination dates, June 30 and July 1 and 2, 1925, fulfilled all the qualifications, and was certified to the Examining Board for examination.

The name of this applicant, "*through no fault of his own*", according to the facts submitted, was not certified with the names of the other successful candidates in the said examination until May 6, 1926, but is now on the eligible list, after belated but proper certification. This certification was a ministerial duty and, if not performed at the time indicated by law, must be performed as soon thereafter as the omission is discovered. *Commonwealth vs. Griest, 196 Pa. 396.*

The provision requiring candidates to be under the age of fifty years applies to the qualifications for examination and not for appointment. The Legislature did not require that a man could not be appointed as an inspector if over fifty years of age, but that the age limit applies to qualifying to appear before the Examining Board. The mere fact that an applicant attains the age of fifty years while he is eligible for appointment, does not disqualify him for such appointment. He continues eligible just the same, no more and no less, as though he were still less than fifty years old.

The ruling in this case in no wise conflicts with the Department of Justice opinion written June 9, 1925, by Deputy Attorney General Frank I. Gollmar, where the question was; whether the Mine Examining Board is justified in refusing to grant a certificate of qualification to a candidate for examination for the office of mine inspector, who has reached his fiftieth birthday, even though he possesses the other qualifications required by the Act. In the instant case the applicant did not become fifty years of age until after he had passed the examination.

I am, therefore, of the opinion that the applicant, who is the subject of your inquiry, is eligible at this time for the appointment to the office of mine inspector in the bituminous region.

Yours very truly,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General*

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**OPINION TO THE STATE BOARD OF EXAMINERS  
FOR REGISTRATION OF NURSES**

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## OPINIONS TO THE STATE BOARD OF EXAMINERS FOR REGISTRATION OF NURSES

*Nurses—Registration—Marriage—Change of name—Act of June 8, 1923, P. L. 683.*

1. Where a registered nurse marries, she may, upon surrender of her registration card, receive a new card in her married name,
2. The law confers upon a wife the surname of her husband upon her marriage.

Department of Justice,  
Harrisburg, Pa., March 9, 1926.

Mrs. Helene S. Herrmann, Secretary-Treasurer, State Board of Examiners for Registration of Nurses, 813 Mechanics Trust Building, Harrisburg, Pa.

Dear Madam: On October 26, 1911, Mildred Reighard was registered as a registered nurse with the State Board of Examiners for Registration of Nurses. On July 13, 1922, she was married to James M. Rose, and from that time, has been known as Mildred R. Rose.

The Act of June 8, 1923, P. L. 683 is an Act relating to the registration and re-registration of nurses, and in Section 1, provides as follows:

“That all persons registered as registered nurses with the State Board of Examiners for Registration of Nurses, and all persons registered with said board, as licensed attendants, shall in every year, following the passage of this act, during the month of January again cause his or her certificate to be recorded in the office of the State Board of Examiners for Registration of Nurses.”

In January, 1923, when Mildred R. Rose applied for re-registration, she asked that her card should be issued in the name of Mildred R. Rose, the name she legally bore. She was informed that a ruling had been made “that all names shall remain on re-registration cards as they appeared when the nurse first received her registration”, and her re-registration card was issued for 1925-1926 in the name of Mildred Reighard.

This Department has been asked for an opinion as to whether or not a nurse, registered originally in her maiden name may after marriage, have her re-registration card issued to her in her married name.

“The meaning of the word ‘name’ is given as the distinctive appellation by which a person or thing is designated or known, or, as better given by another lexicographer, that by which an individual person or thing is designated and distinguished from others. The law recognizes one Christian name or given name and one family surname. Bouvier’s Law Dict. 2285, 21 Am. and Eng. Ency. of Law, 306. At marriage, the wife takes the husband’s surname.”

*Uihlien vs. Cladieux*, 78 N. E. 363.

It is the common law doctrine that the husband is the head of the family, and in accordance with this doctrine, it is the general rule fixed by custom, at least, that marriage confers upon the wife the surname of the husband. 15 *Amer. and Eng. Ency. of Law*, 812.

By custom, a woman at marriage loses her own surname and acquires that of her husband. 21 *Amer. and Eng. Ency. of Law*, 312. And in *Freeman vs. Hawkins*, 77 *Texas* 498, it was held that the law confers upon a wife, the surname of her husband upon marriage.

Mildred Reighard having married, now legally bears the surname of her husband, and is entitled to legally use the name of Mildred R. Rose.

The Act of April 14, 1893, P. L. 16, provides that whenever any female notary shall marry, she shall return her commission to the Governor, stating the fact of her marriage and giving her married name, and the Governor shall, thereupon, issue to her a new commission, conforming to the change of name.

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. Also in the case of a doctor who has had his name changed by legal proceedings, this Department held that the license to practice medicine was issued to a person certain and that license should be given to the person in his new and legal name; that the license was issued to the person and not to the name.

The same reasoning applies to the re-registration of a nurse. The person to whom registration was originally issued having changed her name by marriage in a way recognized and approved by the law, she should not be deprived of any of her rights for doing so. She is entitled to all the rights which were hers under her former name, and one of these rights was to practice as a registered nurse and she ought not, as Mildred R. Rose, be compelled to practice under a re-registration issued in the name of Mildred Reighard.

A person's name is the mark by which they are distinguished from other people, and as Mildred R. Rose is now the legal name of her who formerly bore the name of Mildred Reighard, she should be given a re-registration card in her legal name, for the only thing the law looks to is the identity of the individual.

It has been uniformly held by the courts that a change of name if legally brought about should not deprive the person so changing of any of the rights enjoyed before the change was made.

Probably the leading case on a change of name is *Petition of Sneek*, 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 as an acquired known designation it has become as effectively his name as the one he previously bore."

There should be no difficulty in keeping your records by index and cross index, so that the registration of Mildred Reighard and the re-registration of Mildred R. Rose will be shown and that they are the same person.

The conclusion arrived at in this opinion is intended to apply to all licenses, commissions and registrations issued by State agencies.

You are, therefore, advised that if Mildred R. Rose returns the re-registration card issued to Mildred Reighard, a new card should be issued to Mildred R. Rose showing that she is a registered nurse under that name.

Yours very truly,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

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**OPINION TO THE BOARD OF OSTEOPATHIC  
EXAMINERS**

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## OPINIONS TO THE BOARD OF OSTEOPATHIC EXAMINERS

*Hospitals—Osteopathy—Treatment in hospitals—Powers of trustees—Act of April 24, 1901, P. L. 98.*

1. The trustees of a hospital under the care and control of the Commonwealth may refuse an osteopathic practitioner permission to treat in the hospital a part-pay patient or a private room patient.

2. Legislation relating to osteopathic practitioners has not endowed them with the legal right to make use of the facilities of hospitals in which methods of treatment recognized and maintained by older schools, such as allopathy and homeopathy, prevail.

Department of Justice,  
Harrisburg, Pa., June 14, 1926.

Dr. O. J. Snyder, President, Board of Osteopathic Examiners,  
Wisherspoon Building, Philadelphia, Pennsylvania.

Sir: Your letter of June 4, 1926 enclosing a letter from Dr. T. M. Fuller of Corry, Pennsylvania, with respect to a Hospital which informed him that a part-pay patient would have to be attended by a medical doctor who was on service, and which also refused to allow him to treat a private room patient, has been received and fully considered. The questions which Dr. Fuller raises through you are at once serious and delicate. By successive pieces of legislation osteopathic physicians and surgeons have come to be recognized as a complete, distinct and separate school of the healing art. None of this legislation, however, has endowed osteopathic practitioners with the legal right to make use of the facilities of hospitals in which the methods of treatment recognized and maintained by older schools, such as allopathy and homeopathy, prevail.

The only legislation on the subject seems to be the Act of April 24, 1901, P. L. 98, which provides that the trustees of hospitals and asylums, under the care and control of this Commonwealth, shall, for the purposes for which such trustees have been or shall be appointed, be endowed under their legal title with corporate powers and be subject to corporate obligations, with the right to sue and subject to be sued as corporations, under the general laws of the Commonwealth.

That Act has not disturbed the thoroughly established principle that a purely public charity cannot be made liable for the tort of its agent, servant or employee: *Gable v. Sisters*, 227 Pa. 254 (1910). It has, however, emphasized the fact that, within the scope of their charters, charitable corporations, such as hospitals, are managed and controlled by boards of trustees, which determine the financial, business and administrative policies of such institutions: *Phila. v. Penna. Hospital*, 154 Pa. 9, *Daly's Estate*, 808 Pa. 58; *Gable v. Sisters*, *supra*.

Under that Act, therefore, any hospital under the care and control of the Commonwealth is entitled to determine not only what sort of treatment may be administered in its wards and rooms, but who may prescribe and administer remedies therein. If the charter of a hospital limits the character of diseases and injuries to be cared for by it or defines the branch of the healing art whose philosophy is to be followed by it, then a violation of the charter would take place if a practitioner of a different school of the healing art were permitted to treat his patients in such a hospital or to make use of its facilities.

In view of these considerations, I have to advise you that the Corry Hospital acted entirely within its rights in excluding Dr. Fuller from the treatment of the part-pay patient whom he had occasion to take there, and also refusing to allow him to treat a private room patient there. It is conceivable that this situation may be harmful to the health and welfare of the people of the Commonwealth, but the remedy lies with the legislature and not through any legal proceeding at present known to the law.

Yours very truly,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,

*Deputy Attorney General.*

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## OPINIONS TO PENAL INSTITUTIONS

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## OPINIONS TO PENAL INSTITUTIONS

*Eastern Penitentiary—Prison Labor—Department of Welfare—Acts of 1883, P. L. 112, 1883, P. L. 125; 1915, P. L. 656; 1921, P. L. 101; Administrative Code, Section 2012; 1925, P. L. 188.*

The Eastern Penitentiary has no legal authority to employ prison labor, except such as may be designated by the Department of Welfare.

Department of Justice,  
Harrisburg, Pa., February 11, 1926.

Colonel John C. Groome, Warden, Eastern Penitentiary, Philadelphia, Pa.

Sir: The Attorney General has referred to me your communication asking for an opinion as to whether the Eastern Penitentiary has the legal right to employ inmates at prison labor for the purpose of sewing overalls together, the material to be supplied by a private manufacturer at his own cost, the inmates to be paid by the piece by said manufacturer, and to do no extra work, such as button holes, and so forth, and when sewed together, the said overalls are to be taken from your institution by the manufacturer and to be disposed of by him as he may see fit and for his own profit.

The passage of the Act of 1883, P. L. 112, marked an epoch in prison legislation in Pennsylvania, since it abolished the contract system. The Act of 1883, P. L. 125, required that the brand "convict labor" be placed on all goods, wares and merchandise shipped from penitentiaries, except that this brand was not required on goods, wares and merchandise shipped into other States. Any portion of this Act which permitted the shipment or sale of the products of prison labor to private individuals or corporations, has been repealed, inasmuch as the same is inconsistent with later legislation.

Following the passage of this Act of 1883, there were a number of Acts passed relating to convict labor in penitentiaries. The tendency of this legislation until the passage of the Act of 1915, P. L. 656, was to limit the number of convicts who might be employed at prison labor, but permit the sale of prison products to private interests. But the Act of 1915, P. L. 656, provided as follows:

"Section 1. Be it enacted, etc., That all persons sentenced to the Eastern or Western Penitentiary \* \* \* who are physically capable of such labor, may be employed at labor for not to exceed eight hours, 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 thereof, or for any public institution

owned, managed and controlled by the Commonwealth, or for the preparation and manufacture of building material for the construction or repair of any State institution, or in the work of such construction or repair, or for the purpose of industrial training, or instruction, or partly for one and partly for the other of such purposes, or in the manufacture and production of crushed stone, brick, tile, and culvert pipe, or other materials suitable for draining roads of the State, or in the preparation of road building and ballasting material."

Section 12 of said Act contains the usual repealing clause: "All other acts or special acts inconsistent herewith, are hereby repealed".

This Act of 1915 was the first act which authorized the employment of *all* those sentenced to penitentiaries. But note that it restricted the use of prison labor to certain classes of employment and provided that said products should be for the use of the Commonwealth or any county thereof, etc. This Act was the first departure from the old system of selling to private interests. It was amended by the Act of 1921, P. L. 101, but the Act of 1921 was similar in its effect with regard to prison labor to that of 1915. Under these Acts of 1915 and 1921, the Prison Labor Board, now abolished, had the right to determine the amount, kind and character of machinery used, and under Section 4 of said Act of 1921, the Prison Labor Commission arranged "for the sale of the materials produced by the prisons to the Commonwealth or to any county thereof or to any of the public institutions owned, managed and controlled by the Commonwealth." The Commission was, therefore, expressly restricted in the disposition of materials produced, and did not have the right to sell to private interests. The Administrative Code of 1923, Section 2012 provides that:

"The Department of Welfare shall have the power, and its duty shall be:

(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 \* \* \* 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 institution 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 planting of seed

trees or the performance of other work in State forests or for the purpose of industrial training or instructions, 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 preparation of road building and ballasting material."

Clearly the prison labor proposed to be employed as outlined in the first paragraph of this Opinion is not within the provisions of law. The material when sewed together is delivered to a private manufacturer and is not sold by the Department of Welfare as provided for in Section 2012, Paragraph C of the Administrative Code. Paragraph G of this Section of the Code provides that the Department of Welfare shall supervise the industries carried on in the penitentiaries of the State, and it is provided in Paragraph B that the Department shall determine the amount, kind and character of the machinery to be erected. The profits derived from the sale of such goods to be paid into a manufacturing fund, which fund is to be used for the purpose of purchasing machinery, supplies and material necessary to carry on the said industries, and to pay the salaries of the foremen, supervisors, etc., and the wages of the inmates as provided by the act.

The Act of 1925, P. L. 188, gives the Department of Welfare the right to sell the product of prison labor "to the United States Government or to any department thereof, or to any State or municipal subdivision thereof, or to any Department of said State."

I am of the opinion that you have no legal authority to carry on any industry in the Eastern Penitentiary employing prison labor, except such as may be designated by the Department of Welfare, and in answer to your specific question, you do not have legal authority to employ prison labor to sew and deliver overalls as outlined in paragraph 1 of this Opinion. The Department is required to make and arrange for the sale of the product of prison labor.

You state that idleness of inmates is the greatest curse in the institution, and all authorities on prison management agree with you. The history of prison legislation tends toward the employment of prisoners, and such employment was the purpose of the Acts of 1915, 1921 and 1923. It is not only within the power but it is the duty of the Department of Welfare, to establish, maintain, and carry on industries in the penitentiaries for the employment of inmates. Because of the restricted market, fixed by the Act, the output would probably be too great to find purchasers if all prisoners were employed at some form of industrial work or labor, but it is the evident intent of the Act that the Department should create a system of industrial training and classes, so that all prisoners would have some method of occupying their time.

I suggest that you take up with Doctor Potter of the Department of Welfare, (whom I know is very anxious to have the time of all prisoners employed), the question of additional industrial training and classes. The extension of such classes would seem to be justifiable, even though it is necessary to use some of the profits derived from the sale of prison products.

I also suggest that proper legislation be prepared for submission to the Legislative Session of 1927, in order to assure, either at labor or in classes, the employment of a greater number of prisoners. The law, of course, does not restrict you in the right to employ prisoners in such domestic duties and labor as you may deem necessary for the proper conduct, repair and maintenance of your institution.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*Criminal law and procedure—Parole—Commutation—Good behavior—Robbery of post-office while on parole—Act of June 19, 1911, as amended by Act of June 3, 1915.*

1. Section 10 of the Parole Act of June 19, 1911, P. L. 1055, as amended by the Act of June 3, 1915, P. L. 788, is based upon the theory that punishment for crime has, as a part of its purpose, the reformation of the criminal, and that, as an inducement to such reformation, he should, while in prison, have an opportunity by good conduct to obtain his release after serving the minimum sentence.

2. The policy of the law is that, if while on parole, he commits a crime of the grade for which the laws of this State inflict punishment by imprisonment, he thereby proves that he has not reformed, that his release was a mistake, and that he should return and complete his original sentence.

3. The commission of a crime of such a grade outside of Pennsylvania, or upon Federal property within Pennsylvania, proves that he has not reformed, just as much as the commission of the same crime within this State's jurisdiction.

4. The provision of the act as to the order in which a prisoner shall serve his sentences is simply for the purpose of eliminating any uncertainty as to the order. The fact that a paroled convict has served a sentence in a Federal penitentiary outside of this State cannot operate to defeat the requirement that he shall serve in this State the unexpired term of the sentence upon which he was paroled.

5. A prisoner who has violated the terms of his parole and been returned to a penitentiary in this State to serve the balance of his sentence after serving a sentence in a Federal penitentiary, must serve the remainder of the original sentence without commutation or parole.

Department of Justice,  
Harrisburg, Pa., June 5, 1925.

Mr. Stanley P. Ash, Warden, Western State Penitentiary, Pittsburgh, Pennsylvania.

Sir: In your recent letter to this Department you request an

opinion as to the legality of the detention of Hugh Lane as a prisoner in the Western State Penitentiary.

The facts are as follows:

Lane was sentenced by the Court of Bedford County on January 18, 1916, upon conviction of burglary, to undergo imprisonment in the Western State Penitentiary for the term of not less than four years and not more than six years. At the expiration of his minimum sentence, January 19, 1920, he was paroled by the Governor. On November 13, 1920, after conviction in the United States District Court for the Western District of Pennsylvania of robbery of a United States Post Office, he was sentenced by that Court to undergo imprisonment in the Federal prison at Atlanta, Georgia for the term of four years. After serving this last sentence he was returned to the Western State Penitentiary because of violation of his parole, and is now being held there to serve the unexpired portion of the sentence imposed upon him by the Court of Bedford County.

The conditions attached to the parole granted Lane are the same as those provided in Section 10 of the Act of June 19, 1911, P. L. 1055, as amended by the Act of June 3, 1915, P. L. 788, (West Penn'a. Statutes, Sec. 8249), and so the authority to detain him in your Institution is to be determined under the provisions of that Section of the Act, which is as follows:

- “If any convict released on parole, as provided for  
in this act, shall, during the period of parole, be convicted of any crime punishable by imprisonment under the laws of this Commonwealth, and sentenced to any place of confinement other than a penitentiary, such convict shall, in addition to the penalty imposed for such crime committed during the said period, and after expiration of the same, be compelled, by detainer and remand as for an escape, to serve in the penitentiary to which said convict had been originally committed the remainder of the term (without commutation) which such convict would have been compelled to serve but for the commutation authorizing said parole, and if not in conflict with the terms and conditions of the same as granted by the Governor; but, if sentenced to a penitentiary, then the service of the remainder of the said term originally imposed shall precede the commencement of the term imposed for said crime.”

Lane contends:

1. That his detention is unlawful because the conviction for robbery in the United States Court did not constitute the conviction of a “crime punishable by imprisonment under the laws of this Commonwealth.”

2. That having served the sentence of the Federal Court in a penitentiary, he cannot be held after discharge therefrom to serve the balance of the sentence imposed by the Court of Bedford County because the Act requires the latter to be completed before the former commences.

3. If neither of the two former contentions is sustained he then asks if he is subject to parole under the provisions of the aforesaid Act of 1911.

These three questions will be discussed by reference to the above numbers.

1.

This question is controlled by the opinion of the Department, rendered by Deputy Attorney General Hargest in Stupp's Case, as reported in 48 County Court Reports, page 235, in which it was held that the language of the said Act of 1911 "requires any convict to serve the balance of an unexpired term if he has been convicted outside of Pennsylvania for any crime of a grade which, if committed in Pennsylvania, would be punishable under the laws of this Commonwealth."

In that case Stupp while on parole from the Eastern State Penitentiary, was convicted of the crime of forgery in the Courts of Ohio, for which he was sentenced to be confined in the Ohio State Penitentiary. After serving a portion of his sentence he was released and returned to the Eastern State Penitentiary of this State to serve the unexpired portion of his original sentence in that Institution.

The decision in the Stupp case is that the Legislature did not intend that a paroled convict could not be required to serve out the balance of his term if he committed a crime in an adjoining State, while he would be required to do so if the crime were committed in this State.

We might say, with respect to Lane's case,—the Legislature certainly did not intend that a paroled convict should be relieved from serving the balance of his term because he committed a crime within a Federal Building, but that he must serve such balance if the same crime had been committed on the street in front of such building or in an adjacent storeroom.

The Parole Act is based upon the theory that punishment for crime has, as a part of its purpose, the reformation of the criminal, and that, as an inducement to such reformation, he should, while in prison, have an opportunity by his good conduct to obtain his release after serving his minimum sentence. It is also based upon the theory that as an inducement to continue such reformation after his release, the balance of his sentence should be suspended pending his good behavior. The policy of the law is that, if while on parole,

he commits a crime of the grade for which the laws of this State inflict punishment by imprisonment, he thereby proves that he has not reformed, and that his release prior to the completion of his sentence was a mistake, and that he should return and complete his original sentence.

The commission of a crime of such a grade outside of Pennsylvania, or upon Federal property within Pennsylvania, proves that he has not reformed just as much as the commission of the same crime within the jurisdiction of the Pennsylvania Courts.

The crime of which Lanè was convicted while on parole, reported as robbery of a post office, would undoubtedly have constituted either robbery, larceny or felonious entry with intent to commit a felony, any one of which would have been punishable under the laws of this State by imprisonment in the Penitentiary.

## 2.

The same question was involved in Stupp's Case, *supra*, although not raised by him. The Parole Act specifies that a paroled prisoner, who is sentenced to a penitentiary upon conviction of a crime committed during the period of his parole, shall first complete the unserved balance of his original sentence, and shall then serve a sentence for the crime committed while on parole; but that if he is sentenced to a prison other than a penitentiary for the crime committed on parole, he shall first serve the last sentence in such Institution, and shall then be delivered to the penitentiary to which he was originally sentenced, there to serve out the unexpired balance of such original sentence. This provision is simply for the purpose of eliminating any uncertainty as to the order in which such sentences should be served. The term "Penitentiary" undoubtedly refers to a penitentiary within this State. The fact that such parole convict had served a sentence in a penitentiary without this State imposed upon a conviction of a crime "punishable by imprisonment under the laws of this Commonwealth" cannot defeat the requirement of the Act that he shall serve out the unexpired balance of the sentence upon which he was paroled. And such unexpired balance is to be served in the penitentiary to which he was originally sentenced.

## 3

This question is ruled by the opinion in Stupp's Case, *supra*, in which it is held

"The Section requires such convict to serve the remainder of such term 'without commutation.'"

That case was determined under the provisions of Section 10 of the Act of 1911, *supra*, but the amendment of 1915 has made no

change in this respect. The Act of 1915 specifically provides that the remainder of the original sentence shall be served without commutation.

I, therefore, advise you:

That each of Lane's three contentions must be answered in the negative and that he is to be detained in the Western Penitentiary as a prisoner until he has served the unexpired balance of the sentence he was serving at the time of his parole; also that he is not entitled to commutation or parole under the provisions of the aforesaid Acts of 1911 and 1915. This, of course, does not affect the Constitutional right of the Governor, with the advice of the Pardon Board to commute his sentence or grant him a pardon.

Yours very truly,  
DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

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*Penal Institutions—Board of Trustees of Western State Penitentiary—Authority to pay a contractor under a contract with the Board, for materials to be used in the construction of the buildings at Rockview Penitentiary, damages alleged to have been suffered by reason of delay in completing the contract and interest on portions of the contract price, payment of which was not made by the Commonwealth at the time when the same became due under the terms of the contract—Act of May 11, 1909, P. L. 519, Section 1—Act of March 30, 1911, P. L. 32.*

The Board of Trustees of the Western State Penitentiary has no authority to award damages or interest to contractors and there are no appropriations available on which this Board can draw for the payment of such damages or interest.

Department of Justice,  
Harrisburg, Pa., March 20, 1925.

Board of Trustees, Western State Penitentiary, Pittsburgh, Penna.

Gentlemen: In your recent letter to this Department you request an opinion as to your authority to pay a contractor, under a contract with your Board for materials to be used in the construction of the buildings at Rockview Penitentiary, (1) damages alleged to have been suffered by reason of delay in completing said contract, such delay alleged to be due to the action of officers of the Commonwealth; and (2) interest on portions of the contract price, payment of which was not made by officers of the Commonwealth at the time such payments were due and payable under the terms of the contract.

The claimant is the Van Horn Iron Works Company. Its contract with your Board is dated April 18, 1922 and was finally approved May 18, 1922. It provided for the furnishing and delivery at

Rockview, Pa., of the following material to be used in the construction of the penitentiary at that place; certain tool-proof grills and doors, tool-proof grills and rods to be assembled at the building (window guards), tool-proof cell fronts, complete, and tool-proof doors. Under the terms of the contract deliveries were to be made "at the times and in the sequence required to suit the progress of construction."

It is alleged by the contractor that shipment of this material was delayed by the State and that such delay made it necessary for the contractor to do certain work in removing rust which had accumulated on some of the materials, and to take certain precautions to prevent rust from accumulating on other materials, resulting in the expenditures of \$4,104.09 on account thereof, which sum the contractor requests you to award to it as damages.

You are also requested to award the contractor the sum of \$3,207.44 as interest on money due it under the terms of the contract, payment of which the contractor alleges was delayed on account of the refusal of the Auditor General to approve the same, he having decided that the appropriation made to your Board for this purpose had lapsed, which decision of the Auditor General it is alleged was overruled by the Courts.

Assuming for the present that the facts underlying the claims of the contractor for damages and interest are as he alleges, there is no authority vested in your Board to make payment of any money beyond the amount stated in the contract as the consideration for the work to be done and material furnished.

Section 1 of the Act of May 11, 1909, P. L. 519 provides:

"It shall be unlawful for any officer of this Commonwealth to authorize the payment of any money, by warrant or otherwise, out of the State Treasury, or for the State Treasurer 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; and it shall also be unlawful for any officer of this Commonwealth to authorize the payment of any money, by warrant or otherwise, out of the State Treasury, or for the State Treasurer to pay any money out of the State Treasury in excess of the amount thus specifically appropriated."

The Act of March 30, 1911, P. L. 32 provided for the purchase of a site, and the erection of buildings thereon, for the Western Penitentiary, and made an initial appropriation therefor. Successive Legislatures have appropriated additional money to continue the purpose provided for in this Act. Each such appropriation was made a supplement to the Act of 1911 and carries an appropria-

tion for the "continuance of the erection and construction and equipment of the said Western Penitentiary". There is no authority in these Acts by which your Board can pay any claim for damages or any claim for interest on delayed payments.

I, therefore, advise you that your Board has no authority to award damages or interest against the Commonwealth, and that there is no appropriation available upon which your Board can draw for the payment of either damages or interest.

Yours very truly,  
DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,  
*First Deputy Attorney General*

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**OPINION TO THE PENNSYLVANIA SOLDIERS'  
AND SAILORS' HOME**

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## OPINION TO THE PENNSYLVANIA SOLDIERS' AND SAILORS' HOME

*Pennsylvania Soldiers' and Sailors' Home—Qualifications for admission thereto—Acts of Congress of March 21, 1905, April 14, 1923, May 9, 1916, May 10, 1923; Acts of March 21, 1907, P. L. 21, May 17, 1921, P. L. 905, June 3, 1885, P. L. 63, June 7, 1923, P. L. 498, Article I, Section 2, Article II, Section 202, Article IV, Section 435.*

Admission to the Pennsylvania Soldiers' and Sailors' Home should be extended to honorably discharged soldiers, sailors and marines who served in the armed forces of the United States, whether in the regular army, national army, organized militia, organized reserves or national guard called into the Federal service, during the Civil War, the Spanish-American War, the World War, the Philippine Insurrection, the Expeditionary Engagement in China, or in Mexico, or during the Mexican Border Service, provided such persons come within the provisions of Section 6 of the Act of 1885, *supra*.

Department of Justice,  
Harrisburg, Pa., August 3, 1925.

Major David B. Simpson, Commander, Pennsylvania Soldiers' and Sailors' Home, Erie, Pennsylvania.

Dear Sir: You ask to be advised as to the qualifications for admission to the Pennsylvania Soldiers' and Sailors' Home. Your inquiry is prompted by the fact that Federal Aid to the States includes payment on behalf of one who is entitled to admission to the National Home for Disabled Volunteer Soldiers but who is provided for in a State Soldiers' Home; also by the fact that the Federal Law provides that admission to the said National Home for Disabled Volunteer Soldiers shall be extended to honorably discharged officers, soldiers, sailors or marines who served in the regular volunteer or other forces of the United States, or in the organized Militia or National Guard when called into Federal service; and who are disabled by disease or wounds and have no adequate means of support, and by reason of such disability are either temporarily or permanently incapacitated for earning a living.

Your Institution was established by the Act of June 3, 1885, P. L. 63, which was entitled:

"An Act to provide for the establishment and maintenance of a Home for disabled and indigent Soldiers and Sailors of Pennsylvania."

Section 1 provides for a Commission to establish such a Home for those who

"as citizens of this Commonwealth enlisted and participated in the War for the Preservation of the Union of the United States."

Section 6 establishes the qualifications of those entitled to admission thereto as

“those only who at the time of their enlistment in the army or navy were citizens of Pennsylvania, or served in some Pennsylvania organization, were honorably discharged from the service of the United States, and who are in indigent circumstances, and from any disabilities (not received in any illegal act) are unable to support themselves by manual labor, and who cannot gain admission into the Homes for Soldiers and Sailors provided by the Government of the United States.”

Section 1 of the Act of 1885 was amended by Act of March 21, 1907, P. L. 21, so as to extend the benefits of the Act to such soldiers, sailors or marines as participated in the War with Spain, and was further amended by Act of May 17, 1921, P. L. 905 so as to extend its benefits to such soldiers, sailors or marines as participated in any war in which the United States engaged.

Section 1 of the said Act of 1885 and its amendment of 1921, were repealed by the Administrative Code of 1923, Section 2901. (Page 656).

The Administrative Code abolished the Board of Trustees Soldiers' and Sailors' Home, Erie, (Article I, Section 2) and created the Board of Trustees of Pennsylvania Soldiers' and Sailors' Home as a Departmental Administrative Board in the Department of Welfare, (Article II, Section 202), defined the personnel of said Board, (Article IV, Section 435), gave it general direction and control of the property and management of said Institution, and, inter alia, the following power:

“(d) Subject to the approval of the Secretary of Welfare to make such By-Laws, Rules and Regulations for the management of the Institution as it may deem wise.”

Therefore, the qualifications for admission to the Pennsylvania Soldiers' and Sailors' Home must be determined by reference to Section 6 of the said Act of 1885, which must be read in conjunction with its title, and by reference to rules made by your Board with the approval of the Secretary of Welfare, which rules must be in conformity with the Act of 1885.

Thus construed, the Act provides for the admission of disabled and indigent soldiers and sailors, who at the time of their enlistment were citizens of Pennsylvania or served in some Pennsylvania organization and were honorably discharged from the service of the United States, and who are in the circumstances as defined in the said Section.

The intent of the Act is that the Home should be open to the above described persons who were in the Army, Navy or Marine Corps during any war in which the United States engaged. The right to

declare war having been delegated by the States to the Federal Government, we must be governed by the decision of the proper Federal authorities as to what constitutes a war in which the United States engaged.

The Judge Advocate General of the United States has ruled each of the following operations constituted a condition of war :

Operations of the Expeditionary Force in China, (March 21, 1905 C. 17609); Philippine Insurrection following the war with Spain; operations of the Expeditionary Force in Mexico in 1916 (Ops. J. A. G. 99—001, May 9, 1916); Operations on the Mexican Border in 1916-17 (Op. J. A. G. 325, 36, April 14, 1923 and 330.2 May 10, 1923).

War having been declared by the President in 1861, 1898, and 1917, service in the Army, Navy or Marine Corps during such times is, of course, service during a war in which the United States engaged.

You are therefore advised that admission to the Pennsylvania Soldiers' and Sailors' Home should be extended to honorably discharged soldiers, sailors and marines who served in the armed forces of the United States, whether in the regular army, national army, organized militia, organized reserves or national guard called into the Federal service, during the Civil War, the Spanish-American War, the World War, the Philippine Insurrection, the Expeditionary Engagement in China or in Mexico, or during the Mexican Border Service, provided such persons come within the above quoted provisions of Section 6 of the aforesaid Act of 1885.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

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OPINION TO THE PLYMOUTH LOCAL ARMORY  
BOARD

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## OPINION TO THE PLYMOUTH LOCAL ARMORY BOARD

*Municipal liens—Paving—Real estate owned by State—State armory.*

Real estate within the limits of a borough owned by the Commonwealth and used for public purposes as a State armory is not subject to assessment for, or liable to, the payment of any portion of the cost of the paving of a street upon which it abuts.

Department of Justice,  
Harrisburg, Pa., December 10, 1925.

Mr. T. B. Miller, Chairman, Plymouth Local Armory Board, Plymouth, Pennsylvania.

Sir: You have advised this Department that the Borough of Plymouth has assessed against the State Armory located therein a portion of the cost of paving a street upon which the Armory property abuts and you have asked to be advised as to whether or not this property is liable for the payment of such assessment.

The title to the real estate upon which the Plymouth Armory is built is in the Commonwealth and the property is used for armory purposes.

The property of the State is not subject to taxation. *Harrisburg vs. Pennsylvania Canal Company*, 2 Pearson 93; *Philadelphia vs. American Philosophical Society* 42 Pa. 9; *Opinions of the Attorney General* 1905-06 page 176; *Phoenixville Armory* 39 Pa. C. C. Rep. 108. Nor is the property of any of its municipal subdivisions when used for public purposes unless specifically made so by statute. No exemption law is needed to relieve any public property held as such from taxation. *Pittsburgh vs. Subdistrict School* 204 Pa. 635; *Directors of the Poor of Schuylkill County vs. School Directors* 42 Pa. 21; *County of Erie vs. City of Erie* 113 Pa. 360; *Erie vs. School District* 17 Pa. Super. Ct. 33; *Rebb vs. Philadelphia*, 25 Pa. Super. Ct. 343; *Reading vs. Berks County* 22 Pa. Super. Ct. 373.

These cases point out the confusion, increased expense and absurdity of one branch of the government taxing the property of another branch and collecting money from the taxpayers in order to relieve taxpayers; also that a lien for such taxes against such public property could not be collected by the sale of the land against which it is filed (*Philadelphia vs. Am. Philosophical Society*, supra, page 20), not even for municipal taxes for street improvements (*Pittsburgh vs. Subdistrict School*, supra. ); also that the amount of the assessment could not be recovered by an action in assumpsit (*Erie vs. School District* supra. page 38).

That municipal taxes for local improvements, including the paving of a street upon which the land of the public abuts, are included

within this rule clearly appears in the cases of *Pittsburgh vs. Subdistrict School* supra. page 642, *Erie vs. School District* supra., *Rebb vs. Philadelphia* supra.

In *National Guard vs. Tener* 13 W. N. C. 310 (1883) real estate, owned by a private corporation authorized under its charter to hold property for purposes of an armory and which was so used, was held to be public property used for public purposes within the meaning of the Constitution and the Act of May 14, 1874, P. L. 158 and therefore to be exempt from municipal taxes, even though income was derived from an occasional use of the building for other than public purposes.

To the same effect is the case of *Scranton City Guard Association vs. Scranton*, 1 Pa. C. C. 550, and in *Phoenixville Armory* supra., Deputy Attorney General Hargest advised the State Armory Board that no portion of land, title to which was in the Commonwealth for armory purposes, was subject to taxation, even though a dwelling house erected upon the rear of the lot was then yielding a monthly rental.

In the case of *Pittsburgh vs. Subdistrict School* supra on page 645, the Court, in construing the Act of May 16, 1891, P. L. 75, which was similar to the Act under which the filing of the Plymouth lien has been attempted, says "taxation of any kind whatever imposed upon the property would interfere with and defeat the Commonwealth in maintaining the system of education required by the Constitution. Such an intention should not be attributed to the Legislature in the enactment of either special or general tax laws unless it is manifested by clear and explicit language." That case holds that the said Act of 1891 does not apply to property held by the State or by any of its political subdivisions for public use. The same is true of the later acts of assembly authorizing the assessment of the cost of public improvements upon abutting property and of the filing of liens therefor.

You are therefore advised that the real estate in question being owned by the Commonwealth and being used for public purposes is not subject to assessment for, or liable to the payment of, any portion of the cost of the paving of the street upon which it abuts.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

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OPINION TO SUPERINTENDENT OF STATE  
POLICE

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## OPINION TO SUPERINTENDENT OF STATE POLICE

*Railroad police—Powers—Where exercised—Act of Feb. 27, 1865.*

1. Policeman appointed under the Railroad Police Act of Feb. 27, 1865, P. L. 225, and similar acts, have all of the powers of policemen of the City of Philadelphia within the counties in which they are qualified to act.

2. Such powers may be exercised either on or off the property of the corporation upon whose application they have been appointed, but always and only within the counties in which their respective commissions have been recorded pursuant to law.

3. Such special policemen are not under the control of municipal or other authorities, and are not subject to the call of such authorities.

Department of Justice,  
Harrisburg, Pa., February 24, 1926.

Major Lynn G. Adams, Superintendent Pennsylvania State Police,  
Harrisburg, Pa.

Sir: You have requested to be advised, (1) as to the powers of special policemen, appointed under the provisions of the Act of February 27, 1865, P. L. 225, relative to the performance of police duty off of and away from the property of the corporation upon whose request such officer was appointed, including his right to perform such duties outside of the County or Counties in which his commission is recorded; and (2), if such officer is subject to call from municipal and other authorities to perform police duties off and away from the property of such corporation.

The Act of February 27, 1865, P. L. 225, authorizes the Governor, upon application of a railroad corporation, to appoint and commission the persons named in such applications as policemen, to act as such for said corporation. The Act provides that compensation for such services shall be paid by the petitioning corporation.

Section 3 of the Act is as follows:

“Every policeman, so appointed, shall, before entering upon the duties of his office, take and subscribe the oath required by the eighth article of the constitution, before the recorder of any county through which the railroad, for which such policeman is appointed, shall be located; which oath after being duly recorded, by such recorder, shall be filed in the office of the secretary of state, and a certified copy of such oath, made by the recorder of the proper county, shall be recorded, with the commission, in every county through, or into, which the railroad, for which such policeman is appointed, may run, and in which it is intended the said policeman shall act; and such policeman, so appointed, shall severally possess and exercise all the powers of policemen of the city of Philadelphia, in the several counties, in which they shall be so

authorized to act as aforesaid; and the keepers of jails, or lock-ups, or station houses, in any of said counties, are required to receive all persons arrested by such policemen, for the commission of any offence against the laws of this Commonwealth, upon, or along, said railroads, or the premises of any such corporation, to be dealt with according to law."

By supplements and amendments thereto the provisions of this Act have been extended to certain other corporations.

(1) It clearly appears that the purpose of this appointment is the protection of the property of the corporation which requests the appointment, but it also appears that the powers given these policemen are co-extensive with the powers of policemen of the City of Philadelphia, and that the only limitation upon the exercise of such powers is that they shall not extend beyond the county or counties within which the individual policeman has been qualified to act by the filing of his commission and a copy of his Oath of Office with the Recorder of the county.

The case of *Finrock vs. Northern Central Railway Company*, 58 Pa. Super Ct. 52, involved the question of the liability of the defendant, a railroad policeman, to respond in damages for an unlawful arrest for an offense against the laws of the Commonwealth, alleged to have been committed on the railroad premises, where such policeman held no other position under the company, and where the arrest was not directed or instigated by any officer or employe of the company. In that case (page 59), the Court quotes with approval from the case of *Tucker vs. Erie R. R. Co.*, 69 N. J. Law 19, construing a similar statute of New Jersey, *inter alia*, as follows:

"It is plain, from a reading of the provisions of this statute, that although these men were appointed on the application of the defendant company, received their compensation from it, and were subject to be divested of their powers by its act, they were nevertheless state officers, charged with the performance of public duties. They were, in law, police officers, constables, authorized to arrest persons guilty of criminal offenses or breaches of the peace, not only in cases where the property of the company was involved, but in every case where the crime was committed or the peace broken within the boundaries of any of the counties through which the company's railroad ran. For the proper discharge of their official duties, as well as the proper exercise of their official powers, they were responsible, not to the defendant company, but to the state \* \* \*".

The Superior Court in that case, on page 59, after reciting the fact that such policemen receive their appointment from the Governor, and are required to take and subscribe an Oath to support the Con-

stitution of the Commonwealth, and perform the duties of the office with fidelity, says, "These considerations lead strongly to the conclusion that the policeman presumptively acts as a public officer, and not as the servant or employe of the railroad company. It is true, he may be both, as was Geiselman, and in such a case a different question may arise."

In an opinion of this Department, rendered to the Governor under date of June 12, 1918, as reported in 28 Pa. District Reports, 214, it is stated with reference to the special policemen, appointed under the aforesaid Act, that it does "not create them police officers of the Commonwealth, but police officers for the several corporations asking for their appointment, conferring upon them like powers as are possessed by police officers of the Commonwealth."

You are, therefore, advised that the policemen appointed under the aforesaid Act of 1865, and similar Acts, have, during the continuance of their commissions, all of the powers of policemen of the City of Philadelphia within the counties in which they are qualified to act, which powers may be exercised either on or off the property of the corporation upon whose application they have been appointed, but always and only within the counties in which their respective commissions have been recorded pursuant to law.

(2) These policemen, having accepted a commission from the Governor, granting to them all the powers of policemen in Philadelphia, should be held to have accepted that commission subject to a liability for the performance of such duties, punishable for failure to perform the same. It must be remembered, however, that the paramount duty of such officers is the performance of police duty in connection with the property of the corporation upon whose application they have been appointed, and that they cannot be required to perform other independent police duty so as to interfere with the performance of these paramount duties.

You are, therefore, advised in answer to your second inquiry, that the special policemen are not under the control of the municipal and other authorities, and are not subject to the call of such authorities, but that they have the same responsibility with reference to the enforcement of the law as have city policemen or constables in connection with violations which occur within their view.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

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**OPINION TO THE STATE BOARD FOR  
REGISTRATION OF PROFESSIONAL  
ENGINEERS AND OF LAND  
SURVEYORS**

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## OPINION TO THE STATE BOARD FOR REGISTRATION OF PROFESSIONAL ENGINEERS AND OF LAND SURVEYORS

*Public records—Right to examine—Records of Board of Registration of Professional Engineers—Act of May 25, 1921.*

1. At common law, the right to inspect public records or to make copies, abstracts or memoranda therefrom is limited to those persons who have an interest therein such as would enable them to maintain an action for which the document or record sought can furnish evidence or necessary information.

2. The right of the public generally to inspect public records, if it exists, must be based upon some statutory authority.

3. There is nothing in the Act of May 25, 1921, P. L. 1131, relating to the State Board for Registration of Professional Engineers and of Land Surveyors, which authorizes one who shows no special interest therein to have access to the records of the board.

Department of Justice,  
Harrisburg, Pa., March 11, 1925.

Mr. Richard L. Humphrey, President, State Board for Registration of Professional Engineers and of Land Surveyors, 805 Harrison Building, Philadelphia, Penna.

Sir: We understand that request has been made of you by Mr. George E. Stevenson, who signs himself Chairman Legislative Committee, Engineering Society in N. E. Pennsylvania, for permission to extract from your records "the names, residences, action of your Board, etc. of the applicants for registration as Professional Engineers and Land Surveyors."

Two questions are involved: (1) Are such records public records; (2) Is the applicant entitled to inspect the same and make copies thereof?

1. Section 13 of the Act for the Registration of Professional Engineers and of Land Surveyors, approved May 25, 1921, P. L. 1131, is as follows:

"The board shall keep a record of its proceedings, and a register of all applications for registration, which register shall show: (a) The name, age, and residence of each applicant; (b) the date of the application; (c) the place of business of such applicant; (d) his educational and other qualifications; (e) whether or not an examination was required; (f) whether the applicant was rejected; (g) whether a certificate of registration was granted; (h) the day of the action of the board; and (i) such other information as may be deemed necessary by the board."

It is nowhere specifically provided that such register shall be deemed to be a public record, but such seems to be implied.

I therefore advise you that the aforesaid register is a public record.

(2) At common law the right to inspect public documents or to make copies, abstracts, or memoranda therefrom is limited to those persons who have an interest therein such as would enable them to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. The right of the public generally to inspect public records, if it exists, must be based upon some statutory authority. 23 *Ruling Case Law*, page 160; 34 *Encyclopedia of Law and Procedure*, page 592; *Owens vs. Woolridge*, 22 Pa. Co. Court 237; *Commonwealth ex rel. Milliken vs. Board of Revision of Taxes*, 23 Pa. Dist. Rep. 424.

There is no statute in Pennsylvania modifying this common law rule, as applicable to this request, unless it be found in the aforesaid Act of 1921.

Section 14 provides that a certified copy of your records shall be received in evidence in all courts, and elsewhere, and Section 15 requires you to make public a roster of all applicants registered and provides that copies of such roster shall be furnished to all persons registered and shall be filed in certain designated places for the use of the public.

These sections sustain the above stated general rule of the common law. Section 14 affirms the right at common law of one who shows a special interest in the record, which interest is involved in a proceedings in a court or elsewhere, to have a certified copy of the record thereof. This is necessarily limited to that portion of the record that is involved in such proceedings.

The roster which, under Section 15 is to be published, is specifically limited to those applications which are granted, and under the terms of the section, Mr. Stevenson is not entitled to a copy of this roster unless he is a registered engineer or land surveyor, but must content himself with obtaining whatever information he desires therefrom out of a copy posted in one of the places enumerated in the Act.

There is nothing in the said Act of May 25, 1921, which authorizes one, who shows no special interest therein, to have access to your records. Mr. Stevenson has shown no such special interest.

I therefore advise you that the aforesaid request for permission to make an extract from your records should be refused.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,

*First Deputy Attorney General.*

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OPINIONS TO DEPARTMENT OF PUBLIC  
INSTRUCTION

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## OPINIONS TO DEPARTMENT OF PUBLIC INSTRUCTION

*Public officers—Vacancies—Appointment by deputies—Superintendent of Public Instruction—County superintendents.*

1. As section 213 of the Administration Code of June 7, 1923, P. L. 498, which authorizes the appointment of a deputy or deputies by the Superintendent of Public Instruction, uses the words "deputy" or "deputies" in a general sense, and not in any qualified or limited sense, such deputy or deputies may act for the superintendent in his absence, in any and all matters pertaining to the office of Superintendent of Public Instruction, with the exception of those set forth in section 213 of the Code.

2. Such deputy or deputies may, therefore, in the absence of the superintendent, appoint a county superintendent or a trustee of a normal school when there are vacancies in such offices.

Department of Justice,  
Harrisburg, Pa., February 25, 1925.

Honorable Francis B. Haas, Deputy Superintendent Public Instruction, Harrisburg, Pennsylvania.

Sir: Your letter asking to be advised if a vacancy exists in the office of County Superintendent of Schools in Delaware County, and if such vacancy does exist what procedure should be followed, in the absence of the Superintendent of Public Instruction, the department being conducted by deputies, to fill it; also what should be done in filling vacancies in the Boards of Trustees of normal schools, has been received by this Department.

In the Mandamus proceedings of A. G. Criswell Smith, County Superintendent of Public Schools of Delaware County, Pennsylvania vs. J. Geo. Becht, Superintendent of Public Instruction, et al. and members of Public School Employes' Retirement Board of the Commonwealth of Pennsylvania, Docket 1924, No. 69, the Court found:

"It appears from the pleadings that the plaintiff, after he attained the age of seventy years, was retired by the defendants, the members of the Public School Employes' Retirement Board of the Commonwealth of Pennsylvania, as County Superintendent, on June 30, 1924. The Superintendent of Public Instruction could not place his name on the payroll and issue a voucher and requisition upon the proper officers for the payment of his salary unless he was reinstated by said board. We have no jurisdiction to compel the said board to reinstate him by writ of mandamus. It appearing that the plaintiff is no longer county superintendent of Delaware County, he is therefore not entitled to receive his salary as such officer."

Under this finding of the Court, Mr. Smith is no longer County Superintendent of Schools in Delaware County, and I have no

hesitancy in advising you that there is a vacancy in said office.

The School Code in Section 1120 provides as follows:

"Any vacancy in the office of county superintendent, by reason of death, removal, or otherwise, shall be filled for the unexpired term by the Superintendent of Public Instruction, after careful consideration of any recommendations concerning it from the officers of the proper county school directors' association, made within ten days after the vacancy occurs."

This provision has been re-enacted and made part of the Administrative Code, and Section 708 provides:

"The Superintendent of Public Instruction shall:

(c) Fill all vacancies occurring in the office of county superintendent until the next regular election; but in filling such vacancies he shall give careful consideration to any recommendations concerning them made by the officers of the proper county school directors' association, within ten days after the vacancies occur."

Section 213 of the Administrative Code provides:

"Deputies—The head of any administrative department, except the Auditor General, State Treasurer, and Secretary of Internal Affairs, shall have the power, with the approval of the Governor, to appoint and fix the compensation of a deputy or such number of deputies as the Executive Board shall approve, who shall, in the absence of the head of such department, have the right to exercise all the powers and perform all the duties by law vested in and imposed upon the head of such department, except the power to appoint deputies, bureau or division chiefs, or other assistants or employees."

Under the authority given in this Section of the Administrative Code, the Superintendent of Public Instruction appointed deputies, and the question now is what are the powers of the deputies in the absence of the head of the department.

In Throop on Public Offices, Section 583, the following is laid down:

"\* \* \* A deputy cannot regularly have less power than his principal; cannot be restrained from exercising any part of the office, by covenant or otherwise; must regularly act in his own name, unless it be in the case of an undersheriff, who acts in the name of the high sheriff, because the writ is directed to him. \* \* \* A deputy has power to do every act, which his principal might do, and cannot be restrained to some particulars of his office, 'for that would be repugnant to his being deputy.'"

And in Section 585:

"\* \* \* But where a statute empowers a deputy, eo nomine, to perform particular acts, he may lawfully act in his own name; and the courts will not disturb a long settled practice in a public office, of using the deputy's name, instead of the principal's."

Attorney General Carson in an opinion dated June 11, 1903, and reported in 12 District Reports 646, defined the powers of the Deputy Secretary of the Commonwealth, and the opinion being so peculiarly applicable to the question now being considered, I deem it of sufficient importance to quote it at length:

"The Act of March 12, 1791, 3 Sm. Laws, 8, provides that the Secretary of the Commonwealth 'shall have a deputy, to be by him appointed, with the approbation of the Governor, and the said deputy shall be removable by the said Secretary whenever he shall think expedient.' This, so far as I know, is the only legislative provision upon the subject. You will observe that the word 'deputy' is used without any qualifying adjective, such as 'special deputy,' and I interpret it in the general sense which has been uniformly attached to the word 'deputy'.

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

Anderson, in his Dictionary of Law, gives the following definition: 'Deputy; one who acts officially for another; the substitute of an officer—usually of a ministerial officer.'

The American and English Encyclopaedia of Law defines the word as follows: 'A deputy is one who, by appointment, exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable. He must be one whose acts are of equal force with those of the officer himself; must not in pursuance of law perform official functions, and is required to take the oath of office before acting.'

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

can only bind his principal when he does the act in the name of the principal; but a deputy may do the act and sign his own name, and it binds his principal, for a deputy has, in law, the whole power of his principal.'

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

In the Confiscation Cases, reported in 20 Wallace's Reports of the Supreme Court of the United States, page 111, Mr. Justice Strong, in disposing of an objection which had been urged against proceedings in the District Court, to the effect that they had not been signed by the clerk of the court, but had only been signed by the deputy clerk, used these words: 'This was sufficient. An Act of Congress authorized the employment of the deputy, and, in general, a deputy of a ministerial officer can do every act which his principal might do.'

The legal and the popular definitions agree, and I am of opinion that, inasmuch as the Act which authorized you to appoint a deputy uses the term in its general and not in a special sense, the Deputy Secretary of the Commonwealth is authorized to act for you in all matters pertaining to your office, signing his name as 'Deputy Secretary of the Commonwealth.' "

It will be observed that in Section 213 of the Administrative Code, as in the Act of 1791, the words "deputy" and "deputies" are used without any qualifying adjectives, and the words, therefore, are interpreted in the general broad sense which always is attached to the word "deputy".

The deputies, under the law authorizing their appointment, in the absence of the head of the department, have the right to exercise all the powers and perform all the duties by law vested in and imposed upon the head of such department, except the power to appoint deputies, bureau or division chiefs or other assistants or employes. The exception does not include the appointment of a county superintendent or a trustee of a normal school.

I am of the opinion that inasmuch as Section 213 of the Adminis-

trative Code, which authorizes the appointment of a deputy or deputies by the Superintendent of Public Instruction, uses the words "deputy" or "deputies" in a general sense, and not in any qualified or limited sense, such deputy or deputies may act for the Superintendent of Public Instruction, in his absence, in any and all matters pertaining to the office of Superintendent of Public Instruction, with the exception set forth in Section 213 of the Administrative Code.

This empowers a deputy in the absence of the principal to appoint a county superintendent or a trustee of a normal school when there are vacancies in such offices.

.Very truly yours,

DEPARTMENT OF JUSTICE,

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

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*Public Instruction, Department of—Fees chargeable by Examining Boards included within said Department—Where payable—Acts of March 30, 1925, P. L. 92; April 1, 1925, P. L. 111; April 1, 1925, P. L. 112; April 2, 1925, P. L. 119; April 4, 1925, P. L. 142.*

The Department of Public Instruction has the right to fix all fees to be charged by all of the examining boards included therein, including fees for annual registrations,—all of which fees must be paid into the State Treasury.

Department of Justice,  
Harrisburg, Pa., June 4, 1925.

Dr. Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request to be advised with respect to the construction to be placed upon Acts Nos. 77, 78, 65, 86 and 102 of the 1925 Session of the General Assembly. All of these Acts affects the financial affairs of the professional examining boards within your Department.

Act No. 77 approved April 1, 1925 provides that your Department may annually fix the fees to be charged by the several professional examining boards within your Department, prescribing the basis upon which such fees shall be fixed. This Act became effective on June first.

Act No. 78 also approved April 1, 1925 provided that after June first of this year all fees, fines and other income received by the several examining boards should be paid into the State Treasury and that all special funds heretofore existing for the benefit of any of these boards shall be abolished as soon as all liabilities contracted prior to June first and payable out of such funds shall have been paid.

Act No. 65 approved March 30, 1925 requires all licensed under-

takers to register annually with the State Board of Undertakers and to pay for such registration two dollars (\$2.00) or such other fee as may be fixed by the Department of Public Instruction under authority of law. It provides in addition that "all fees collected under the provisions of this section shall go to and be used by the State Board of Undertakers to defray its necessary expenses."

Act No. 86 approved April 2, 1925 requires all persons holding licenses issued by the State Board of Medical Education and Licensure or by your Department acting for that Board, to register annually and to pay for such registration one dollar (\$1.00) or such other sum as may be fixed by the Department of Public Instruction under authority of law. This Act provides that the moneys thus received "shall be available for the use of the said Board of Medical Education and Licensure for the purpose of enforcing the provisions of this Act against unlicensed, illegal and unregistered practitioners."

Act No. 102 approved April 4, 1925 requires osteopathic physicians to register annually with the State Board of Osteopathic Examiners and to pay for such registration three dollars (\$3.00) or such other sum as shall be fixed by the Department of Public Instruction under authority of law. This Act provides that: "All fees received hereunder shall, unless otherwise provided by law, be used by the said Board in carrying out the provisions of this Act."

We understand that you desire to be advised:

1. Whether your Department may lawfully fix the registration fees to be charged for annual registration of undertakers, physicians and osteopathic physicians, respectively, under Acts No. 65, 86 and 102;

2. Whether the fees received by the State Board of Undertakers, the Board of Medical Education and Licensure and the State Board of Osteopathic Examiners, respectively, under the same Acts must be paid into the State Treasury or whether those Boards may under the provisions of the Acts mentioned retain these fees to be used as provided in the said Acts.

With respect to your first question the answer is free from difficulty. Each of Acts Nos. 65, 86 and 102, while it fixes the fee to be charged for registration, provides that the fee shall be the designated sum "or such other fee as may be fixed by the Department of Public Instruction under authority of law." Plainly, the fees fixed by these Acts will be in force only until your Department shall have designated different fees under authority given you by Act No. 77.

While on its face your second question is more difficult there can be no doubt about the proper construction to be placed upon the provisions of the several Acts in question. It is true that Acts Nos. 65 and 86 provide that fees collected for annual registration shall be available to the State Board of Undertakers and the Board of

Medical Education and Licensure respectively; and that Act No. 102 provides that the fees collected for annual registration thereunder shall "unless otherwise provided by law" be used by the State Board of Osteopathic Examiners for carrying out the provisions of the Act. None of these Acts, however, makes an appropriation of the fees collected thereunder, nor is there anything in any of them inconsistent with or contradicting the provision contained in Act No. 78 that every professional examining board within the Department of Public Instruction shall pay into the State Treasury all fees, fines and other income received by it.

The mandate of Act No. 78 must, therefore, be obeyed by every examining board within your Department; all fees must be paid into the State Treasury. Having been paid into the State Treasury these fees can, under the Constitution, be paid out of the State Treasury only after an appropriation made by law, and Acts Nos. 65, 86 and 102 make no such appropriations.

While the Legislature declared its policy to be that fees collected under the provisions of these three Acts should be available to the Boards involved for their work it failed to enact legislation to carry into effect that policy. It should, however, be mentioned in passing that the Legislature did make adequate provision for the work of all of the examining boards within your Department by the appropriation of a lump sum to your Department in the General Appropriation Act.

Accordingly you are advised that your Department has the right to fix all fees to be charged by all of the examining boards within your Department including the fees for annual registrations required under Acts Nos. 65, 86 and 102; and that, without exception, all fees received by the several professional examining boards within your Department must be paid into the State Treasury.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

*Superintendent of Public Instruction—Authority to draw warrants upon the State Treasurer for payment to districts, pursuant to Section 1210, paragraph 23 of the School Code of May 18, 1911, as amended by the Act of 1925—Acts of May 14, 1925, Appropriation Acts, p. 328A, May 18, 1911, P. L. 309, Section 1210, paragraph 23, Section 2301, May 27, 1921, Appropriation Acts, p. 33, June 30, 1923, Appropriation Acts, p. 35, May 6, 1925, P. L. 546.*

The Superintendent of Public Instruction, and not the Auditor General, should draw his warrants upon the State Treasurer for payments made pursuant to paragraph 23, Section 1210 of the Act of May 18, 1911, known as the School Code, as reenacted in 1925.

Department of Justice,  
Harrisburg, Pa., June 16, 1925.

Mr. W. M. Denison, Deputy Superintendent, Administration Office,  
Harrisburg, Pa.

Dear Sir: This Department has your communication of June 11th, containing the following inquiry:

Will you kindly advise me whether Section 2 of Act No. 44-A, Session 1923, or any other provision of the law requires that the Auditor General shall draw the warrants upon the State Treasurer for payments to districts under the Edmonds Salary Act or whether House Bill No. 392, line 6257—June 26—when taken in connection with Section 1210, paragraph 23 of the School Code, requires the State Superintendent of Public Instruction to draw the warrants upon the State Treasurer in favor of each district?

In substance, shall the Auditor General or the Superintendent of Public Instruction draw the warrants upon the State Treasurer for payments under the Edmonds Act?

The General Appropriation Act of 1921, in Section 1, provides as follows:

“Provided, That all sums hereby appropriated shall be paid on the warrant of the Auditor General, drawn upon the State Treasurer, unless otherwise prescribed by law.”

And in the item appropriating to the Department of Public Instruction a sum of \$32,000,000.00 for the support of public schools, etc., the following provision is found:

“The remainder of the amount hereby appropriated shall be paid on warrant of the Superintendent of Public Instruction, drawn in favor of the several school districts of the Commonwealth in amounts and in the proportions designated by law.”

The General Appropriation Acts of 1923 and 1925 both have provision as to the Auditor General drawing the warrants upon the State Treasurer in the manner prescribed by law. In the Acts of 1923 and 1925, the provision “that the remainder of the amount hereby appropriated shall be paid on warrant of the Superintendent

of Public Instruction, drawn in favor of the several school districts of the Commonwealth in amounts and in the proportions designated by law", is omitted. A new provision is found in both of these Acts, namely,

"For reimbursing school districts upon the salaries of school teachers as required by law and for closed schools as required by law."

It will be borne in mind that the General Appropriation Acts are general Acts and deal with the entire subject of "providing 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", and if any particular act deals with any particular subject, which may be embraced in the General Act, the particular act must prevail.

The Act of May 18, 1911, P. L. 309, The School Code, in Section 2301, provides as follows:

"All money appropriated by the General Assembly for the maintenance and support of the public schools of this Commonwealth shall be paid by order on the State Treasurer signed by the Superintendent of Public Instruction."

Section 1210, Paragraph 23 of the School Code, provides:

"The amount apportioned and allotted to each school district shall be divided into equal semi-annual installments, and the Superintendent of Public Instruction shall draw his warrants semi-annually upon the State Treasurer in favor of each district for the amount to which it is entitled, and payment thereof shall be made to fourth class districts during the months of February and August of each year, to second and third class districts during the months of March and September of each year, and to first class districts during the months of April and October of each year."

This provision that the amount apportioned and allotted to each school district shall be divided into equal semiannual installments, and the Superintendent of Public Instruction shall draw his warrants semiannually upon the State Treasurer in favor of each district, was re-enacted by the general Assembly of 1925, in Act No. 292, and it shows that it was the legislative intent that the Superintendent of Public Instruction should draw the warrants upon the State Treasurer for the amount apportioned and allotted to each school district.

Here are particular Acts of Assembly covering a particular subject and their terms must be observed and obeyed.

The general rule as to interpreting statutes like the ones now under

consideration is laid down in *Endlich on The Interpretation of Statutes, Section 216*, as follows:

“Where there are in an act specific provisions relating to a particular subject, they must govern in respect to that subject, as against general provisions in other parts of the statute, although the latter standing alone would be broad enough to include the subject to which the particular provisions relate. Hence if there are two acts, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also, and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision’”.

This same rule is followed in *Thomas vs. Hinkle, 126 Pa. 478*, and in *Kolb vs. Reformed Episcopal Church, 18 Sup. Ct. 477*.

Being, therefore, of the opinion that Section 1210, Paragraph 23 of the School Code, as re-enacted by the Act of 1925, controls the question you have asked, I advise you that it is the duty of the Superintendent of Public Instruction to draw the warrants upon the State Treasurer for payments under the Edmonds Act.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN W. BROWN,

*Deputy Attorney General.*

*State Board for Registration of Professional Engineers and of Land Surveyors—Status of said Board as a professional examining board within the meaning of the Administrative Code—Fees received by Board, where deposited—Expenses of Board payable out of what appropriation—Disposition of special fund known as the Engineers' Fund—Acts of April 1, 1925, P. L. 112, June 7, 1923, P. L. 498, Section 1310.*

The State Board for Registration of Professional Engineers and of Land Surveyors is a professional examining board within the meaning of the Act of June 7, 1923. All fees, fines and other income received by it after June 1, 1925, must be paid into the State Treasury; the balance in the Engineers' Fund as of June 1, 1925, must be transferred into the General Fund, as provided by the Act of April 1, 1925.

The expenses of the Board are clearly payable out of the appropriation to the Department of Public Instruction, contained in the Act of June 7, 1923, for the payment of the expenses necessary for the proper conduct of the work of the professional examining boards within said Department.

Department of Justice,  
Harrisburg, Pa., January 4, 1925.

Dr. Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request to be advised:

1. Whether the State Board for Registration of Professional Engineers and of Land Surveyors is a professional examining board within the meaning of the Administrative Code Act of June 7, 1923, P. L. 498 and Act No. 78 of the 1925 Session approved April 1, 1925?

2. Whether the fees received by this Board should be deposited in the State Treasury?

3. Whether the expenses of this Board should be paid out of the appropriation made by the last Legislature to your Department? and

4. Whether the special fund in the State Treasury known as the "Engineers' Fund" should be transferred to the General Fund in the State Treasury as of June 1, 1925?

By reference to Section 1310 of the Administrative Code it appears that the Legislature specifically dealt with the State Board for Registration of Professional Engineers and of Land Surveyors as a "professional examining board". Section 1310 provides that except in certain particulars "the professional examining boards within the Department of Public Instruction shall \* \* \* exercise the rights and powers and perform the duties by law vested in and imposed upon them\* \* \*."

After noting the excepted particulars the section provides that:

"Subject to the preceding provisions of this section and to any other inconsistent provisions in this act contained \* \* \*."

"The State Board for Registration of Professional Engineers and of Land Surveyors shall continue to exercise the powers and perform the duties by law vested in and imposed upon the said Board".

There can, therefore, be no doubt that the State Board for Registration of Professional Engineers and of Land Surveyors is, under the Administrative Code, a "professional examining board".

Act No. 78 of the 1925 Session approved April 1, 1925, provides that all professional examining boards within the Department of Public Instruction shall after June 1, 1925 pay into the General Fund of the State Treasury all fees, fines and other income received by them under the provisions of the several Acts of Assembly authorizing the collection of such fees, fines and other income. It further provides that as soon after June 1, 1925 as all outstanding liabilities payable out of any of the special funds in the State Treasury for professional examining boards within your Department shall have been paid, all such special fund shall be abolished and all unexpended balances in such funds shall be transferred to the General Fund in the State Treasury. There is no ambiguity in the provisions of Act No. 78. It applies to all examining boards within your Department and of these Boards the State Board for Registration of Professional Engineers and of Land Surveyors is one.

We advise you, therefore, that all fees, fines and other income received by the State Board for Registration of Professional Engineers and of Land Surveyors after June 1, 1925 must be paid into the State Treasury, and that the balance in the Engineers' Fund as of June 1, 1925 must be transferred into the General Fund as provided by Act No. 78 of the 1925 Session.

In the General Appropriation Act of 1925 the Legislature appropriated to your Department the sum of three hundred two thousand eight hundred and twenty dollars (\$302,820) "for the payment of the salaries, wages, and other compensation of the members, officers and employes of the professional examining boards within the Department of Public Instruction, for supplies and equipment, contingent expenses, traveling expenses, incidental and other expenses necessary for the proper conduct of the work of the said examining boards and for the necessary costs and expenses incurred in the prosecution of offenders or violators of the Acts creating any of the said examining boards, their amendments or supplements."

As the State Board for Registration of Professional Engineers and of Land Surveyors is a professional examining board within your

Department its expenses are clearly payable out of the appropriation just quoted.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

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*Department of Public Instruction—Authority of a Deputy Superintendent of said Department to take the place of the Superintendent of Public Instruction and act in his stead on any or all of the boards, commissions, or other governmental agencies in which the latter holds an ex-officio membership—Act of June 7, 1923, P. L. 498.*

The powers and duties imposed upon the Superintendent of Public Instruction are both ministerial and judicial. The latter duties cannot be delegated by him to his deputies. A Deputy Superintendent of Public Instruction may not take the place of the Superintendent and act in his stead on any of the boards or commissions in which the Superintendent holds an ex-officio membership.

Department of Justice,  
Harrisburg, Pa., October 15, 1925.

Honorable Francis B. Haas, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: Your letter, asking whether a Deputy Superintendent of Public Instruction may take the place of the Superintendent of Public Instruction, and act in his stead, on any or all of the Boards, Commissions or other governmental agencies on which the Superintendent holds an Ex-Officio membership, has been received.

Some time ago, this Department advised you as to the powers of Deputies in the absence of the head of the Department. That advice was based entirely upon the powers conferred by Section 213 of the Administrative Code, and cannot, therefore, be considered in answering the question you now ask.

Many of the powers and duties imposed upon the Superintendent of Public Instruction are merely ministerial, and do not require the exercise of judicial determination. There are other duties imposed which are judicial, and such duties cannot be delegated by him to his Deputies.

The rule of law is well settled that ministerial powers may generally be executed by Deputies, but judicial powers may not. Judicial powers are those which involve the exercise of judgment and discretion, and which cannot be delegated to another. Ministerial powers are those which merely involve the following of instructions, such powers which can be performed without the exercise of more than ordinary skill and prudence.

In *Kershner vs. Stoltz*, 1 County Court 72, it was held by the Court:

"An officer whose duties are merely ministerial can appoint a deputy, but a judicial officer cannot delegate his powers to another."

"Official duties involving such discretion and trust that they must be performed by an officer personally cannot be delegated to a deputy; *State vs. Hastings*, 10 Wis. 525; but ministerial duties may be delegated: *People vs. Bank of North America*, 75 N. Y. 547; and officers are frequently authorized to appoint deputies to perform their regular duties, and provision is sometimes made for the appointment of assistant officers. Deputies so appointed are state officers and not merely employees." 36 Cyc. 859.

Discussing the powers of deputies in *Ruling Case Law*, Volume 22, page 584, it is stated:

"Deputies are usually invested with all the power and authority of the principal. Thus a deputy clerk may authenticate instruments for record when his principal is authorized to do so. But if an officer such as sheriff or clerk of court exercises both judicial and ministerial duties, the latter alone can be performed by deputy. For example, a deputy clerk of a court cannot determine whether an injunction should or should not issue, although this may be one of the normal powers of his principal. . . .

"In many jurisdictions the rule prevails that the deputy must sign in the name of his principal, because where the authority exercised by the deputy is manifestly a derivative and subsidiary one, it is the authority conferred on the principal and not an authority inherent in the deputy. It follows, in such cases, that the authority must be exercised in the name of him in whom it exists, and not in the name of him who has no recognized authority. Where this doctrine prevails, whatever official act is done by a deputy must be done in the name of his principal, and not in the name of the deputy. If he undertakes to act in his own name and on his own authority, he no longer acts as a deputy, but in an independent capacity, and his acts can then no longer be recognized as official."

Deputy Attorney General Hargest, in an opinion dated February 7, 1917, held that a Deputy Commissioner of Banking could not lawfully act as a member of Boards in place of the Commissioner of Banking. In the opinion he said:

"In *Bouvier's Law Dictionary*, citing *Allen vs. Smith*, 12 N. J. 159, *Tillotson vs. Cheetham*, 2 Johns (N. Y.) 63, it is said: 'When the office partakes of a judicial and ministerial character, although a deputy may be made

for the performance of ministerial acts, it cannot be made for the performance of a judicial act; a sheriff cannot, therefore, make a deputy to hold an inquisition under a writ of inquiry, though he may appoint a deputy to serve a writ' ”.

The duties of the Boards and Commissions of which you are an Ex-Officio member are many and important. Licenses to practice professions are granted, suspended and revoked. Standards of examinations for different professions are fixed and determined, and many other things, requiring judgment and discretion, come before the Boards and Commissions. The duties, therefore, are judicial, and not merely ministerial.

I am, therefore, of the opinion, and so advise you, that a deputy may not take the place of the Superintendent of Public Instruction, and act in his stead on all or any of the Boards and Commissions in which the Superintendent holds an Ex-Officio membership.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN W. BROWN,

*Deputy Attorney General.*

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*Erie Public Library—Authority to enter into a contract with individual school districts outside the City of Erie, or with the county commissioners, whereby it could extend its services to those who live outside of the Erie School District and cover the entire county—Acts of May 5, 1864, P. L. 826, June 28, 1895, P. L. 411, March 30, 1897, P. L. 10, May 11, 1901, P. L. 180, April 2, 1903, P. L. 133, May 18, 1911, P. L. 309, Chapter XXV, Sections 2507, 2510, 2517.*

The Erie Public Library may not enter into an agreement with either individual school districts outside of the City of Erie, unless such districts adjoin the City, or with the county commissioners, under which it could extend its services to those who live outside of the Erie School District in districts not adjoining.

Department of Justice,  
Harrisburg, Pa., December 9, 1925.

Mr. W. M. Denison, Deputy Superintendent, Administration Office,  
Department of Public Instruction, Harrisburg, Pa.

Dear Sir: Your letter asking for an opinion on the question contained in the communication from Miss MacDonald, Acting Director State Library and Museum, has been received.

The question upon which Miss MacDonald wants advice is about as follows:

May the Erie Public Library enter into a contract with either individual school districts outside of the City of Erie or with the County Commissioners under

which it could extend its services to those who live outside of the Erie School District, the service to cover the entire County?

Since 1864 the establishment and maintenance of free public libraries has been provided for in connection with public schools.

The Act of May 5, 1864, P. L. 826 entitled: "An Act to promote the establishment of district and school libraries," provided that while the library is to be under the management of the Board of School Directors, as trustees, its use and enjoyment are not confined to school children, but may be enjoyed by any person over twelve years of age resident within the district.

Then came the Act of June 28, 1895, P. L. 411 entitled: "An Act for the establishment of free public libraries in the several school districts in the Commonwealth, excepting cities of the first and second class."

The Act of March 30, 1897, P. L. 10 is a supplement to the Act of 1895 and provides:

"That in any school district, except cities of the first and second class, wherein there is or shall hereafter be established, otherwise than under the provisions of the Act to which this is a supplement, a free non-sectarian public library, the school directors, board or organization having control of the common schools of said district may, instead of establishing another public library and providing for its government, extend aid to such library on such terms as to control and management as shall be agreed upon between the managers thereof and the school authorities, and for that purpose may levy the taxes provided for in the act to which this is a supplement in the manner provided therein."

The Act of 1895 is amended by the Act of May 11, 1901, P. L. 180 so as to permit the Board of School Directors to act as trustees of the library upon resolution duly passed by the majority of the Board.

The Act of April 2, 1903, P. L. 133 was a supplement to the Act of 1895 and provides for the joint establishment by a joint township and borough of a free non-sectarian public library by the joint action and at the joint expense of the school authorities of the several districts.

Thus stood the law on the subject of school libraries when the School Code was approved and Chapter 25 of that Code does little more than codify and re-enact the laws above mentioned.

Chapter 25 of the School Code provides for the establishment and maintenance of public school libraries and, as the right to maintain and establish such libraries is purely statutory, only such

rights as are given in the statute can be exercised. Beyond that school districts dare not go.

In the determination of the question under consideration but three sections of Chapter 25 of the School Code need be examined, Sections 2507, 2510 and 2517.

Section 2507 provides:

"The board of school directors in any school district in this Commonwealth may annually appropriate for the support and maintenance of any public school library in its district, out of its annual school taxes, such sums as it may deem proper, not exceeding one mill on the dollar of the total valuation of taxable property in the district: Provided, That when a library is first established, the board of school directors may provide for the building and establishment of such public library, or may provide for the enlargement of any library in like manner as any public school building may be built or enlarged."

This determines just where a Board of School Directors may support and maintain a public school library and for which it may appropriate the money of the district. It must be supported and maintained in the school district, and nowhere is authority given to a School Board to appropriate money for a library located in another district.

Section 2510 provides:

"Instead of establishing or maintaining a separate public school library, any board of school directors may, by a two-thirds vote, join with or aid any individual or association in the maintenance, or the establishment and maintenance, of a free, public non-sectarian library, under such written agreement as it may determine, which agreement shall be entered in full in its minutes. Such agreement shall specify the manner, terms, and conditions agreed upon for, the aiding, establishment, maintenance, or management of such joint library."

This means that instead of establishing or maintaining a separate public school library a Board of School Directors may, as provided, join with or aid in the maintenance or the establishment and maintenance of a free public non-sectarian library in the same school district. This Section of the School Code is practically a re-enactment of the Act of 1897, and the provisions of that Act clearly show that the law was intended to apply to one school district only.

Section 2517 provides:

"Two or more school districts may unite in the establishment or maintenance of a joint public school

library, or may aid in the support of a library as herein provided, subject, as far as they are applicable, to the provisions herein prescribed for the establishment and maintenance of joint schools. Trustees of such library may be appointed either by the school directors of the district or by the joint school committee."

In order to establish or aid a joint school library the provisions for the establishment and maintenance of joint schools, so far as they are applicable, must be observed. Applying these provisions, the districts establishing or maintaining or aiding a joint public school library must be adjoining. The establishing and maintaining or aiding must be paid by the several districts in such manner and in such proportion as they may agree upon. The action of the Boards establishing and maintaining or aiding such library must be recorded in full in the minutes of each Board.

The Boards are authorized to meet jointly and exercise the same authority over the library so established and maintained or aided. No joint public school library shall be established or aided without receiving the affirmative vote of a majority of the members of the Board of School Directors in each district establishing or aiding the same. No joint public school library shall be established or aided unless the several districts intending to establish or aid the same shall enter into and record in their respective minutes a written agreement by and among themselves, setting forth the terms and conditions upon which the library is established or aided.

Other provisions for the establishment and maintenance of joint schools are applicable to the establishment of a joint public school library, but need not be here mentioned.

Repeating that the powers and duties of school directors are entirely statutory, and the only powers of such directors in establishing and maintaining a library being those conferred by Chapter 25 of the School Code, I am of the opinion and advise you that the Erie Public Library may not enter into an agreement with either individual school districts outside of the City of Erie, unless such districts adjoin the Erie City School District, or with the County Commissioners under which it could extend its services to those who live outside of the Erie City School District in districts not adjoining.

Yours very truly,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

*Department of Public Instruction—State Normal Schools—Building and Construction of—"Construction" defined.*

The Legislature of 1925 made an appropriation for "building and construction of State Normal Schools." The word "construction" as used in the Act, means the construction of new buildings and cannot be construed to include repairs, alterations or additions to buildings already constructed.

Department of Justice,  
Harrisburg, Pa., January 4, 1926.

Honorable Francis B. Hass, Superintendent of Public Instruction,  
Harrisburg, Pa.

Sir: This Department has received your letter stating that the Legislature of 1925 made an appropriation for "buildings and construction of State Normal Schools as authorized and approved by the Superintendent of Public Instruction," and asking what meaning is to be placed upon the word "construction" as used in the Act.

Webster defines the word construction "to put together, in their proper place and order, the constituent parts of, to build, to form, as to construct an edifice, a building."

Anderson's Law Dictionary, Construction—"Putting together, ready for use, building; erecting; applied to houses, etc."

Words used in a statute, unless in some way controlled by the context, are to be considered in the ordinary and proper acceptance of the terms used.

In Landis's Appeal, 10 Pa. 379, the Court said: speaking through Justice Coulter:

"In the common understanding and language of the people, when we speak of the erection or construction of a house or building, we mean the erection of a new house or building, and not the repairing of an old one. And we presume that such was the intent of the Legislature, because it accords with what is the spirit, as well as the words of the Act."

In Rand vs. Mann, 3 Philadelphia 429, it was held that every change, alteration or addition in or to an existing structure does not constitute a construction of a building within the meaning of that word as used in the laws giving mechanics liens. The change or alteration must be such that the whole structure as changed or altered would actually be regarded as another new and different building, and the addition of a back building to a main structure, as for instance, a bathhouse and kitchen, to a residence is not the construction of a building.

In Hancock's Appeal, 115 Pa. 1, in construing the Mechanics Lien Act, it was held by the Court that the Act authorizing a mechanics lien to be filed on buildings for work and materials in

the "erection or construction" thereof, means the original building of the house or other building, and cannot be constructed to include the repair, alteration or addition to houses or other buildings already constructed.

You ask if an addition to a building in the form of additional rooms, fire towers, fire escapes, remodeling, construction of refrigeration plant, installation of toilet systems, rebuilding or replacement of old toilet systems are included in the term "for buildings and construction of State Normal Schools." That they are not is shown by the Act itself making the appropriation.

The General Appropriation Act in the paragraph immediately preceding the one making an appropriation for "buildings and construction of State Normal Schools as authorized and approved by the Superintendent of Public Instruction," makes an appropriation

"For the support of State Normal Schools including instruction, operation, maintenance, expenses of boards of trustees and the cost of such necessary additions, extensions, alterations, equipment and repairs, as may be authorized and approved by the Superintendent of Public Instruction."

This clearly and plainly shows the legislative intent that such necessary additions, extensions, alterations, equipment and repairs as authorized and approved by the Superintendent of Public Instruction are to be paid for out of the appropriation made in the paragraph mentioned, and especially made, *inter alia*, for such purposes, and not from the appropriation made for "buildings and construction of State Normal Schools."

I am of the opinion that the word "construction," as used in the paragraph of the Appropriation Act to which you refer, means the construction of new buildings and cannot be construed to include repairs, alterations or additions to buildings already constructed.

Yours very truly,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

*Department of Public Instruction—State Council of Education—Gilberton Borough School District—Loan.*

Legality of a proposed agreement between the State Council of Education and Gilberton Borough School District, whereby the State Council of Education accedes to the request of the School District for a loan of \$13,000 from the income account of the State School fund.

It is within the power of the State Council of Education to loan or use the money in question in the way provided in the proposed agreement and it is within the power of the School District to execute that agreement.

Department of Justice,  
Harrisburg, Pa., May 12, 1926.

Mr. W. M. Denison, Deputy Superintendent of Public Instruction,  
Harrisburg, Pa.

Sir: You have requested an opinion as to the legality of a proposed agreement between the State Council of Education and Gilberton Borough School District, whereby the State Council of Education accedes to the request of the School District for a loan of \$13,000 from the income account of the State School Fund, upon which loan no interest is to be charged, and whereby the School District is to repay to the State Council of Education the said sum of \$13,000 in several payments to be made by deductions from the regular semiannual appropriations to the School District, the amounts and dates of repayment to be determined by the Superintendent of Public Instruction.

The circumstances under which this agreement has been prepared are, briefly, that the School District, having contracted for the erection of a new school building, and having provided for the payment of the cost of that building by taxation, found itself unable to finish the work thus contracted for, because a portion of the assessments for taxation were declared to be illegal in regular judicial proceedings. The object and purpose of the proposed agreement are to enable the School District to complete the building which had been started before the taxes out of which it was intended to be paid were declared null and void.

Two questions present themselves in this connection; first, as to the power of the State Council of Education to make the contemplated temporary loan; second, as to the power of the School District to covenant for the repayment of that loan as provided in the proposed agreement.

As to the power of the State Council in the premises, it is only necessary to say that both under the School Code of 1911 and under Section 1307 of the Administrative Code of 1923 (Act of June 7, 1923, P. L. 498) the State Council of Education has the power and is charged with the duty "to equalize, through special appropriations for this purpose or otherwise, the educational ad-

vantages of the different parts of this Commonwealth." Under this statutory provision you are advised that there is nothing improper in the request which has been made of the State Council by the School District, or in the manner in which the State Council has agreed to assist the School District.

The other inquiry involved in the present situation, namely, as to the power of the School District to consent that its regular semi-annual appropriations shall be partly applied for several years, upon the terms and conditions set forth in the proposed agreement, to the gradual repayment of the loan in question makes necessary a consideration of the Constitutional limitation on municipal indebtedness. Section 8 of Article IX of the Constitution provides as follows:

"The debt of any county, city, borough, township, school district, or other municipality or incorporated district, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur any new debt, or increase its indebtedness, to an amount exceeding two per centum upon such assessed valuation of property, without the consent of the electors thereof, at a public election, in such manner as shall be provided by law."

You inform me that the Gilberton Borough School District at the present time, in consequence of its inability to collect the taxes which were assessed for the purpose of erecting the school building in question, has outstanding a total indebtedness to the full extent permitted by the foregoing provision of the Constitution. Is the contemplated loan a further indebtedness of the School District within the meaning of that provision? Obviously it is not a debt in the technical acceptance of that term.

It has been decided that the validity of municipal contracts, under the Constitutional provision to which reference has been made, is to be judged by the facts existing at the time they are executed; hence, if a contract, when made, is for an indebtedness within the limit, it will be upheld, even though, on account of the happening of subsequent events, the limit may be passed. Thus, in *Addyston Pipe & Steel Co. vs. Corry*, 197 Pa. 41 (1900), it appeared that at the time a contract was entered into for the construction of a sewer, an assessment upon property owners had been made, so that the indebtedness incurred strictly by the city would not be excessive. Subsequently the assessment against some of the property owners was found to be illegal, and the city's debt was thereby increased to an illegal amount. The court nevertheless held that the contract for the construction of the sewer must be held binding. Mr Justice Mitchell said:

"It is not, however, always possible to adapt present action to future results with absolute precision, and if means are adopted which in good faith, according to reasonable expectations, will produce a sufficient fund, the contract entered into on the faith of them should not be held unlawful on account of an unintentional miscalculation, or an accidental and unexpected failure to produce the full result. Thus, if a city at the time of making a contract levies a special tax in good faith supposed to be adequate to meet it, but in consequence of fire or flood or decline in values the result is an insufficient fund, it cannot be held that the contract good at its inception would thereby be made bad. The constitutional restriction was not intended to make municipalities dishonest, nor to prevent those who contract with them from collecting their just claims, but to check rash expenditure on credit, and to prevent loading the future with the results of present inconsiderate extravagance."

Following the reasoning of the Court in the case just quoted it was held in *Rettinger vs. Pittsburgh School Board*, 266 Pa. 67 that where a debt is incurred by a School Board for the construction of a school house, and it is claimed that the amount of it exceeds the Constitutional limit, the burden of proof is on the Board to show that such debt could not be paid out of current revenues; if such evidence is not produced, the Courts will not declare the debt illegal.

More recently in *Jackson vs. School District*, 280 Pa. 601, it was held that a School District, even though it has received the proceeds of promissory notes signed by the President and Secretary of its Board, is not liable upon those notes where it has taken no step by tax levy, or otherwise, to create a current fund for repayment of such debts and has no means of so doing.

From these decisions it is apparent that the Gilberton Borough School District originally attempted and intended to obey "the constitutional provision requiring it to pay as it goes" and that the agreement which it now desires the State Council of Education to execute is but a means of replacing a portion of that fund of which the District was deprived through unintentional miscalculation. The proposed agreement shows that the District still intends "to pay as it goes."

It is to be noted that the proposed agreement contains no pledge of the School District's credit nor agreement to repay the State Council of Education out of future revenues. In short, what the proposed agreement is intended to accomplish is the meeting of an emergency caused by the disappearance of the source of the revenue which the School District thought it had provided when it undertook to erect the school building. Because of the fact that this

emergency is to be met by a temporary use of the income of the State School Fund, you are advised that the transfer of the money named in the proposed agreement from the State Treasury to the School District is not an increase in the indebtedness of that District within the meaning of the Constitutional provision under consideration. If the School District has not originally sought to pay for the new building by a tax levy, the situation possibly would be one where the State Council could not constitutionally render assistance. But as the situation actually exists, you are advised that it is within, first, the power of the State Council of Education to loan or use the money in question in the way provided in the proposed agreement; and secondly, it is within the power of the School District to execute that agreement.

Yours very truly,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

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*Department of Public Instruction—Teacher's Certificates—Basis for Granting of—  
Acts of 1923, P. L. 316; 1925, P. L. 142; April 27, 1925.*

Whenever the blanks furnished by the Department to applicants for teachers' certificates are properly filled out, the statements therein with regard to general health certified to by licensed osteopathic physicians and surgeons should be received as the basis for the granting of teachers' certificates.

Department of Justice,  
Harrisburg, Pa., September 18, 1926.

Dr. Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: Your communication of September 16, 1926, in which you set forth the confusion and misunderstanding which have arisen regarding the authority and obligation of the Department of Public Instruction to accept a certificate signed by a properly licensed osteopathic physician as the basis for the issuance of a teacher's certificate, has been received and thoroughly considered.

The most recent legislation that bears on the difficulties with which you are confronted is contained in the Act of April 27, 1925, P. L. 316, which is an Act amending certain earlier legislation with regard to the practice of osteopathy, the examination and licensing of osteopaths, and providing for the effect of reports and certificates made by osteopathic physicians. The portion of the Act to which I refer reads as follows:

"Every license issued by said board to practice surgery shall authorize the holder thereof to practice major or operative surgery, as taught and practiced in the legally incorporated, reputable colleges of osteopathy; and the use of 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, shall not be considered the practice of medicine, or in violation of any of the laws relating to the practice of medicine or regulating public health."

The most important part of this legislation is that which declares that the use by osteopaths of anaesthetics, anticeptics, narcotics, and germicides shall not be considered as a violation of any of the laws relating to the practice of medicine or regulating public health. This means that osteopathic physicians and surgeons are not amenable to the laws relating to the general practice of medicine, especially, in so far as penalties are provided for the violation of those laws. In other words, osteopathic physicians and surgeons are placed on an equality before the law with physicians and surgeons of all other schools. Therefore, so long as an osteopathic physician or surgeon is practicing under authority from the State Board of Osteopathic Examiners, and has paid his annual license fee, his authority with regard to matters of public health is the same as that of physicians and surgeons of other schools.

Annual registration of osteopathic physicians and surgeons was provided for by the Act of April 4, 1925, P. L. 142; which in terms is virtually the same as the Act providing for the annual registration of physicians and surgeons in general. Having been passed at the same Session of the Legislature which adopted the Act hereinbefore referred to, the later statute is really a supplement of the earlier one.

By the Act of June 14, 1923, which amends the Act of March 19, 1909, P. L. 46 and the Act of May 17, 1917, P. L. 229, it is provided that

"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 relating 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 departments to whom the same are made, with the same force and effect as reports or certificates issued by physicians of other schools."

It is to be noted that among the duties specifically imposed on osteopathic physicians and surgeons is that of reporting and certifying all births and deaths and all matters of public health the same as physicians of other schools. This provision is followed by the further provision that all such reports and certificates when made or issued by osteopathic physicians shall be accepted by the persons, partnerships, corporations, officers, boards, bureaus or departments to whom the same are made with the same force and effect as reports or certificates issued by physicians of other schools. The statutory provisions just referred to obviously permit osteopathic physicians and surgeons to issue general health certificates; otherwise osteopaths could not certify to births and deaths. This extension of the powers of osteopathic physicians and surgeons is not a departure from the limitations surrounding the practice of osteopathy, as set forth in earlier statutes of the State. It is virtually a classification of osteopathic physicians and surgeons with practitioners of all other schools of medicine so far as the issuance of certificates required by law for the purpose of furnishing the proper officials of the Commonwealth with correct vital statistics, and of enabling citizens of the Commonwealth who are required to produce health certificates before they can be employed in certain occupations, to resort to osteopathic physicians and surgeons for such certificates, as well as to Doctors of medicine. The language of the Act last quoted would seem not only to authorize but to oblige the Department of Public Instruction to accept such health certificates when presented by applicants for the positions of teachers.

The only apparent obstacle in the way of reaching this conclusion is contained in Section 1320 of the School Code, which provides:

"No teacher's certificate shall be granted to any person who has not submitted upon a blank furnished by the Superintendent of Public Instruction a certificate from a physician legally qualified to practice medicine in this Commonwealth, setting forth that said applicant is neither mentally nor physically disqualified by reason of tuberculosis or any other chronic or acute defect."

At the time the School Code was adopted osteopathic physicians and surgeons were not authorized to issue the necessary certificates called for by Section 1320 of that code; but the three Acts to which reference has hereinbefore been made, namely, the Act of June 14, 1923, the Act of April 4, 1925 and the Act of April 27, 1923, confer upon osteopathic physicians and surgeons the authority in this regard which they lacked at the time of the adoption of the School Code, and to that extent amend Section 1320 of the School Code.

You are, therefore, advised that, so long as the blanks which your

Department furnishes to applicants for teachers' certificates are properly filled out, the statements therein with regard to general health certified to by osteopathic physicians and surgeons should be received by your Department as the basis for the granting of teachers' certificates.

Yours very truly,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,

*Deputy Attorney General.*

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**OPINION TO PUBLIC SERVICE COMMISSION**

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## OPINION TO PUBLIC SERVICE COMMISSION

*Public Service Commission—Jurisdiction—Power companies—Issuance of securities—Lease—Approval of commission.*

1. The Public Service Laws of July 26, 1913, P. L. 1374, as amended by the Act of March 3, 1921, P. L. 43, does not make the approval of the Public Service Commission a condition precedent to the issuance of securities by public service companies.

2. The requirement of the law is met if a certificate of notification fully responsive to all the questions contained in the commission form is tendered for filing, accompanied by the statutory filing fee.

3. The approval of the Public Service Commission is necessary where a power company of Pennsylvania proposes to lease its riparian properties in Pennsylvania to a corporation of another state.

4. The commission has power in such case to inquire into the rental terms of the agreement, and can refuse its approval should it appear that any such provisions are derogatory to the services, accommodation, convenience or safety of the public.

5. The commission has the power and is required to pass upon the terms of a lease of transmission lines of one Pennsylvania power company to another Pennsylvania company.

6. While the commission is not required to pass upon a general agreement of several power companies as to the undertaking of each in respect to the construction and financing of a power project, such agreement cannot become effective if it appears that several of the undertakings contained therein require the approval of the commission and such approval is not obtained.

7. The transmission of electric energy generated in one state into another constitutes interstate commerce.

8. Where a Pennsylvania company receives such power and distributes it to its customers, the commission has jurisdiction over the rates charged until Congress has expressly acted.

Department of Justice,  
Harrisburg, Pa., October 2, 1925.

Hon. Wm. D. B. Ainey, Chairman The Public Service Commission  
of Pennsylvania, Harrisburg, Pennsylvania.

Dear Chairman Ainey: In reply to your communication requesting my advice with respect to certain questions specifically set forth in the two letters of C. C. Merrill, Executive Secretary of The Federal Power Commission, which you enclosed: The questions concern the extent of your Commission's jurisdiction over certain proposed transactions involved in the consummation of what is known as the Conowingo Project, being the creation of a power pool on the Susquehanna River in the States of Maryland and Pennsylvania; the construction of a hydro-electric generating plant in the State of Maryland; and the transmission of the major portion of electric energy thus produced, to and for consumption in a certain area in the State of Pennsylvania.

Mr. Merrill's requests were for the purpose of information and guidance to the Federal Power Commission in the issuance of its license for the Project and for determining the extent of its regulatory authority over the several corporate parties to the Project. I shall abstain herein from a narration of the details of the said Project, they are contained in eight contemplated agreements, printed copies of which are in your possession; also from extensive quotations from The Public Service Company Law or The Federal Power Act, both of these enactments are well known and readily accessible to you. I shall approach the questions from the aspect of your authority as a single and independent regulating agency and will not discuss herein your power to function jointly with the rate regulating authorities of the State of Maryland, and this solely for the reason that I do not consider the question of your authority so to jointly regulate as being necessarily involved in the questions as propounded. I shall also identify the corporation, owning the Pennsylvania pool, and the lessor of the Pennsylvania transmission line, as the Philadelphia Electric Power Company, because Mr. Merrill's inquiries thus style the corporation. While I understand it is the contemplation of the parties to ultimately make this the corporate name, the requisite legal procedure has not yet been taken, the present legal title of the company being the Susquehanna Water Power Company.

The first question is:—

What authority has your Commission over the issuance of securities of public utility electric corporations organized within the State?

The answer to the question is to be found in Article III Sec. 4 of The Public Service Company Law, dealing with the powers and limitations of powers of public utilities, and Article V Sec. 1 of the same statute, amended in other respects by the Act of March 3, 1921, P. L. 43, dealing with the powers and duties of the Commission. The section first referred to, after authorizing the issuance of securities in accordance with the requirements of the State Constitution, making fictitious issues void and empowering, but not requiring, a utility to obtain, by application, a certificate of valuation from the Commission to the effect that any particular issue is not within the constitutional inhibition, provides for the filing on, or prior to, the date of issuance of securities payable more than twelve months thereafter, what is styled by the act a Certificate of Notification. The section makes certain specifications with respect to the contents of the certificate and empowers the Commission to require additional information and to prescribe the form of the certificate. When filed the certificate is expressly made a public record and the Commission is authorized to give such further publicity as it

deems to be for the public welfare. Article V Sec. 1 invests the Commission with general administrative power "as provided in this act" to supervise and regulate public utilities doing business in the Commonwealth including "the power to inquire into and regulate as specifically provided in this act, the issuing of stocks, trust certificates, bonds, notes, or other securities by public service companies."

It is apparent that the Legislature did not intend to make Commission approval a condition precedent to security issues. The requirement of the law is met if a certificate of notification fully responsive to all the questions contained in the Commission form is tendered for filing, accompanied by the statutory filing fee.

The second question is:—

Has The Public Service Commission authority to pass upon and does the law require it to approve the terms of the "Pool Agreement," so-called, under which it is proposed to lease the riparian properties of the Philadelphia Electric Power Company in the State of Pennsylvania to the Susquehanna Power Company, a Maryland corporation, and does such authority to pass upon, or requirement of approval, extend to the annual rental which it is proposed to charge under such agreement?

The said "Pool Agreement" cannot become a valid contract until approved by your Commission. It contemplates a sale, assignment, lease or transfer of properties, power, franchises, or privileges by a utility doing business in Pennsylvania within the meaning of Article III Sec. 3 cl. (c) of The Public Service Company Law which enacts that:

"Upon like approval of the Commission first had and obtained, as aforesaid, and upon compliance with existing laws, and not otherwise, it shall be lawful—

"(c) For any public service company to sell, assign, transfer, lease, consolidate, or merge its property, powers, franchises, or privileges, or any of them, to or with any other corporation or person."

It will be noted that the operation of the provision is upon the utility proposing to dispose of its property, that is, the vendor, assignor, transferer or lessor and that the identity or character of the vendee, etc., is immaterial. It was of no moment to the legislative mind that the vendee, lessee, etc., be a non-utility corporation or an individual or a corporation, utility or otherwise, of another state. No domestic utility could dispose of those things which might be essential (as enumerated in the statute) to the discharge of its public obligations, until the state, through the Commission had passed upon and given its approval.

By Article V Sec. 18 of the statute it is, inter alia, provided:

“When application shall be made to the Commission \* \* \* by any public service company \* \* \* for the approval by the Commission of the sale, assignment, transfer, lease, consolidation, or merger of any of its powers franchises or privileges with any other corporation or person; \* \* \* such approval, in each and every case, or kind of application, shall be given only if and when the said commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience, or safety of the public.”

The reference in Article III Sec. 3 cl. (c) to “like” approval and “as aforesaid” is to the next preceding section which provides that the Commission’s approval is to be “evidenced by its certificate of public convenience.”

In its consideration of the matter the Commission has full power to inquire into the rental term of the agreement and can refuse its approval should it appear that any such provisions were derogatory to the service, accommodation, convenience or safety of the public.

The third question is:—

Does the Commission have authority to pass upon and does the law require it to approve the terms of the lease of the transmission lines in Pennsylvania by the Philadelphia Electric Power Company to The Philadelphia Electric Company (both Pennsylvania corporations), including the annual rental which it is proposed to charge? The answer together with the reasons, given to the question immediately preceding, applies in its entirety to this question. The lease, including rental provisions, must be approved by your Commission before the agreement is a valid contract.

The fourth question is:—

Does the Commission have authority to pass upon and does the law require it to approve the “Master Contract”, so-called, between the several corporations, or would any rights or obligations under such contract be limited to such rights and obligations as existed under the several individual leases and contracts so that the authority to regulate the terms of the latter would be sufficient?

The “Master Contract” is an agreement among The Susquehanna Power Company, Philadelphia Electric Power Company, The Susquehanna Electric Company and The Philadelphia Electric Company as to the undertakings of each of the corporations with respect to the construction, leasing and financing of the Conowingo Project and the operation thereof and disposition of energy produced thereby. The law does not require that this agreement be submitted to the Commission for its approval. However, several of the undertakings therein contained and vital to the corporate plan of the project can-

not be consummated until the approval of the Commission is obtained.

The fifth question is:—

Has the Commission authority to require the maintenance of a system of accounts and reports by the Philadelphia Electric Power Company, a non-operating concern?

An answer to this question must await a fuller disclosure of the facts than now in my possession. The Philadelphia Electric Power Company has corporate responsibilities to supply electric current to the public within the confines of its charter territory. The plan seems to contemplate that the said company will meet this duty by distributing energy purchased from the Susquehanna Electric Company. Should this be the fact, said Philadelphia Electric Power Company would not be a “non-operating concern” and would clearly be subject to Article II Sec. 1 cl. (i) of the Commission’s organic act, making it the corporate duty

“To adopt, use and keep, in conducting its business, such form, method, system, or systems of accounts, records, and memoranda as shall be prescribed by the commission; to carry no charges in any operating account which should properly be charged to the capital account, or vice versa; to carry a proper and reasonable depreciation account, if required so to do by order of the commission; and to obey and abide by all the regulations and orders of the commission concerning such accounts, records, and memoranda, and the keeping of the same.”

I accordingly abstain from answering at this time your fifth question. It can be renewed if deemed necessary after all the facts pertaining to the matter have been developed.

The sixth question is:—

Has the Commission authority to pass upon the terms of the “Operating Agreement”, so-called, between The Susquehanna Electric Company and The Philadelphia Electric Company, or the annual payments to be made thereunder?

Under this contract the Susquehanna Electric Company agrees that it will so operate the properties leased to it by the Susquehanna Power Company, including the right to the exclusive benefit and enjoyment of the Pennsylvania Power Pool acquired by the said Susquehanna Power Company under agreement with the Philadelphia Electric Power Company, as to deliver to the high tension transmission line constructed by the Philadelphia Electric Power Company in Pennsylvania from the Pennsylvania-Maryland boundary line, (said line being leased to Philadelphia Electric Company), the maximum hydro-electric energy consistent with the capacity of

the plant, the flow of the Susquehanna River, and certain energy requirements of the market local to the power plant. The operating agreement is between the Susquehanna Electric Company and the Philadelphia Electric Company. It contains the measure of compensation to be made for the energy thus to be transmitted. The contract does not require the approval of your Commission, as a condition precedent to its validity. Your Commission can, however, require, under Article II Sec. 1 cl. (g) that a certified copy of the contract be filed with it.

The seventh question is:—

If such operating agreement is executed and becomes effective in its present form, can it later be made subject to review or revision directly or indirectly in any rate-making proceeding in Pennsylvania?

The Susquehanna Electric Power Company as hereinbefore indicated is a corporation of the State of Maryland. It does not contemplate registering in Pennsylvania as a public service company engaged in business in this State. While it succeeds to the rights of its lessor (The Susquehanna Power Company) in the Pennsylvania pool, that right is expressed to be only the right of "exclusive use and benefit", maintenance and anything necessary to be done in the future with respect to the Pennsylvania pool, being performed by one or the other of the Pennsylvania companies. The place of delivery of electric energy by the Maryland company is expressly stated to be at a point on the Pennsylvania-Maryland boundary.

I am of the opinion that your Commission should approach the consideration of the project on the theory that it singly lacks authority to regulate directly the rate provisions of the operating agreement. That the transmission of electric energy generated in one state, into another, constitutes interstate commerce, seems clear by analogy with the transportation of natural gas. (*P. U. Commission v. Landon*, 249 U. S. 236; *Pa. Gas Co. v. Public Service Commission*, 252 U. S. 23). Its status as interstate commerce was directly ruled by the West Virginia Supreme Court of Appeals in *Hill Creek Coal and Coke Co. v. Public Service Commission*, reported in *American Law Report*, Vol. VII, p. 1081. In the case of *Missouri v. Kansas Gas Co.*, 265 U. S. 298, it was decided that the business of piping natural gas from one state to another and selling it, not to consumers, but to independent distributing companies which sell it locally to the consumers, was interstate commerce free from state interference and that an attempt of a state to fix the rates chargeable in this interstate business was a direct burden on interstate commerce, even in the absence of any regulation of it by Congress.

Aside from the fact that under the project the "distributing" company (the Philadelphia Electric Company) is to own all of the

capital stock of the "transmitting" company, Susquehanna Electric Company, except qualifying shares, the interstate commerce between the parties would seem to be no different in principle than that before the court in the case last cited. Whether this stock ownership has any bearing with respect to the authority of your Commission to exercise regulatory control over the rate provisions of the agreement under consideration, I deem it necessary for the present purpose to inquire, inasmuch as the Philadelphia Electric Company could, through the medium of a non-utility holding company or other corporate device, divest itself of such stock ownership and still insure against the acquisition of control of the Maryland company by adverse interests. As to any Commission power to review or revise indirectly any rate provision of the operating agreement, I advise you that, whether the Philadelphia Electric Company in distributing electric energy purchased under the agreement would function in interstate commerce or not, the rates charged to its consumers would be subject under the present law to the jurisdiction of your Commission. The character of its interstate commerce, if any, would be local and not national and would accordingly come within the Pennsylvania Gas Company decision hereinbefore cited wherein authority of the state to regulate the rates until Congress had expressly acted, was definitely conceded.

In any Commission inquiry into the reasonableness of rates of the Philadelphia Electric Company, moneys paid by said company pursuant to contract provisions, and charged to operating expenses, would be before the Commission, although the scope of the Commission's authority in such a proceeding with respect to such contract payments could not at this time be definitely described. The question of managerial judgment would be a factor in the case, and the extent of power of a regulatory body functioning in an inquisitorial and corrective capacity, is a matter determinable only under all the facts and circumstances with respect to a particular company at a particular time.

The eighth question is:—

Has the Commission authority to pass upon and does the law require it to approve the "Guaranty Agreement," so-called, between The Susquehanna Electric Power Company, a Maryland corporation, and The Philadelphia Electric Company, a Pennsylvania corporation?

Pursuant to the provisions of this agreement the Philadelphia Electric Company guarantees to The Susquehanna Electric Power Company the faithful performance of the obligations and undertakings of the latter's lessee (The Susquehanna Electric Company) as contained in a contract called "Lessee of Maryland Properties."

No provision of The Public Service Company Law confers or imposes on the Pennsylvania Public Service Commission the power or duty to pass upon or approve the "Guaranty Agreement."

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General.*

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**OPINIONS TO SCHOOL EMPLOYEES'  
RETIREMENT BOARD**

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## OPINIONS TO SCHOOL EMPLOYES' RETIREMENT BOARD

*Public School Employees' Retirement Board—Legal authority to invest funds in 5% water works bonds of the Borough of Ashland, Pa.—Acts of April 5, 1917, P. L. 47, May 20, 1889, P. L. 246, Section 17, June 28, 1923, P. L. 884, July 18, 1917, P. L. 1043.*

The bonds in question are an obligation of the Borough of Ashland and are a first lien on the entire water works system of said Borough.

They are legal investments of the Retirement Board.

Department of Justice,  
Harrisburg, Pa., June 23, 1925.

Dr. H. H. Baish, Secretary, School Employees' Retirement Board,  
Harrisburg, Pennsylvania.

Sir: This Department has received your letter in which you state "The School Employees' Retirement Board has been offered \$100,000 Borough of Ashland, Schuylkill County, Pennsylvania, 5% Water Works Bonds," and asking, 1st. If these bonds are first mortgage on the entire Water Works System of the Borough? 2nd. If they are an obligation of the Borough of Ashland? And 3rd. The legality for investment purposes by your board of these bonds.

The answers to questions one and two must be determined by an examination of the action of the Borough authorities in issuing the bonds and ascertaining what obligation the Borough assumed.

The Borough of Ashland by a number of deeds, the first in October 1876, and the last in December 1923, had conveyed to it all the land upon which the Water Works of said Borough is erected and which is used in the operation thereof. All the said deeds are of record in the Recorder's Office of Schuylkill County. The Borough being the owner is also the operator of the entire Water Works System and it is now a municipally owned and operated plant.

It was found necessary to borrow the sum of \$300,000 for additions, extensions, replacements and betterments to the existing Water Works owned and operated by the Borough. An ordinance was duly enacted, approved by the burgess, recorded in the minute book of the town council and advertised as required by law, authorizing the creation of a bonded indebtedness consisting of an issue of municipal Water Works bonds.

By Section 8 of the said ordinance it is provided as follows:

"SECTION 8. The proper officers of the Borough of Ashland are hereby authorized and directed, prior to the execution of the bonds hereinabove provided for, to execute and deliver to Provident Trust Company of Philadelphia, as Trustee, an Indenture of Mortgage or

Deed of Trust evidencing and making effective the lien of said bonds upon all of the water works and land appertaining thereto, including pipe lines, reservoirs, basins, dams, spillways, gate houses, intakes, causeways and distribution systems, and of property hereafter acquired by the Borough of Ashland for use in connection with said water works to secure the lien of said bonds, said Mortgage to contain a covenant that the said Borough of Ashland will not create any farther bond issue than the present issue of Three Hundred Thousand (\$300,000) Dollars for paying or reimbursing to itself the cost of the acquisition or construction of said water works or any improvements or betterments appertaining thereto made prior to May 1, 1925, or for any unfulfilled contract obligations of the Borough with reference thereto outstanding on said date, and a further covenant that the Borough of Ashland will not grant a franchise to any privately owned water company to occupy the streets of said Borough in laying its pipes for the distribution of water as long as any of the bonds provided for therein are outstanding."

By virtue of the above section a mortgage or deed of trust was executed by the Borough to the Provident Trust Company of Philadelphia, as Trustee, wherein all the premises and property of the water works system was conveyed to the Trustee. In the mortgage the following covenant is contained:—

SECTION 4. That this Indenture shall, during the term of said bonds be and remain a first and direct lien upon the premises and property conveyed by the granting clauses hereof, and upon all renewals and replacements thereof, and all property hereafter acquired by the Borough or used in connection with or appurtenant to said water works, and that it will not create or suffer to be created, any debt, lien or charge which would constitute a lien prior to or upon a parity with the lien of this Indenture, upon the trust estate or any part thereof, and that it will not suffer any liens, statutory or otherwise, to remain upon the said property or any part thereof, the lien whereof might or could be held to be prior to the lien of this Indenture, and that it will not suffer any other matter or thing whatsoever whereby the lien hereby created might be impaired; \* \* \*".

The ordinance having authorized the creation of a bonded indebtedness consisting of an issue of municipal water works bonds and further having authorized and directed the proper officers of the Borough, prior to the execution of the bonds, to execute and deliver the mortgage or deed of trust evidencing and making effective the lien of said bonds upon all of the water works and land appertaining thereto and the mortgage or deed of trust having been

executed containing the covenant that the mortgage or deed of trust shall during the term of the bonds be and remain a first and direct lien upon the premises and property conveyed, there can be no question that the bonds issued under the said mortgage or deed of trust are a first lien on the entire water works system of the Borough.

Are the Bonds obligations of the Borough of Ashland?

In the ordinance authorizing the creation of a bonded indebtedness consisting of an issue of municipal water works bonds the treasurer of the Borough is directed to establish a sinking fund for the purpose of paying the interest and State tax on the bonds and the principal at maturity.

Section 5 of the ordinance reads as follows:

“SECTION 5. For the purpose of paying the interest and State tax on said bonds and the principal thereof at maturity, the Treasurer of said Borough of Ashland is hereby directed to establish a Sinking Fund out of the annual net revenue derived from the Water Works in the sum of Twenty-One Thousand (\$21,000) Dollars annually; said Sinking Fund to be deposited in equal semi-annual installments on or before the fifteenth day of October and April of each year, during the life of the bonds hereby authorized in a reputable bank or trust company, in an account to be known as ‘Sinking Fund, Municipal Water Works of the Borough of Ashland, Pennsylvania,’ said deposits shall be subject to withdrawal by the order of the proper officers only for the payment of the interest and State tax on said bonds and the principal thereof at maturity, and for no other purpose whatsoever.”

In case the revenues from the water works should at any time be insufficient to pay the interest and tax on said bonds and the principal at maturity, Section 6 of the ordinance was passed and is as follows:

“SECTION 6. There is hereby levied and assessed on all persons and property, subject to taxation for municipal purposes within the Borough of Ashland an annual tax in such amount as may be necessary for the payment of the interest and State tax on said bonds and the principal thereof at maturity, commencing with the year 1926, being the first fiscal year following the issue of said bonds, and continuing up to and including the year 1955.”

This section levies and assesses on all persons and property subject to taxation for municipal purposes within the Borough an annual tax for the payment of the interest and State tax on said bonds and the principal at maturity and thereby makes the bonds obligations of the Borough.

This is followed by the covenants in the mortgage or deed of trust among which is the following:—

## “ARTICLE I

### COVENANTS OF THE BOROUGH.

The Borough hereby covenants and agrees:

SECTION 1. That it will duly and punctually pay the principal of and interest on every bond issued under this Indenture, on the dates and in the manner specified in such bonds and in any coupons thereto belonging, according to the true intent and meaning thereof. The coupons on bonds registered as to principal shall be payable to the bearer of such coupons in the same manner as coupons on bonds not so registered. All matured bonds and coupons when paid shall be cancelled and forthwith deposited with the Trustee.”

This is an expressed covenant or agreement by the Borough that it will pay the principal of and interest on every bond issued under the mortgage or deed of trust. It is hard to see how the bonds could be made more binding as obligations of the Borough.

The legality of these Bonds for Investment Purposes by your Board.

The Act of July 18, 1917, P. L. 1043 establishes a public School Employees' Retirement System and creates a Retirement Board for the administration thereof. Section 6 of the Act deals with the management of the funds of the system and is as follows:

“The members of the retirement board shall be the trustees of the several funds created by this act, and shall have exclusive control and management of the said funds, and full power to invest the same; subject, however, to all the terms, conditions, limitations, and restrictions imposed by this act upon the making of investments; and subject, also, to the terms, conditions, limitations, and restrictions imposed by law upon savings banks in the making and disposing of their investments; \* \* \*”.

This limits the investment of the funds of the System “to the terms, conditions, limitations and restrictions imposed by law upon savings banks in making and disposing of their investments”.

What investments savings banks may make is definitely settled by law and by the Act of May 20, 1889, P. L. 246, in Section 17 it is provided as follows:—

“SECTION 17. 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.

By the Act of April 5, 1917, P. L. 47, bonds issued by Federal Land Banks were added to the list of investments for savings banks, and by the Act of June 28, 1923, P. L. 884, amending the Act of 1917, bonds issued by Joint Stock Land Banks. The bonds now under consideration are bonds of the Borough of Ashland, issued pursuant to the authority of the law of the State and are legal investments for savings banks. Being legal investments for savings banks, they are, therefore, legal investments for your Board.

I, therefore, advise you, First, that the bonds in question are a first Lien on the entire water works system of Ashland Borough. Second, that the bonds are an obligation of the Borough of Ashland, and Third, that they are legal investments for your Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

*Public School Employes' Retirement Board—Authority to include extra salary when computing contributions to the Retirement Fund and when computing the final salary upon which the retirement allowance is based—Act of 1917, P. L. 1043, Section 7, Paragraph 5.*

Where teachers are employed annually for extra teaching periods and for this extra service receive an additional monthly salary the Board may include this extra salary when computing contributions for the final salary upon which the retirement allowance is based. But the Board may not include this extra compensation where a teacher received extra compensation for occasional temporary service.

Department of Justice,  
Harrisburg, Pa., December 15, 1925.

Mr. H. H. Baish, Secretary, School Employes' Retirement Board,  
Harrisburg, Pennsylvania.

Sir: In your letter of recent date addressed to the Attorney General, you ask whether the School Employes' Retirement Board has the right to include extra salary when computing contributions to the Retirement Fund and when computing the final salary upon which the retirement allowance is based: (a) In a case where public school teachers are employed annually for extra teaching periods and for this extra service an additional monthly salary is paid; (b) in the case where the teacher receives extra compensation for occasional extra temporary service such as the taking of school census, etc.

The Act of 1917, P. L. 1043, Section 7, paragraph 5, relating to this subject, provides:

"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 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 \* \* \*, 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; \* \* \*."

In a former opinion by this Department, dated January 9, 1923, it was held that the words "salary" and "wages" as found in the Act are synonymous and 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.

If, as stated in Section 7, the per centum to be deducted shall be based on the total amount of the salary earnable by a contributor

in such pay-roll period, and in deducting this total amount earnable the Board may consider "the rate of salary (synonymous with wages) payable on the first day of each regular pay-roll period." then in the first case (a) where teachers are employed annually for extra teaching periods and for this extra service an additional monthly salary is paid, the Board may include this extra salary when computing contributions and the final salary upon which the retirement allowance is based. The total amount of salary received by such teachers is the sum of the regular salary plus the regular extra compensation or wages. This total amount is a regular fixed sum payable on the first day of each regular pay-roll period.

But the Board may not include this extra compensation in the second case (b) where a teacher received extra compensation for occasional temporary service. In this second case the extra amount is not regularly payable on the first day of each regular pay-roll and the Board may, therefore, omit this extra amount, it being for a period less than a full pay-roll period and the contributor was not a contributor as to this amount on the first day of the regular pay-roll period.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,

• Deputy Attorney General.

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*School Employes Retirement Board—School Employee Member of American Expeditionary Force—Credit for Service—Act of 1925, P. L. 162.*

Section 4 of the Act of 1925, P. L. 162, includes (insofar as it relates to war activities) only those employees who were actually across the waters with the American Expeditionary Force and does not include those engaged in war activities remaining in this country.

Department of Justice,  
Harrisburg, Pa., February 10, 1926.

Dr. H. H. Baish, Secretary, School Employes' Retirement Board,  
Harrisburg, Pennsylvania.

Sir: I reply to your letter of January 22nd, 1926 asking for an opinion as to whether Section 4 of the Act of 1925, P. L. 162 permits credit for service rendered by school employes who did not leave this country during the World War.

Section 4 of the said Act amends Section 11 of the Act of 1917, P. L. 1043 and provides as follows:

"In computing the length of service of a contributor for retirement purposes, under the provisions of this act, full credit shall be given to each contributor by

the retirement board for each school year of service as an employe, as defined in section one, paragraph seven of this act, and for each school year for which credit is not otherwise provided for in this act and during which the contributor was a member of the American Expeditionary Force in the World War, or in activities connected therewith approved by the retirement board. \* \* \* \* \*

I am of the opinion that this amendment permits credit for service rendered by a school employe who was a member of the American Expeditionary Force in the World War. The term "American Expeditionary Force" applies to these United States soldiers of the World War who saw service abroad and such soldiers if school employes are clearly entitled to the benefits of this section of the act. If a school employe, though not a soldier in the strict application of the term, was abroad with the American Expeditionary Force, engaged in activities connected with the said Expeditionary Force, your Board should allow credit for each school year the said employe was thus occupied. The activities connected with the American Expeditionary Force contemplated by the Legislature probably include the American Red Cross, Young Men's Christian Association, Knights of Columbus, Young Men's Hebrew Association, and kindred organizations.

The Legislature in granting the benefits of this Act distinguished between those soldiers who remained in this country and those who saw service abroad and it undoubtedly had in mind the same distinction in regard to those engaged in the activities suggested above. The question whether the employe was engaged in such activities as were actually connected with the American Expeditionary Force is one for your Board to pass upon. I am of the opinion, however, that the amended part of this paragraph 4 of the Act includes, (insofar as it relates to war activities) only those employes who were actually across the waters with the American Expeditionary Force and does not include those engaged in war activities remaining in this country.

Yours very truly,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,

*Deputy Attorney General.*

*School Employes Retirement Board—Class Room Teachers—Former Teachers' Fund—Age Limit—Act of 1925, P. L. 85.*

Paragraph 4 of the Act of 1925, P. L. 85 creates a "Former Teachers' Fund," the provisions of which apply equally to those class-room teachers in the public schools of Pennsylvania who were sixty-two years of age at the time of the passage of the act and to those class-room teachers who arrived at or will attain that age subsequent to the passage of the act.

Department of Justice,  
Harrisburg, Pa., February 10, 1926.

Dr. H. H. Baish, Secretary, School Employes' Retirement Board,  
Harrisburg, Pennsylvania.

Sir: I reply to your letter of January 22nd, 1926 asking for an opinion as to whether paragraph 4 of the Act of 1925, P. L. 85 applies to former class-room teachers who have or will become sixty-two years of age after the passage of said act.

The said Act of 1925 amends Section 14 of the Act of 1917, P. L. 1043 and provides as follows:

"4. Any person sixty-two years of age or older who was a class-room teacher in the public schools of Pennsylvania for at least twenty years, and who separated from school service for any reason prior to the first day of July, one thousand nine hundred and nineteen; or any person who was a class-room teacher in the public schools of Pennsylvania for at least fifteen years, and who separated from school service because of physical or mental disability prior to the first day of July, one thousand nine hundred and nineteen, and who still is unable to teach because of such disability, shall receive a State annuity equal to one eightieth of his or her final salary for each year of school service. For this purpose there is hereby created a 'Former Teachers' Fund', to which the General Assembly shall from time to time appropriate moneys sufficient to make payments under this sub-section: Provided, That any teacher who is entitled to receive a State annuity hereunder, and who is receiving a retirement allowance under the provisions of a local teachers' retirement system shall receive from the 'Former Teachers' Fund' only the difference between the annuity to which such teacher would otherwise be entitled under the provisions of this sub-section and the annual amount received by such teacher from such local teachers' retirement system."

This paragraph of the Act expressly creates a "Former Teachers' Fund" and I am of the opinion that the provisions thereof apply equally to those class-room teachers in the public schools of Pennsylvania who were sixty-two years of age at the time of the passage of the Act and to those class-room teachers who arrived at or will

attain that age subsequent to the passage of the Act of 1925, P. L. 85; provided of course that the said teachers (a) were employed as class-room teachers in the public schools for the period of years required by the Act, (b) that they left the school service prior to July 1st, 1919, (c) and in the case of those teachers who left the service because of mental or physical incapacity are still unable to teach because of such disability.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*School Employes' Retirement Board—Philadelphia School District—Contingent Reserve Fund—State Annuity Fund Number Two—Act of 1917, P. L. 1043.*

Section 9 of the Act of 1917, authorizes the State Superintendent of Public Instruction and the State Treasurer to deduct from the amount of money due the Philadelphia School District as of January 1, 1926 on account of any appropriation for schools or other purposes, the amount due the contingent reserve fund and the State annuity fund number two.

Department of Justice,  
Harrisburg, Pa., March 12, 1926.

Mr. H. H. Baish, Secretary, School Employes' Retirement Board,  
Harrisburg, Pa.

Sir: You ask for an opinion as to whether the State Superintendent of Public Instruction and the State Treasurer may legally deduct the amount computed to be due as of January 1, 1926 from the Philadelphia School District to the State Treasury on account of the Contingent Reserve Fund and State Annuity Fund Number Two (provided for in the Act approved July 18, 1917, P. L. 1043) from the State appropriation due to the Philadelphia School District April 1, 1926.

Paragraph 3 of Section 8 of said Act of 1917 provides as follows:

"In the month of July, nineteen hundred twenty, for a period covering the twelve months next preceding, and semiannually thereafter, covering the six months next preceding, the Commonwealth of Pennsylvania shall pay into a fund to be known as the contingent reserve fund, on account of each new entrant who was a contributor for one or more months of such respective periods, such amount as shall be certified by the retirement board as necessary to provide by such method of payment, during the prospective active service of such new entrant, the State annuity reserve required

at the time of retirement for the disability or superannuation State annuity allowable by the said Commonwealth, under the provisions of this Act."

Paragraph 5 of Section 8 of said Act of 1917 provides as follows:

"Beginning with the month of July, nineteen hundred nineteen, and continuing until the accumulated reserve equals the present value, as computed by the actuary of the retirement board and approved by the retirement board, of all State annuity payments thereafter payable by the Commonwealth on account of present employes, then retired or to be retired on State annuities as provided in this Act, the said Commonwealth shall pay semiannually into a fund, to be known as State annuity reserve fund number two, an amount," etc.

Section 9 of said Act of 1917, referred to above provides as follows:

"The Commonwealth of Pennsylvania shall be reimbursed to the extent of one-half of the amount paid by the Commonwealth into the contingent reserve fund and the State annuity reserve fund number two on account of employes of each other employer, by payments into its treasury made directly by such employer, or indirectly from moneys otherwise belonging to such employer. To facilitate the payment of amounts due from the treasurer of any employer to the treasurer of the Commonwealth, on account of the retirement system, and to permit the exchange of credits between the treasurer of the Commonwealth and the treasurer of any employer the State Superintendent of Public Instruction and the State Treasurer are hereby authorized and empowered to cause to be deducted, and paid into or retained in the State Treasury, from the amount of any moneys due to any employer on account of any appropriation for schools or other purposes, the amount due to the State Treasury from such employer, in accordance with the provisions of this act. Corresponding amounts, which would be otherwise transferred to the treasury of the Commonwealth from the treasurer of such employer, may be credited to the accounts of the employer to which the moneys withheld by the Commonwealth were payable."

In view of the above I am of the opinion that Section 9 of the said Act of 1917 authorizes the State Superintendent of Public Instruction and the State Treasurer to deduct from the amount of moneys due the Philadelphia School District on account of any appropriation for schools or other purposes, the amount due the contingent reserve fund and the State annuity fund number two.

I am also of the opinion that the sum computed to be due from the Philadelphia School District for the purpose of the Retirement Fund for the period ending January 1, 1926, is legally due in January,

1926 and may be deducted from the State appropriation due the Philadelphia School District April 1, 1926. Paragraph 3 of Section 8, referred to above, relates to the contingent reserve fund, and provides:

"In the month of July nineteen hundred twenty, for a period covering twelve months next preceding and semi-annually thereafter, covering the six months next preceding, the Commonwealth of Pennsylvania shall pay into a fund known as the contingent reserve fund," etc.

The twelve months next preceding July, 1920 would be from June 30, 1919 to July 1, 1920. The next semiannual payment would be due January 1, 1920 which would cover the period from June 30, 1920 to January 1, 1921. Each six months thereafter the Commonwealth is required to pay into the contingent reserve fund such amount as shall be certified by the Retirement Board; therefore the Philadelphia School District is required by the Act to pay to the State the amount due in January and July of each year. The same situation exists with reference to the State annuity reserve fund number two.

Paragraph 5 of Section 8 of the Act of 1917 provides:

"Beginning with the month of July, nineteen hundred nineteen, and continuing until the accumulated reserve equals the present value, \* \* \* the Commonwealth shall pay semiannually into a fund to be known as the State annuity reserve fund number two, an amount \* \* \*," etc.

Should the Philadelphia School District fail to pay the amount due at the time fixed by the Act, it is readily seen that the fund will constantly lose the use of this money and the interest which should accrue to the benefit of the fund. Section 9 of the Act of 1917, is aimed at specifically providing for reimbursement from the school districts to the State Treasury of one-half of the amounts paid by the State into the said two funds; and if the Philadelphia School District, or any other school district, owes anything to the State Treasury on account of said two funds, Section 9 provides for payment of the amount by the retention of that amount by the State from the payment due to the school district.

Yours very truly,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

*School Employees' Retirement Board—Withdrawal of Member—Reinstatement—Credit While Employed in Department of Public Instruction—Acts of 1921, P. L. 245; 1925, P. L. 147.*

The Board can give the particular employe credit in the School Employees' Retirement System for the service which he rendered while in the Department of Public Instruction and while a member of the School Employees' Retirement System upon his compliance with the provision of the Act of April 21, 1921, as to restoring his accumulated deductions to the date of his withdrawal from the System.

Department of Justice,  
Harrisburg, Pa., May 3, 1926.

Mr. H. H. Baish, Secretary, School Employees' Retirement Board,  
Harrisburg, Pa.

Sir: Receipt is acknowledged of your communication of April 27th, 1926 in which you request an opinion covering the following point.

"A member of the Department of Public Instruction who exercised his option of withdrawing from the State School Employees' Retirement System some months ago has now been elected as a Superintendent of Schools, and he has informed the State School Employees' Retirement Board of his desire to enter again the State School Employees' Retirement System.

"The question has been raised as to whether the School Employees' Retirement Board can give this employe credit in the School Employees' Retirement System for the service which he rendered while in the Department of Public Instruction and a member of the State Employees' Retirement System."

The answer to your inquiry would seem primarily to be governed by the Act of April 21, 1921, P. L. 245, which amended extensively the Act of July 18, 1917, P. L. 1043 by which your Board was created. The pertinent part of the amendatory Act amending Section 12 of the original Act, reads as follows:

"Should a contributor, by resignation or dismissal, or in any other way than by death or retirement, separate from the school service, or should such contributor legally withdraw from the retirement system, he or she shall be paid on demand; (a) the full amount of the accumulated deductions standing to the credit of his or her individual account in the annuity savings fund, or in lieu thereof, should he or she so elect, (b) an annuity or a deferred annuity, which shall be the actuarial equivalent of said accumulated deductions. His or her membership in the retirement association shall thereupon cease.

"Should an employe, so separated from the school service, return within three years, and restore to the annuity savings fund his or her accumulated deductions

as they were at the time of his or her separation, the annuity rights forfeited by him or her at that time shall be restored."

It is apparent that the applicant to whose case you refer falls within the provisions of the above quoted Section. He legally withdrew from the School Employees' Retirement System, manifestly within three years of the date on which he asks to return.

The Act of April 6, 1925, P. L. 147, which amended paragraph 6 of Section 1 of the Act of June 27, 1923, relating to the establishment of a State Employees' Retirement System places the legality of his withdrawal from your system beyond a doubt, since the Act of April 6, 1925 includes in the definition of "State Employee" such officers and employees of the Department of Public Instruction who may withdraw from the Public School Retirement Association, and then provides that no member shall be deprived of credit for prior service as a State employe because of the fact that such service was rendered while he or she was a member of the Public School Retirement Association.

Reading the Act of April 6, 1925 in conjunction with the Act of April 21, 1921, it is apparent that if a person formerly belonging to the Public School Employees' Retirement Association should take advantage of the later Act, and then within three years after so doing desires to return to the School Employees' Retirement System he or she may do so upon the condition set forth in the Act of April 21, 1921. This condition is that the employe restore to the Public School Annuity Savings Fund his or her accumulated deductions as they were at the time of his or her separation, and thereupon "the annuity rights forfeited by him or her at that time shall be restored."

You are, therefore, advised that the School Employees' Retirement Board can give the particular employe whose case is before you credit in the School Employees' Retirement System for the service which he rendered while in the Department of Public Instruction and while a member of the State Employees' Retirement System upon his compliance with the provision of the Act of April 21, 1921 as to restoring his accumulated deductions to the date of his withdrawal from your System.

Yours very truly,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,

*Deputy Attorney General.*

*School Employees' Retirement Board—Authority to require a school employe applying for a disability retirement allowance to pay back contributions on his full salary or on a maximum salary—Acts of 1917, P. L. 1043 and 1925, P. L. 162.*

The "final salary" is the average annual salary earnable by contributor as an employe for ten years of service immediately preceding retirement and the retirement allowance should be computed on his full average salary for said period.

Since July 1, 1925, the School Employees' Retirement Board has authority to permit employes seeking disability allowances to make up their back contributions.

Department of Justice,  
Harrisburg, Pa., May 3, 1926.

Mr. H. H. Baish, Secretary, School Employees' Retirement Board,  
Harrisburg, Pa.

Sir: On April 20, 1926, you requested an opinion as to the effect of the Act of April 7, 1925, P. L. 162, on two questions, which you set forth as follows:

"Under date of March 2, 1926 a school employe applied for a disability retirement allowance to date from June 1, 1925. This employe received a salary in excess of \$2000 per year for the service rendered between July 1, 1919 and June 1, 1925.

"The Retirement Board is uncertain as to whether this employe should be required or has the right to pay up his back contributions on his salary in excess of \$2000 per year, and the Board is also uncertain as to whether his retirement allowance should be computed on his full salary or only on a maximum salary of \$2000 per year."

The Act of April 7, 1925, is legislation that amends the Act of July 18, 1917, P. L. 1043, which was "An Act establishing a public school employes' retirement system, and creating a retirement board for the administration thereof; establishing certain funds from contributions by the Commonwealth and contributing employes, defining the uses and purposes thereof and the manner of payments therefrom, and providing for the guaranty by the Commonwealth of certain of said funds; imposing powers and duties upon boards having the employment of public school employes; exempting annuities, allowances, returns, benefits, and rights from taxation and judicial process; and providing penalties."

The two Acts must therefore be read together. So reading them, your last question will be answered first. Clause 17 of Section 1 of the earlier Act in which the method of computing the "final salary" of an employe entitled to a retirement allowance is defined, has been amended in the later Act by eliminating therefrom any maximum salary. The "final salary" now is the average annual salary earnable by a contributor as an employe for the ten years of service immediately

preceding retirement. The retirement allowance to which the applicant whose case you have under consideration may be entitled should therefore be computed on his full average salary for the ten years preceding his retirement.

Passing to your first inquiry, your attention is directed to the chronology of the situation. The provisions of the amendatory Act of April 7, 1925, did not become applicable until July 1, 1925, so far as concerned those persons who were on the retired list of Pennsylvania Public School Employees at the time that Act was approved by the Governor, and those provisions, from and after July 1, 1925, have been subject to such rules and regulations as the Retirement Board may adopt with respect to the class of persons just mentioned. The present applicant was not on the retired list on April 7, 1925. In fact, his disability is not claimed to have begun until June 1, 1925. His application was not presented to you until March 2, 1926.

This order of events narrows your question to what is the correct interpretation of the last sentence of Section 6 of the amendatory Act of April 7, 1925. That sentence reads:

“Except in the case of disability retirement, no employe shall be required to make up any payments for the school years nineteen hundred nineteen to nineteen hundred twenty-five, inclusive.”

It is the opinion of this Department, and you are advised, that this sentence means when read in conjunction with the previous portion of the section under consideration, that since July 1, 1925, the School Employees' Retirement Board has had the power and the right to require, and also to permit, employes seeking disability allowances or annuities to make up their back contributions on their salaries. This is evidently the legislative intent, especially in view of the new definition of “final salary”, of applicants, to which your attention has already been called.

The present applicant having between July 1, 1919, and June 1, 1925, received for his services a salary in excess of \$2000 per year, the granting of a disability retirement allowance should be conditioned on his payment of such amount as you compute on his “final salary,” less credit for such payments as he has already made, in accordance with the definition of “final salary,” contained in the Act of July 18, 1917, P. L. 1043, to which reference has already been made.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. Y. C. ANDERSON,  
*Deputy Attorney General.*

*School Pensions—Disability—Age limit—Marriage after retirement—Ruling of Pittsburgh School District barring married women.*

The Act of July 18, 1917, 1043, relating to pensions for public school teachers, providing the manner in which "retirement upon disability," shall be made and discontinued, does not make marriage a cause for the discontinuance of the allowance. The fact that the Pittsburgh School District has adopted a local ruling that married women will not be employed as school teachers would not bar such allowance, where the teacher had been married subsequent to her retirement.

Department of Justice,  
Harrisburg, Penna., December 8, 1926.

Dr. H. H. Baish, Secretary, School Employes' Retirement Board,  
Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your letter of November 3rd, in which you ask whether the disability retirement allowance granted, on September 20th, 1926, to the former Miss Esther V. Johnson, who was until such retirement a public school teacher in a Pittsburgh school district, should be discontinued because of her marriage since September 20th, 1926.

Under a ruling or policy of the Pittsburgh school district, the former Miss Johnson, if and when restored to health, will no longer be eligible to teach in the public schools of that district, provided she is still married. Under these circumstances the Retirement Board is uncertain whether or not the former Miss Johnson should continue to receive presently the disability retirement allowance granted to her.

Section 13 of the Act of July 18, 1917, P. L. 1043 provides the manner in which "retirement upon disability shall be made and discontinued." Assuming that the disability retirement allowance in the instant case was properly granted the Act contains the following provisions for its discontinuance:

"2. Once each year the retirement board may require any disability annuitant, while still under the age of sixty-two years, to undergo medical examination by a physician or physicians, designated by the retirement board; said examination to be made at the place of residence of said beneficiary, or other place mutually agreed upon. Should such physician or physicians thereupon report and certify to the retirement board that such disability beneficiary is no longer physically or mentally incapacitated for the performance of duty, or that such disability beneficiary is able to engage in a gainful occupation, and should the retirement board concur in such report, then the amount of the State annuity shall be discontinued, or reduced to an amount that shall be not in excess of the amount by which the amount of the last year's salary of the beneficiary, as an employe, exceeds the present earning capacity of the contributor.

"3. Should any disability annuitant, while under the age of sixty-two years, refuse to submit to at least one medical examination in any year by a physician or physicians designated by the retirement board his or her State annuity shall be discontinued until the withdrawal of such refusal; and, should such refusal continue for one year, all his or her rights in and to the State annuity constituted by this Act shall be forfeited.

"4. Upon application of any beneficiary under the age of sixty-two years, drawing a retirement allowance under the provisions of this Act, said beneficiary may be restored to active service by the employer by whom he or she was employed at the time of his or her retirement. Upon the restoration of a beneficiary to active service, his or her retirement allowance shall cease."

There is no hint in these provisions that the disability retirement allowance shall, under any circumstances, be discontinued by reason alone of any local school district ruling or policy to the effect that married women shall not be eligible to positions as teachers. Marriage, under the Act, is not a ground for discontinuance of a disability retirement allowance.

If as a result of some future periodical medical examination the former Miss Johnson, while under the age of sixty-two years, shall be found physically and mentally capable of resuming her duties as a teacher or engaging in other gainful occupation and should she then still be married and unable or unwilling to secure a position as a teacher in the Pittsburgh school district or elsewhere in the public schools of Pennsylvania or to otherwise engage in gainful occupation, then the question of the discontinuance of her disability retirement allowance and her withdrawal from the Retirement System will properly arise under the provisions of Sections 12 and 13 of the said Act of July 18, 1917 as amended.

I am therefore of the opinion that until the present disability of the former Miss Johnson is removed no question can arise as to her right to continue to receive her disability retirement allowance by virtue of the local ruling or policy of the Pittsburgh school district not to employ married women.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON D. METZGER,  
*Deputy Attorney General.*

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. OPINIONS TO THE SESQUI-CENTENNIAL  
COMMISSION

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**OPINIONS TO THE SESQUI-CENTENNIAL COMMISSION**

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*Sesqui-Centennial Commission—State Building—Pay-toilets.*

The Commission has authority to install pay-toilets in the State building erected by it, the money to be used for the sanitation of the building during the exhibition.

Department of Justice,  
Harrisburg, Pa., June 7, 1926.

Major R. Y. Stuart, Chairman, State Sesqui-Centennial Commission  
Room 926 Widener Building, Philadelphia, Pennsylvania.

Sir: By informal inquiry you have requested the opinion of this department upon the following question: Has the State Sesqui-Centennial Commission appointed by the Governor under the Act of April 24, 1925, (Appropriation Acts, P. 160) authority to install in the building erected by it under said act pay (coin-box) toilets and use the money so received for the sanitation of said building during the Sesqui-Centennial Exhibition?

The said act provides that the Governor shall appoint a Commission of three persons of whom he shall designate one as chairman and one as secretary, and that the Governor shall be ex-officio a member of said Commission. The act appropriates \$750,000 and gives the said Commission full authority to determine the manner in which said appropriation shall be expended. It further provides that the Commission "may in its discretion arrange for the erection of a suitable building to be known as the Pennsylvania Building, \* \* \* and for an exhibit of the resources, manufactures, industries, agriculture and other activities of this Commonwealth and its people."

You say that the Commission has caused the erection of said building and provided for an exhibit therein as authorized by the provision of the statute above quoted; that toilets will be necessary in said building and it may be found desirable to install pay toilets in order that the use of the facilities provided may be restricted as far as practicable to those who use the building for viewing such exhibit.

It cannot be doubted that provision of toilet facilities for the custodians of and visitors to such an exhibit as the statute authorizes is necessary to the success of the exhibit, nor that such restriction of use of the facilities as will result from the imposing of a small charge in their use may be found expedient for the purpose of limiting the use of the facilities to such necessity. The use of the money so received for the sanitation of the building is within the discretion of the Commission to "arrange for \* \* \* an exhibit". Neither the Administrative Code nor the Act of May 25, 1907 P. L. 259 requiring certain state officials and boards therein listed to pay daily into the state treasury all fees and other moneys received, and to file daily in

the office of the Auditor General and in the office of the State Treasurer an itemized statement thereof, has any application to the State Sesqui-Centennial Commission appointed under the said Act of 1925.

Your question is therefore answered in the affirmative.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP P. WELLS,  
*Deputy Attorney General.*

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*Sesqui-Centennial Commission—Insurance on Exhibits Displayed in State Building—Act of 1925, App. Act page 160.*

The Commission is authorized to provide insurance on exhibits loaned for display in the State building, and to pay the premium on such insurance.

Department of Justice,  
Harrisburg, Pa., October 27, 1926.

Honorable Clyde L. King, Chairman, Sesqui-Centennial Commission,  
Philadelphia, Pennsylvania.

Sir: I have before me bill from Beidler & Bookmyer, Inc., to your Commission for insurance on those exhibits displayed in the State Building at the Sesqui-Centennial Exposition which were loaned to your Commission for exhibition at said building.

The policies of insurance were taken out as part of the arrangements for the lending of said exhibits by the parties making the loans; and it is my opinion that since the insured exhibits and property were not and are not owned by the Commonwealth, it was within the power of your Commission to provide the insurance for which the bill and requisition for \$5,775.00 premium were made out.

Under Section 2 of the Act of April 24, 1925 (Appropriation Acts page 160) it is provided with regard to your Commission as follows:

“The Commission appointed, as herein provided shall have full authority to determine the manner in which the appropriation made by this Act shall be expended.”

Again in Section 3 the Legislature provided that

“The money appropriated by this Act shall be expended only as authorized and directed by the said Commission.”

The above quoted provisions of the Act appropriating \$750,000.00 for your Commission to expend “for and during the celebration of the Sesqui-Centennial” established beyond all doubt the power of your Commission, if it so “authorized and directed” to provide for

the loan of exhibits and to insure them as a natural and necessary expenditure in connection with the exhibitions provided for.

It is probable that many of the loaned exhibits could not be replaced by the use of money. Nevertheless, it is only fair and proper that the owners be protected to the extent obtainable through insurance, and such insurance, when "authorized and directed" by your Board comes clearly within the purview of the Appropriation Act in question.

Therefore, like all other expenditures when "authorized and directed" by your Commission, payment of the premium of \$5,775.00 should be brought about, as is provided in the law, by being "drawn from the State Treasury upon warrants of the Auditor General, drawn upon requisition by the Chairman of the said Commission, countersigned by the Secretary of the said Commission."

Yours very truly,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,  
*Attorney General.*

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**OPINIONS TO STATE EMPLOYES' RETIREMENT  
BOARD**

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**OPINIONS TO STATE EMPLOYES' RETIREMENT BOARD**

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*State Employes' Retirement Association—Eligibility for Membership therein by certain State employes—"Salaries" defined—"State Employee" defined—Acts of February 27, 1865, P. L. 4, April 13, 1866, P. L. 104, May 2, 1899, P. L. 184, May 8, 1919, P. L. 159, June 20, 1919, P. L. 521, Section 15, June 27, 1923, P. L. 858, paragraph 6, Sec. 1, July 8, 1919, P. L. 782, July 15, 1919, P. L. 963, July 17, 1919, P. L. 1025, July 21, 1919, P. L. 1072.*

The Mercantile Appraisers of the City of Philadelphia, being paid on a fee basis are not eligible to membership in the State Employes' Retirement Association; the Mercantile Appraisers of the County of Allegheny, being paid on a yearly salary basis are eligible to membership; the Mercantile Appraisers of counties of the State having a population of less than 1,000,000 inhabitants, being paid on a fee basis, are not eligible to membership. Clerks appointed by the Auditor General employed in the county treasurer's office in counties having a population of more than 1,000,000 and less than 1,500,000 inhabitants, engaged to assist the Mercantile Appraisers in the collection of mercantile tax, paid on a monthly salary basis, are eligible to membership; Clerks or investigators appointed by the Auditor General and employed in the county treasurer's office of any county in the investigation of returns for the purposes of mercantile tax pursuant to the Act of July 21, 1919, paid on a monthly salary basis, are eligible to membership. Clerks appointed by the Auditor General in the Register of Wills Office in the county of Allegheny and in counties having a population of 1,500,000 inhabitants engaged in the collecting and paying over of inheritance taxes, paid on a monthly salary basis, are eligible to membership, but such clerks in counties having a population of more than 1,500,000 inhabitants engaged in the collection of inheritance taxes are not eligible to membership. Investigators appointed by the Auditor General in the various offices of the Registers of Wills in counties of less than 1,500,000 inhabitants engaged in assisting the Registers in collecting inheritance taxes and paid on a monthly or yearly salary basis, are eligible to membership, but clerks so employed paid on a fee basis are not eligible.

Department of Justice,  
Harrisburg, Pa., January 8, 1925.

Honorable Clyde L. King, Chairman, State Employes' Retirement Board, Harrisburg, Pennsylvania.

Sir: You have inquired of this Department to be advised as to the eligibility of five classes of persons for membership in the State Employes' Retirement Association. You make this inquiry because of a request which has been made of your Board by the Auditor General of the Commonwealth concerning the same. The Auditor General in his letter lists the several classes of employes as follows:

1. The Mercantile Appraisers of Philadelphia and Pittsburgh who are employed on a yearly salary basis for the purpose of making appraisements in these counties.

2. The Mercantile appraisers in other counties of the State who make the mercantile appraisements in their respective counties, and who are paid on a fee

basis, depending upon the number of appraisements made.

3. Clerks employed in the Treasurer's office in the counties of Allegheny, Philadelphia and several other counties, who are engaged in work in connection with the collection of State taxes and who are paid on a monthly salary basis.

4. Clerks in the Register of Wills office in the counties of Allegheny, Philadelphia and several other counties, who are engaged in work in connection with the collection of Inheritance Taxes and who are paid on a monthly salary basis.

5. Investigators in the various offices of the Register of Wills, who make investigations and collect data concerning the taxability of the decedents, some of whom are paid on a monthly salary basis, and others on a fee basis, depending upon the number of cases they handle and report.

We shall consider these questions in the order mentioned.

1. Are the Mercantile Appraisers of the Cities of Philadelphia and Pittsburgh eligible for membership in the State Employees' Retirement Association? The Mercantile Appraisers of the City of Philadelphia are five in number, appointed by the Auditor General and the City Treasurer for a term of four years each, under the provisions of the Act of July 17, 1919, P. L. 1025, which Act also provides that the "compensation of said appraisers shall be as now provided by law." The Act providing for the compensation of the Mercantile Appraisers for the City and County of Philadelphia is the Act of April 13, 1866, P. L. 104. In accordance with this Act "the said appraisers of mercantile taxes shall receive for the classification of each person, in lieu of the compensation now fixed by law, the sum of sixty-two and a half cents."

The State Employees' Retirement Act of June 27, 1923, P. L. 858, provides in paragraph 6 of Section 1 thereof as follows:

"'State Employee' 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 Employee' 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 employees' 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)."

Does the meaning of "State Employee", as used in the State Employees' Retirement System Act, include the Mercantile Appraisers of the City of Philadelphia? It will be noted by the definition above quoted that two classes of persons are referred to in said meaning or definition of "State Employee". In the one class are those persons employed "by the year or by the month by the State Government"; in the other are those persons "holding a State office under the Commonwealth." When we consider the Retirement Act in its general scope and scheme of operation, we find that the definition of the term "State Employee" must necessarily be qualified. Paragraph five of Section seven of said Act provides in part as follows:

"The head of each department shall cause to be deducted on each and every pay-roll of a contributor, for each and every pay-roll period subsequent to December thirty-first, nineteen hundred twenty-three, such per centum of the total amount of *salary* earnable by the contributor in such pay-roll period as shall be certified to the head of each department by the retirement board as proper, in accordance with the provisions of this act."

From the provisions just quoted, as well as other parts of said Section, it will be readily seen that whether the person is a State officer of the Commonwealth or is employed by the year or by the month by the State Government, the provisions of the Act are made and intended to operate for those persons who receive a "salary." In other words, the provision just quoted, as well as the other provisions of the Act concerning the deductions and collection of contributions, clearly indicate that the Legislature intended that the Act was not meant to apply to any person who was paid on a fee basis. It would be almost impossible to provide regulations that would properly meet uncertainties of deductions from persons paid on a fee basis. Fees are compensations for particular acts or services. Consequently, where certainty as to amount and times of deductions are necessary, as it is in a system of the character of our State Employees' Retirement System established by said Act of June 27, 1923, P. L. 358, the Act becomes unworkable for those persons who are paid on a fee basis, and we are of the opinion that the Act can not apply to any person receiving fees. Therefore, the term "State Employee" as used in the Retirement Act cannot include the Mercantile Appraisers of the city of Philadelphia who are paid on a fee basis.

The Mercantile Appraisers of the City of Pittsburgh are appointed by the Auditor General under the provisions of the Act of May 8, 1919, P. L. 159. These Mercantile Appraisers although they probably have their office in the City of Pittsburgh are under the pro-

visions of said Act appraisers for the entire county of Allegheny. They are five in number but "each receive a salary not to exceed the sum of \$5,000.00 per annum, which salary shall be fixed by the Auditor General", as provided in Section one of said Act. The duties they perform in the matter of taxation for the State Government are important in the State's fiscal system as now established. Irrespective of the question as to whether they are persons "holding a State office under the Commonwealth of Pennsylvania", they are clearly persons, "employed by the year or by the month by the State Government of the Commonwealth of Pennsylvania", and being paid a "salary" out of State funds they are eligible to the State Employees' Retirement Association.

2. Are the Mercantile Appraisers in the other Counties of the State, that is, the Counties having a population of less than one million inhabitants eligible to become members of the State Employees' Retirement Association? The Act of May 2, 1899, P. L. 184 as amended by the Act of July 15, 1919, P. L. 963 provides that the Mercantile Appraisers in Counties having a population of less than one million inhabitants shall be appointed annually by the Auditor General and in each such county one Mercantile Appraiser is appointed. The compensation of these Mercantile Appraisers is provided by the Act of February 27, 1865, P. L. 4. This Act provides for their payment entirely on a fee basis. Consequently, these appraisers have no different standing so far as the State Employees' Retirement Act is concerned than do the Mercantile Appraisers for the City of Philadelphia, which we have previously fully discussed. Therefore, you are advised that the Mercantile Appraisers of the Counties of the Commonwealth having less than one million inhabitants are not eligible to the State Employees' Retirement Association.

3. Are the clerks employed in the Treasurer's office in the counties of Allegheny, Philadelphia and the several other counties of the State where they are employed, which clerks are engaged in work in connection with the collection of State taxes, eligible to membership in the State Employees' Retirement Association? Under the Act of May 8, 1919, P. L. 159, the Auditor General is authorized to appoint in counties having a population of more than one million and less than one million five hundred thousand inhabitants, such clerks as he may deem necessary to assist the Mercantile Appraisers, and shall fix their salaries. These clerks are paid on a monthly salary basis out of State funds collected by the Mercantile Appraisers and paid into the County Treasury for the use of the Commonwealth. These clerks are appointed by the Auditor General, an elective officer of the State Government, for the sole purpose of service in the collection of State taxes in the respective county where they are directed by the Auditor General to serve and he

fixes their salaries for such service. They are unquestionably employes of the State Government, and being paid on a monthly salary basis, are clearly within the meaning of the term "State employe", as set forth in paragraph 6, Section 1 of said Act of June 27, 1923, P. L. 858 as above quoted. They are, therefore, eligible to membership in the State Employes' Retirement Association.

As to the clerks employed in the Treasurer's office in the county of Philadelphia, and in several other counties of the State where the population is less than one million inhabitants, "who are engaged in work in connection with the collection of State taxes and who are paid on a monthly salary basis," the letter and inquiry of the Auditor General does not advise as to the basis upon which their appointment is made nor the particular character of their work, and we are unable to find any Act of Assembly applicable to such appointment of clerks unless it be the Act of July 21, 1919, P. L. 1072 amending section 7 of the Mercantile License Tax Act of May 2, 1899, P. L. 184, which provides that where the vender or dealer makes inaccurate returns or the appraiser fails to make accurate reports, "it shall be the duty of the Auditor General to investigate and ascertain the character and amount or volume of business transacted by such dealer or dealers, vender or venders, during the calendar year preceeding the year for which the tax is to be paid." All clerks or investigators appointed by the Auditor General, in pursuance of the provisions of said Act of July 21, 1919, who are paid on a monthly salary basis, are within the meaning of the term "State Employe" as defined in paragraph 6 of Section 1 of the Act of June 27, 1923, P. L. 858, and are eligible to membership in the State Employes' Retirement Association.

4. Are the clerks in the Register of Wills office in the counties of Allegheny, Philadelphia and several other counties, who are engaged in the matter of collection of inheritance taxes, eligible to membership in the State Employes' Retirement Association? The Act of July 8, 1919, P. L. 782 provides, in the first section thereof, as follows:

"That all clerks and other persons, other than appraisers, required to assist any Register of Wills, in any county of this commonwealth having a population of less than one million five hundred thousand inhabitants in collecting and paying over inheritance taxes shall be appointed and their compensation fixed by the Auditor General, and, upon his approval and order, shall be paid out of the said taxes in the hands of the registers, together with other necessary expenses incident to the collection of such taxes."

These clerks are engaged in the work of the collection of taxes for the State Government, under appointment by the Auditor General author-

ized by law, whose compensations are also fixed by the Auditor General, and although their services are being performed in the Register of Wills office of the respective counties they are just as much engaged in the service of the State Government as if they were performing their duties in the Auditor General's office. They are employes of the State Government, and being paid on a monthly salary basis from State funds, are clearly within the meaning of the term "State Employee" as given in paragraph 6 of Section 1 of the Employees' Retirement System Act of 1923, and, therefore, eligible to membership in the said system.

As to clerks and other persons, other than appraisers, and those employed for expert appraisement purposes, assisting Register of Wills, in Counties having a population of more than one million five hundred thousand inhabitants, engaged in collecting and paying over inheritance taxes we find that these clerks are not appointees of the Auditor General. There is no law giving him such authority of appointment nor any law giving him the right to fix their compensation.

In Section 15 of the Act of June 20, 1919, P. L. 521, among other things, it is provided that "the Auditor General, in the settlement of accounts of any register, may allow his costs of advertising and other reasonable fees and expenses incurred in the collection of the tax." However, this provision does not put the power of appointment of clerks necessary to assist the Register in collecting inheritance taxes in the hands of the Auditor General in the counties having a population of over one million five hundred thousand inhabitants. These clerks are not State Employees. Accordingly, we are of the opinion that clerks and other persons assisting the Register of Wills in counties having a population of over one million five hundred thousand inhabitants, engaged in collecting and paying over inheritance taxes, are not eligible to membership in the State Employees' Retirement Association.

5. Are investigators in the various offices of the Register of Wills, who make investigations and collect data concerning the taxability of decedents' estates for State purposes, eligible to membership in the State Employees' Retirement Association? These investigators are appointed by the Auditor General and are engaged in the respective Register of Wills offices to which they are directed by the Auditor General to perform their duties in work similar to that performed by the clerks in the offices of the Register of Wills appointed by the Auditor General in connection with the collection of inheritance taxes, and we are of the opinion they are on exactly the same basis and are entitled to membership in the State Employees' Retirement Association, if they are paid on a monthly salary basis. These investigators we presume are employed under the provisions of the Act of July 8, 1919, P. L. 782. However, in cases where these investigators are paid

on a fee basis they are not eligible for membership in the State Employees' Retirement Association for the same reason as above set forth in the discussion of the question of the eligibility of Mercantile Appraisers of the City of Philadelphia who are paid on a fee basis.

It will be noted that in the above five classes of officers or employees cases where eligibility to membership in the State Employees' Retirement Association is allowed they do not receive their salary directly from the State Treasury, but under the provisions of the Acts provided for and regulating their employment and payment, they receive their salary checks either from the County Treasurer or from the Register of Wills in the respective county in which they are performing their particular service for the State, with the approval of the Auditor General. They are paid out of the State funds collected by the County Treasurer or Register of Wills as the case may be. The salaries are paid regularly as provided by law, but the particular State tax moneys are turned over to the State Treasurer by the County Treasurer or Register of Wills as the case may be.

Therefore, where any of these employees are eligible to membership in the State Employees' Retirement Association, the question naturally arises as to how their contributions will be deducted because the Act itself provides for the method of deduction of these contributions by the State Treasurer from the payrolls of the members of the Retirement Association as the same shall be certified in accordance with the Act. Although this method of deduction is clearly provided for in the Act, the collection of these contributions is entirely an administrative matter, and the Legislature could certainly never have intended that persons in the employ of the State Government who were otherwise eligible to membership in the State Employees' Retirement System should lose their right to the same because they were not paid their salary directly from the State Treasurer, but indirectly through some other officer or person acting for the State. This would surely not be equitable or just, and inasmuch as the collection of these deductions is simply an administrative matter, and the further fact that under paragraph 5 of Section 4 of said Act, the Retirement Board is authorized to establish rules and regulations for the administration of the funds created by this Act, and for the transaction of its business, we are of the opinion that the Retirement Board has sufficient authority to establish rules and regulations for the deduction and collection of the contributions to the Retirement Association of the persons above referred to, who are eligible to membership in said State Employees' Retirement Association.

Therefore, we answer specifically the questions submitted to us as follows:

1. The Mercantile Appraisers of the City of Philadelphia, being paid on a fee basis, are not eligible to membership in the State Em-

ployes' Retirement Association. The Mercantile Appraisers of the County of Allegheny which includes the City of Pittsburgh, paid on a yearly salary basis, are eligible to become members of said Association.

2. The Mercantile Appraisers of counties of the State having a population less than one million inhabitants, being paid on a fee basis, are not eligible to membership in the State Employes' Retirement Association.

3. Clerks appointed by the Auditor General, employed in the County Treasurer's office in Counties having a population of more than one million and less than one million five hundred thousand inhabitants, which includes the county of Allegheny, engaged to assist the Mercantile Appraisers in the collection of mercantile tax, and paid on a monthly salary basis, are eligible to membership in the State Employes' Retirement Association. Clerks or investigators appointed by the Auditor General and employed in the County Treasurer's office of any county in the investigation of returns for the purposes of mercantile tax in pursuance to the provisions of the Act of July 21, 1919, P. L. 1072 and paid on a monthly salary basis, are eligible to membership in the State Employes' Retirement Association.

4. Clerks appointed by the Auditor General in the Register of Wills office in the county of Allegheny and in counties having a population of one million five hundred thousand, engaged in the collecting and paying over of inheritance taxes who are paid on a monthly salary basis, are eligible to membership in the State Employes' Retirement Association. But these clerks assisting the Register of Wills in Counties having a population of over one million five hundred thousand inhabitants, engaged in the collection of inheritance taxes, are not eligible to membership in the State Employes' Retirement Association because they are not State Employes.

5. Investigators appointed by the Auditor General in the various offices of the Register of Wills in the counties of less than one million five hundred thousand inhabitants, who are engaged under the provisions of the Act of July 8, 1919, P. L. 782 in assisting said Registers in collecting inheritance taxes and paid on a monthly or yearly salary basis, are eligible to membership in the State Employes' Retirement Association, but those clerks so employed who are paid on a fee basis are not eligible.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,  
*Deputy Attorney General.*

*Retirement of State employees—Prior service—Service in legislature—Acts of May 24, 1923, and June 27, 1923—Constitutional law.*

1. A member of the general assembly does not come within the meaning of the term "State employee" as used in the Act of May 24, 1923, P. L. 436.

2. Under the Act of June 27, 1923, P. L. 858, members of the legislature are not "State employees" employed by the year or month by the State government.

3. The Constitution makes a clear distinction between members of the general assembly and other State officers.

4. Former members of the general assembly employed in the executive branch of the government are not eligible to become members of the retirement system created by the Act of June 27, 1923, P. L. 858, and as to them the question whether they are entitled to receive prior service credit for the years they served in the assembly does not apply.

Department of Justice,  
Harrisburg, Pa., February 10, 1925.

Honorable Clyde L. King, Chairman, State Employees' Retirement Board, Harrisburg, Pennsylvania.

Sir: In an inquiry to this Department you as Chairman of the State Employees' Retirement Board, enclosed a letter which contains the following:

"I was a Member of the House of Representatives in the Sessions of 1901, 1903, 1905, 1907 and 1915,—ten years of service "holding a State office under the Commonwealth of Pennsylvania" as provided in the Act of 1923. I am now, and have been for about seven years past, employed in the Department of the Auditor General. Am I to be credited with seventeen (17) 'years of service' under the Act of 1923 or with but the seven years served under the Auditor General"?

And you make the following inquiry: Shall time of service, as a member of the State Legislature, of a person otherwise qualified for membership in the State Employees' Retirement Association, be counted in computing the "prior service" of said person?

Section 10 of the Act of June 27, 1923, P. L. 858, establishing the State Employees' Retirement System, 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, paragraph six and thirteen of this act. \* \* \*"

Paragraph 6 of Section 1 of said act provides 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 Section 1 of said act provides as follows:

" 'Prior service' shall mean all service completed not later than the thirty-first day of December, nineteen hundred twenty-three."

Therefore, from these sections of the act, as quoted, the basis for allowance of prior service for retirement purposes in the State Employes' Retirement Association, is whether the member was a "State employe", during the time of said period of service for which allowance of prior service is requested.

The meaning of said term "State employe" is given entirely in said paragraph 6 of Section 1 of said act as above quoted. In determining the full scope of this term let us first turn to the former retirement acts we find that the first one passed by the Legislature was the act of June 14, 1915, P. L. 973. This was amended by the Act of June 7, 1917, P. L. 559, and the Act of April 20, 1921, P. L. 197. It was repealed and superseded by the Act of May 24, 1923, P. L. 436. On June 27, 1923, the State Employes' Retirement Act was passed, which is the retirement act under consideration. By this Retirement Act any State employe who before December 31, 1924 became eligible for retirement under said Act of May 24, 1923, P. L. 436, had the option of retirement thereunder, or under the provisions of the State Employes' Retirement System Act of June 27, 1923, the act here in question. It will be noted by examination of the acts above referred to that at each time the original act of 1915 was amended, the meaning of the term "State employe" was changed to afford greater scope; and when it was superseded by the Act of May 24, 1923, P. L. 436 the definition of "State employe" was as follows:

"Section 1. That the phrase 'State employe', as used in this act, includes (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."

It will readily be seen that a member of the General Assembly does not come within the meaning of the term "State employe" as used in the Act of May 24, 1923, P. L. 436. This term among others, includes all officers and employes of the Legislative branch of the State Government. Members of the General Assembly cannot be included within the meaning of the words "officers and employes" of the Legislative branch of the State Government because the Constitution itself not only provides for the election of the presiding officer in each House, but also provides in Section 10 of Article 3 thereof that the General Assembly shall prescribe by law "the number, duties and compensation of the officers and employes of each House." Accordingly the Act of May 24, 1923, P. L. 436, although passed at the same session of the Legislature with the State Employes' Retirement System Act of June 27, 1923, affords us no assistance in determining the question herein involved. By the Retirement Act of June 27, 1923, P. L. 858, the term "State employe" is given a still broader scope of meaning. Does this meaning of "State employe" as defined in said Act in Paragraph 6, Section I thereof, as above quoted, include members of the State Legislature? Are they persons "holding a State office under the Commonwealth of Pennsylvania?"

There can be no doubt that in a certain sense members of the General Assembly are "Public Officers", and that to the extent to which they are "Public Officers" they hold their offices under the Commonwealth of Pennsylvania; but the question now before us is whether it was the intention of the General Assembly when the Act of June 27, 1923 was enacted that they should be included within the definition of "State employe" already quoted. The answer to this question does not depend upon the status of the members of the Legislature generally. It is a narrow question of interpretation. In dealing with this narrow question the general scope, purpose and scheme of the State Employes' Retirement Act in question must be considered.

As far as employes who are not "officers" of the Commonwealth are concerned, the Act is limited to persons "employed by the year or by the month by the State Government". Paragraph five of Section 7 of the Act provides in part as follows:

"The head of each department shall cause to be deducted on each and every pay-roll of a contributor, for each and every pay-roll period subsequent to December thirty-first, nineteen hundred twenty three, such per centum of the total amount of salary earnable by the

contributor in such pay-roll period as shall be certified to the head of each department by the retirement board as proper, in accordance with the provisions of this act."

The reason for the limitation, as just stated, to persons who are not "officers" is not only obvious from the provision made for the deductions of contributions as indicated by the paragraph just quoted, but also a survey of the details of the Retirement System which the Act establishes. It would be a matter of great difficulty to calculate and regulate the deductions of the contributions to be made each month by persons whose compensation is fixed otherwise than by an annual or monthly basis. During the first year of operation of the Retirement System membership was optional as to old and as to new employes; but after December 31, 1924 membership for new employes is optional only during the first six months of their employment. Beginning the seventh month of their employment membership is compulsory. The details of membership and contribution of employes, are to be handled by the head of each Department under the direction of the Retirement Board. The board which administers the system contains two members to be elected from the membership of the Association by the members thereof.

Members of the Legislature are compensated on a per session basis, which is neither an annual nor a monthly basis. If a member of the Legislature is a State employe within the meaning of the definition of "State employe" in the Act, and the Retirement Board had not extended the time, as allowed by the Act, during which State employes may become original members of the Association, then those members who are old members of the Legislature would have been obliged after December 31, 1924 to become members of the Retirement System, and under Section 7 of the Act it would have been obligatory for the State Treasurer after December 31, 1924 to make deductions from the salaries of such members of the General Assembly to cover their contributions to the Retirement fund. Since December 31, 1924 persons becoming members of the General Assembly, that is, those who are now members, will be compelled to become members of the Retirement Association after their first six months of service. Unless, therefore, the Session lasted more than six months the State Treasurer would have found that, although members of the General Assembly had become members of the Retirement Association, they had received their compensation for two years in full and it would be impossible for him to deduct the contributions to the fund which the law requires. If on the other hand the Session lasted more than six months deductions could be made only from such compensation as was payable after the first six months of the Session, so that members of the General Assembly would not contribute to the Fund on the same basis upon which all other members of the Association would

contribute. It is unthinkable that the members of the General Assembly intended such a discrimination in their favor.

Again under Article II, Section 6 of the Constitution of this Commonwealth senators and representatives are disqualified during their terms of office from appointment "to any civil office under this Commonwealth". A member of the State Employes' Retirement Board is undoubtedly a "civil officer under the Commonwealth". If members of the General Assembly were entitled and required to become members of the Retirement Association they would be the only members of the Association not eligible to be chosen by the other members of the Association as members of the Retirement Board which is to administer the System. It is not likely that the General Assembly intended to create such a situation.

We are aware of the arguments which have been and doubtless will be advanced by those who desire prior service credits for having been members of the General Assembly in past years. They argue that a member of the Legislature holds a "State office under the Commonwealth" and that the Legislature, therefore, must have intended that its members should be included in the class of persons entitled to membership in the Retirement System. But the Constitution itself in dealing with the General Assembly makes a clear distinction between members of the General Assembly and other State officers.

Article II of the Constitution deals with "The Legislature". Nowhere in that article are members of the General Assembly denominated officers. They are always referred to as "members", Section 2 speaks of the "term of service",—not "of office",—of members. Section 5 again uses this expression,—"*terms of service*". Section 7 provides that no person convicted of certain crimes "shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this Commonwealth". Were members of the Legislature regarded as "officers" as that term is generally used, it would have been unnecessary specifically to mention them in the expression quoted.

A similar distinction appears in Article III, Section 30 of the Constitution which provides that any person shall be guilty of bribery who shall offer, give or promise any money, et cetera "to any executive or judicial officer or *member of the General Assembly* \* \* \*." Article III, Section 31 provides that the offense of corrupt solicitation of "members of the General Assembly or of public officers of the State \* \* \* shall be defined by law and shall be punished by fine and imprisonment". Article VI, Section 3 provides that "the Governor and all other civil officers shall be liable to impeachment \* \* \*". Under this section members of the General Assembly are clearly not "civil officers".

Article VII, Section 1 provides "that Senators and Representatives and all judicial, State, and County officers" shall take the constitutional oath of office. If Senators and Representatives were "State Officers", as that term is commonly understood, it would be unnecessary specifically to mention them. This Section further provides that "in the case of State officers and Judges of the Supreme Court" the oath shall be filed in the office of the Secretary of the Commonwealth. This provision has never been interpreted to include members of the General Assembly, whose oaths are not subscribed or filed.

Accordingly, the mere use of the expression "any person holding a State office under the Commonwealth of Pennsylvania" in the Retirement Act of 1923 does not in any sense disclose a clear intention on the part of the General Assembly to include themselves within the meaning of this term. On the contrary the instances in which the Constitution has treated members of the General Assembly and State officers as two distinct classes of public servants would seem to render it necessary for the Legislature specifically to mention members of the General Assembly as included within the definition of "State employe" in order to entitle them to membership in the Retirement System.

You are accordingly advised that it is the opinion of this Department that members of the General Assembly were not contemplated as State employes within the meaning of the Retirement Act of 1923.

1. Because the Act as to members of the General Assembly would be practically unworkable;

2. Because if members of the Legislature were regarded as within the Act, the provisions of the Act with regard to contributions would give members of the Legislature a preference which would be discriminatory in their favor; and

3. Because the Constitution of this Commonwealth itself clearly establishes a precedent which requires specific mention of members of the General Assembly to include them within the meaning of provisions relating to "State officers" generally.

It follows that as members of the General Assembly are not eligible to become members of the Retirement System persons employed in the Executive branch of the government cannot receive prior service credit for the years during which they were members of the General Assembly.

It would seem that the question with which we are dealing is one of those which should become the subject of determination by your Board as contemplated by the last sentence of clause 6, section 1 of the Retirement Act of 1923.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,  
*Deputy Attorney General.*

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*Retirement Fund—Registration Commissioners for Pittsburgh—County and State Funds—Act of June 27, 1923, P. L. 858.*

The Board of Registration Commissioners for the City of Pittsburgh, which commissioners are appointed under the provisions of the Act of February 17, 1906, P. L. 49, as well as the employees of said board, are not eligible to membership in the State Employee's Retirement Association created by the Act of June 27, 1923, P. L. 858, as they are paid by the county. The retirement fund applies only to those who receive salaries from State funds.

Department of Justice,  
Harrisburg, Pa., March 11, 1925.

Honorable Clyde L. King, Chairman, State Employees' Retirement Board, Harrisburg, Pennsylvania.

Sir: In a recent communication to this Department you advise that the Board of Registration Commissioners for the city of Pittsburgh, created by the Act of February 17, 1906, P. L. 49, request advice as to rights of membership of employees of the Board in the State Employees' Retirement Association, that the Commissioners are appointed by the Governor, that all salaries and expenses of the office are paid by the County, and that the Board has several employees appointed by the Commissioners, some of whom have been employed for many years in the services of the Board, and you inquire whether these Commissioners and their employees are eligible to membership in the State Employees' Retirement Association.

The State Employees' Retirement Association was created by the Act of June 27, 1923, P. L. 858. Section 3 of this Act provides that the membership of the association "shall consist of all State employees, as defined in paragraph 6 of Section 1 of this Act, who, by written application to the Retirement Board, shall, either as an original member or a new member, elect to be covered by the retirement system."

Paragraph 8 of Section 1 of said Act 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.”

Said 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). 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.”

From the wording of this last paragraph it will readily be noted that, beyond the exceptions therein provided for, the term “State employe” shall mean, first, “Any person holding a State office under the Commonwealth of Pennsylvania,” or secondly, “Any person employed by the year or by the month by the State Government of the Commonwealth of Pennsylvania in any capacity whatsoever.” However, when we consider the purpose intended by the Legislature as revealed by the Act, and the general scheme set up for the accomplishment of this purpose, we find that the term “State employe” must necessarily have additional qualification and limitation in its scope beyond the general meaning suggested by the definition itself.

Paragraph 5 of Section 7 of this Act provides that deductions shall be caused to be made by the head of each department of the State Government, on each and every pay-roll of a contributor, of such per centum of the salary of the contributor in such pay-roll period as shall be certified to the head of each department by the Retirement Board as proper, in accordance with the provisions of this Act. It also provides that the head of each department shall certify to the Treasurer of the Commonwealth a statement as voucher for the amount so deducted. Paragraph 6 of the same section provides further that the State Treasurer on receipt of these vouchers for deductions shall pay each of the amounts so deducted into the Members’ annuity savings fund. Although the procedure provided for the making of the deductions is an administrative matter, it must readily be seen that the Act is intended to apply only to those State employes who are paid salaries out of State funds. The Retirement System and funds thereunder created are based in part on contributions by the members of the Retirement Association, deducted from their salaries. This fact, together with the certainty sought to be secured

by the State Legislature in the collection of these deductions, indicates conclusively that the Act in question was intended only to apply to those persons paid out of State funds.

Consequently it is unnecessary for us to determine whether the Board of Commissioners and the employes thereunder come within the first class of "State employes" as above indicated, to wit, persons holding a State office under the Commonwealth of Pennsylvania, because neither the Commissioners nor other employes are paid out of State funds as indicated by part of paragraph 16 of the Act of February 17, 1906, P. L. 49 as follows:

"The county commissioners of each county, upon proper vouchers, shall provide for the payment of the commissioners, registrars and other officers or clerks provided by this act. They shall provide such clerical assistance for the commissioners as may be reasonably necessary, and shall furnish proper rooms for the accommodation of themselves and their records."

The salaries of the Commissioners and the employes of the Board are paid out of County funds, and the Retirement Act in question was never intended to apply to officers or employes paid out of County funds. The fact that the members of your Board are under the law appointed by the Governor of the Commonwealth cannot change the situation.

For these reasons, therefore, you are advised that the Commissioners of the Board of Registration Commissioners for the city of Pittsburgh, a city of the second class, which Commissioners are appointed under the provisions of the Act of February 17, 1906, P. L. 49, as well as the employes of said Board, are not eligible to membership in the State Employes' Retirement Association created by the Act of June 27, 1923, P. L. 858.

Yours very truly,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,  
*Deputy Attorney General.*

*State Employees' Retirement Association—Eligibility of Stream Observers to membership therein—"State Employee" defined—Acts of June 27, 1923, P. L. 858, April 6, 1925, P. L. 147.*

Men employed as Stream Observers by the year and paid monthly are State employes within the meaning of Paragraph 6, Section 1, Act of 1925, P. L. 148; if they entered the employ of the State subsequent to December 31, 1924, and have been employed for a period of more than twelve months, membership in the State Employees' Retirement Association is compulsory.

Department of Justice,  
Harrisburg, Pa., December 31, 1925.

Mr. Daniel D. Shively, Secretary, State Employees' Retirement Board,  
Harrisburg, Penna.

Sir: In reply to your memorandum of recent date, inquiring whether Stream Observers are required to join the State Retirement Association:

You say that these men are paid on a monthly salary basis, but receive only \$90.00 per year, and their employment requires their time for about one and one-half hours per day.

Paragraph 6 of Section 1 of the Act of 1925, P. L. 147, provides 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." (Judges and school employes are excepted by proviso contained in the Act.)

Section 3 of the Act of 1925, P. L. 148, provides as follows:

"A state employes' retirement association is hereby organized, the membership of which shall consist of all State employes, as defined in paragraph six of section one (above referred to) of this act, who, by written application to the Retirement Board, shall, either as an original member or a new member, elect to be covered by the retirement system. Any state employe who becomes a State employe subsequent to the thirty-first day of December, nineteen hundred twenty-five, shall during the first twelve months of employment as a State employe, have the option of membership, but after the first twelve months of such employment as a State employe membership, as a new member shall be compulsory."

You do not give the length of time these men have been employed.

In view of the above law, I am of the opinion that these men, employed as Stream Observers by the year and paid monthly, are "State employes" within the meaning of Paragraph 6, Section 1 of the Act of 1925, P. L. 147, and if they entered the employ of the State subse-

quent to December 31, 1924, and have been employed for a period of more than twelve months, membership in the State Employees' Retirement Association is compulsory.

Very truly yours,

DEPARTMENT OF JUSTICE.

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*State Employees' Retirement Board—Discretionary power, to change a choice or election made by the contributor—Act of 1923, P. L. 858.*

Under Sections 11, 13, 14 and 15 of the Act of 1923, the State Employees' Retirement Board has no discretionary power to change an election or choice once made by a contributor upon retirement, and the latter is bound by such election.

Department of Justice,  
Harrisburg, Pa., June 18, 1926.

Mr. R. E. Haines, Secretary, State Employees' Retirement Board,  
Harrisburg, Pennsylvania.

Sir: In reply to your recent letter relating to the cases of John Lawrence Foy and I. M. Gray, I beg to submit the following:

With reference to the Foy case, your letter states:

"John Lawrence Foy was retired from State service not voluntary, after 10 years and 1 month service, on December 5th, 1925. His monthly annuity amounts to \$7.99. On February 28, 1926, we sent him his first check for the period 12-5-25 to 3-1-26, amounting to \$22.64. He cashed this check and wrote us stating that he had been misinformed as to the amount of his monthly annuity, as \$7.99 would be absolutely worthless to him. He asked that the Board reverse its decision in this matter, and allow him the balance of his accumulated deductions which amounts to \$274.43. I wrote to Mr. Foy and explained the value of \$7.99 as long as he lives, compared with a lump sum settlement of \$274.43, but he is still of the opinion that he would rather have the large check instead of his annuity."

Section 11, Paragraph 3 of the Act of 1923, P. L. 858-870, provides as follows:

"3. Should a member be discontinued from service, not voluntarily, after having completed ten years of total service, he shall be paid as he may elect as follows:

(a) The full amount of the accumulated deductions standing to the credit of his or her individual account in the annuity savings fund; or

(b) An annuity of equivalent actuarial value to his accumulated contributions, and, in addition, to State annuity, beginning immediately, having a value equal to the present value of a State annuity beginning at the retirement age, of one one-hundred-sixtieth (1-160) or one one-hundredth (1-100) of his final salary multiplied by the number of years of prior service, plus one one-hundred-sixtieth (1-160) or one one-hundredth (1-100) of his final salary multiplied by the number of his years of service as a member."

In this case the words "as he may elect" means *as he may make choice of*, and having made his election, the employe cannot at a later period, change said choice or election. It may be that in some cases this will work a hardship to the employe because of his present financial condition. In view of this, it might be wise to have the Act of Assembly so amended that the Board would have discretionary powers in cases of this kind. It is true that the Act of 1923, P. L. 862, Section 4, Paragraph 5, provides that "Subject to the limitations of this act and of law, the retirement board shall, from time to time, establish rules and regulations for the administration of the funds created by this act and for the transaction of its business," but I am of the opinion that this paragraph does not give the Board power to change the expressed provisions of Section 11, Paragraph 3, quoted above.

I am, therefore, of the opinion that Mr. Foy is not entitled to be paid the balance of his accumulated deduction which you state amounts to \$274.43, but shall continue to receive monthly annuity.

With reference to the case of I. M. Gray:

Your letter states as follows:

"Mr. I. M. Gray applied for superannuation retirement February 18, 1926. His annuity amounts to \$15.63 per month. His accumulated deductions total \$251.54. Mr. Gray now states that due to illness and business reverses, he is in very great need of the \$251.54, and asked that the Board reverse its decision and grant him this amount in lieu of his monthly annuity. I also wrote to Mr. Gray, explaining the situation in detail, and asked him to accept the annuity for his own good."

Section 13 of the Act of 1923, P. L. 858-872, provides as follows:

"Retirement for superannuation shall be as follows:

(1) Any contributor who has reached the superannuation retirement age may retire for superannuation by filing with the retirement board a written statement duly attested, setting forth at what time, subsequent to the execution of said application, he or she desires to be retired. Said application shall retire said contributor at the time so specified, or, in the discretion of the retire-

ment board, at the end of the year in which the time so specified occurs.

#### Allowance on Superannuation Retirement.

(2) On retirement for superannuation, a contributor shall receive a retirement allowance which shall consist of—

(a) A member's annuity, which shall be the actuarial equivalent to his or her accumulated deductions; and

(b) A State annuity of one one-hundred-sixtieth (1-160) or one one-hundredth (1-100) of his or her final salary for each year of total service; and

(c) In addition thereto, if an original member of the retirement association, a further State annuity of one one-hundred-sixtieth (1-160) or one one-hundredth (1-100) of his or her final salary for each year of prior service, as certified to said original member in the certificate issued to him or her by the retirement board under the provisions of section ten of this act; but in no event shall the total State annuity exceed fifty per centum of his or her final salary."

Section 14 of said act provides as follows:

#### "Options.

At the time of his or her retirement, any contributor may elect to receive his or her benefits in a retirement allowance, payable throughout life; or he or she may, on retirement, elect to receive the actuarial equivalent at that time of his or her member's annuity, State annuity, or retirement allowance, in a lesser member's annuity, or a lesser State annuity, or a lesser retirement allowance, payable throughout life, with the provisions that—

"Option 4.—Some other benefit or benefits shall be paid to either the contributor or such other person or persons as he or she shall nominate; provided such other benefit or benefits shall, together with such lesser member's annuity, or lesser State annuity, or lesser retirement allowance, be certified by the actuary of the retirement board to be of equivalent actuarial value, and shall be approved by the retirement board."

Section 15 provides as follows:

#### "Monthly Payments.

A member's annuity, a State annuity, or a retirement allowance, granted under the provisions of this act, shall be paid in equal monthly instalments, and shall not be increased, decreased, revoked, or repealed except as otherwise provided in this act."

Section 14 of the Act referred to above also provides that the contributor may elect to do certain things as set forth in said Section,

and I am of the opinion that having made such election or choice, he is bound thereby. There is no provision in the Act giving to the Board discretionary powers to change an election once made by the contributor.

I am, therefore, of the opinion that you are not permitted by law to pay to Mr. Gray the accumulated deductions which you said would now amount to \$251.54.

Yours very truly,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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**OPINION TO THE BOARD OF TRUSTEES OF THE  
STATE HOSPITAL FOR THE INSANE AT  
WARREN, PA.**

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## OPINION TO THE BOARD OF TRUSTEES OF THE STATE HOSPITAL FOR THE INSANE AT WARREN, PA.

*State Hospital—Counties Outside District—Discretion Vested in Trustees—Order of Court—Administrative Code of 1923.*

The Board of Trustees of a State Hospital for the Insane, under the Administrative Code of 1923, may decline to accept criminal insane persons coming from a county outside its district as the same is designated and defined by the Department of Welfare, irrespective of whether the same are committed by the Court or not.

Department of Justice,  
Harrisburg, Pa., April 14, 1925.

Board of Trustees of the State Hospital for the Insane at Warren,  
Pa., Warren, Penna.

Gentlemen: This Department is in receipt of your request for an opinion as to whether or not you may "decline to admit any criminal insane person coming from a county outside (your) State Hospital district, whether committed specifically by a court or not."

The Administrative Code of 1923, Article XX, Section 2015, provides, inter alia, as follows:

"With regard to State institutions under the supervision of the Department of Welfare, the Department shall have the power, and its duty shall be: (a) to determine the capacity of such institutions; (b) to determine and designate the type of persons to be received by such institutions, the proportion of each type to be received therein, and the districts from which persons shall be received by such institutions;"

The State Hospital for the Insane at Warren is a State Institution under the supervision of the Department of Welfare (Administrative Code, Article II, Section 202).

In conformity with the above quoted authority granted to it, the Department of Welfare, under date of May 31, 1924, determined and designated (1) the types of persons to be received by the respective State mental hospitals; (2) the proportion of each type to be received therein, and (3) the districts from which persons should be received by such institutions, inter alia, as follows:

### WARREN STATE HOSPITAL

1. For all types of mental diseases.
2. For the time being the proportion of the several types of patients to be received will not be limited.

3. The district from which patients shall be received, shall include the following counties:

|          |        |         |
|----------|--------|---------|
| Cameron  | Elk    | Mercer  |
| Clarion  | Erie   | McKean  |
| Crawford | Forest | Venango |
|          | Warren |         |

This action of the Department of Welfare was promulgated May 31, 1924.

You are therefore advised that you may decline to admit any criminal insane persons coming from a county outside your district, as the same is designated and defined by the Department of Welfare, irrespective of whether the same are committed by the court, or not.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES O. CAMPBELL,  
*First Deputy Attorney General.*

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**OPINION TO THE STATE WORKMEN'S  
INSURANCE BOARD**

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## OPINION TO THE STATE WORKMEN'S INSURANCE BOARD

*Workmen's compensation—State insurance fund—Payments—Extension of payments—Discretion of board—Acts of June 2, 1915, and July 20, 1917.*

1. The State Workmen's Insurance Board may, under the Acts of June 2, 1915, P. L. 762, and July 20, 1917, P. L. 1139, in its discretion, so as to administer properly the fund in its hands, pay more than \$100 for medical service, medicine and supplies to an injured workman employed by a policy-holder of the fund.

2. The board may also, in the proper exercise of its discretion, make such payments for a greater period than thirty days after the disability arises.

Department of Justice,  
Harrisburg, Pa., September 13, 1926.

Honorable Richard H. Lansburgh, Chairman, State Workmen's Insurance Board, Harrisburg, Pennsylvania.

Sir: Some months ago you requested to be advised whether or not the Workmen's Insurance Board has authority:

1. Under any circumstances to authorize the payment of more than one hundred dollars (\$100.00) for medical services, medicines and supplies for employes of policyholders of the State Workmen's Insurance Fund, entitled, because of injuries received, to have such services and supplies furnished by their employer under the provisions of the Workmen's Compensation Act; and

2. To pay for such medical services, medicine's and supplies for a greater period than the first thirty days after disability begins.

Under date of June 8th we answered your inquiry but have since had occasion to reconsider the opinion then expressed. Accordingly this opinion will supersede that heretofore rendered.

The Workmen's Insurance Board was created by the Act of June 2, 1915, P. L. 762 for the purpose of administering "The State Workmen's Insurance Fund" which was also created by that Act.

The State Workmen's Insurance Fund consists of:

1. The premiums paid by subscribers thereto who as employers are obliged to carry workmen's compensation insurance unless exempted from the duty of so doing by the Department of Labor and Industry;

2. A surplus accumulated out of premiums and set apart to cover the catastrophe hazard of the subscribers to the Fund and to guarantee its solvency; and

3. Reserves adequate to make future disbursements on account of past injuries to or death of employes of subscribers to the Fund.

The rates payable by subscribers are those established by the Rating Bureau which determines all Workmen's Compensation in-

insurance rates chargeable in Pennsylvania and must be paid in full to the Workmen's Compensation Board, but under Section 11 of the Act of June 2, 1915, as amended by the Act of July 20, 1917, P. L. 1139 the Workmen's Insurance Board is directed at the expiration of every year, if there shall be a balance remaining after deducting the disbursements on account of injuries to employes of subscribers and for administering the fund, the unearned premiums on undetermined risks and the percentage of premiums paid or payable to maintain the surplus required by the Act and after setting aside an adequate reserve, to distribute as much of the balance among the subscribers as the Board may determine to be safely distributable.

Under this Section of the Act of 1915 as amended subscribers to the Workmen's Insurance Fund have an interest in the economical administration of the Fund and it is clear that the Workmen's Insurance Board has a two-fold function to perform, namely, to see to it that payments of workmen's compensation are made to employes or dependents of employes of subscribers to the Fund as provided by law, and, in addition, to conserve the assets of the Workmen's Insurance Fund for the benefit of the subscribers thereto.

Section 13 of the Act of June 2, 1915, P. L. 762, is as follows:

"The said Board shall have the power to make all contracts necessary for supplying medical, hospital and surgical services, as provided in Section 306, subsection (e), Article III of the Workmen's Compensation Act of 1915."

Section 20 of the Act provides that a subscriber to the Fund upon giving notice within a prescribed time of the happening of an accident to his employe shall be discharged from all liability for the payment of compensation for the personal injury or death of such employe by such accident, but that nothing in the section "shall discharge any employer from the duty of supplying the medical and surgical services, medicines and supplies, required by Section 306 of the Workmen's Compensation Act of 1915: And provided, further, that any subscriber who has supplied such services, medicines and supplies shall be reimbursed therefor from the Fund."

Section 306 (e) Article III of the Workmen's Compensation Act of 1915 (Act of June 2, 1915, P. L. 736) as amended by the Act of June 26, 1919, P. L. 642 is as follows:

"(e) During the first thirty days after disability begins, the employer shall furnish reasonable surgical and medical services, medicines, and supplies, as and when needed, unless the employe refuses to allow them to be furnished by the employer. The cost of such services, medicines, and supplies shall not exceed one hun-

dred dollars. If the employer shall, upon application made to him, refuse to furnish such services, medicines, and supplies, the employe may procure the same, and shall receive from the employer the reasonable cost thereof within the above limitations. In addition to the above services, medicines and supplies, hospital treatment, services, and supplies shall be furnished by the employer for the said period of thirty days. The cost for such hospital treatment, service, and supplies shall not in any case exceed the prevailing charge in the hospitals for like services to other individuals. If the employe shall refuse reasonable surgical, medical, and hospital services, medicines and supplies, tendered to him by his employer he shall forfeit all right to compensation for any injury or any increase in his incapacity shown to have resulted from such refusal."

As the Workmen's Insurance Board is authorized by Section 13 of the Act of June 2, 1915, P. L. 762 to make all contracts necessary for supplying medical, hospital and surgical services as provided in the above-quoted provision of the Workmen's Compensation Act it is necessary to consider the meaning and effect of that provision. Section 306 (e) of the Workmen's Compensation Act prescribes the *employer's duty* to furnish medical, and hospital services, medicines and supplies. It provides that such services must be furnished during the first thirty days after disability. It also provides that the cost of surgical and medical services, medicines and supplies shall not exceed one hundred dollars. Clearly this limitation does not render it unlawful for an employer to furnish surgical and medical services, medicines and supplies for more than thirty days or costing more than one hundred dollars. The plain intent of the Legislature was to place a limitation upon the employe's right to demand hospital, surgical or medical services, medicines and supplies. If by furnishing such services, medicines or supplies for more than thirty days or by spending more than one hundred dollars for surgical or medical services the duration of the employe's disability can be shortened, or if by hospital or medical or surgical attention for more than thirty days or the expenditure of more than one hundred dollars the loss of a member can be avoided, clearly an employer is not violating either the letter or the spirit of the Workmen's Compensation Act in thus benefiting his employe and at the same time reducing or attempting to reduce his financial outlay for weekly compensation payments.

Similarly an insurance carrier other than the State Workmen's Insurance Fund may without any violation of the compensation laws extend beyond thirty days the period of hospital or surgical or medical treatment rendered to an employe or expend in surgical or medical treatment more than one hundred dollars; notwith-

standing the fact that the insurance company's primary purpose is by reducing the period of disability or preventing the loss of a member to diminish the cost to the insurance company of the accident.

If under Section 306 (e) of the Workmen's Compensation Act of 1915 as amended employers and their insurance carriers other than the State Workmen's Insurance Fund may lawfully extend the period of surgical or medical services or exceed an expense of one hundred dollars in rendering such services, is there anything in the Workmen's Insurance Fund Act (P. L. 762) of 1915 which prevents the Workmen's Insurance Board from Administering the Workmen's Insurance Fund along similar lines for the purpose of minimizing disbursements and increasing the dividends payable to subscribers?

We are of the opinion that this question must be answered in the negative.

In authorizing the Workmen's Insurance Board to make contracts necessary for supplying medical, hospital and surgical services as provided in Section 306 (e) of the Workmen's Compensation Act the Workmen's Insurance Board is given authority in all cases to contract for rendering such services to injured employes of subscribers for the period during which such service is mandatory and in the amount which the employe is entitled to demand that the employer shall spend in his behalf if necessary. The Board is not prohibited from going further if by so doing it believes it can conserve the assets of the Fund. The Board could not pay to an injured employe more than one hundred dollars to reimburse him for his surgical or medical expenses nor could it pay to the employe the cost of hospital services beyond the first thirty days after the commencement of disability. Nor could the Board reimburse an employer for his expenditures on behalf of an employe in excess of the above limitations. The Board may, however, as a matter of administration, contract with a surgeon or a physician or a hospital to care for the employe of one of its subscribers after the first thirty days of disability have expired and even though it has already expended one hundred dollars for surgical or medical expenses, if in the judgment of the Board such additional care will lessen the period of disability to such an extent as to save the Fund more than the cost of the additional surgical or medical or hospital services. We are further of the opinion that for any possible error of judgment in this regard, the members of the Board could not be held personally liable for the excess expenditures.

It would, of course, be unlawful for the Board out of a spirit of generosity to agree to furnish surgical or medical or hospital services to an injured employe for a period greater than thirty days or

to expend more than one hundred dollars for surgical or medical services if there were no prospect by such additional period of service or such additional expenditure of money of reducing the duration of disability or avoiding the loss of a member, as the case may be, and thereby saving money for the Fund. As trustee of the Fund administered by them the members of the Board have no power to expend any of the moneys of the Fund for charitable purposes. They do, however, have the power and, in our opinion, it is their duty if upon competent advice they believe that an expenditure for surgical, medical or hospital services beyond the required period or in excess of the required amount will save money to the Fund to contract for the rendering of such extended service or the expenditure of such excess amount. Any other conclusion would be incompatible with the clearly expressed theory upon which the Fund was created namely, that it is to be administered for the benefit of the subscribers thereto and of their employes.

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,

*Attorney General.*

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OPINIONS TO THE WATER AND POWER  
RESOURCES BOARD

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## OPINIONS TO THE WATER AND POWER RESOURCES BOARD

*Water and Power Resources Board—Authority of the Chairman to draw requisitions against the appropriation made in the Act of July 18, 1919 to the Water Supply Commission of Pennsylvania or the Department of Conservation—Legality of proposed agreement between the Secretary of War of the United States and the Water & Power Resources Board of the Commonwealth of Pennsylvania relative to a survey of the Allegheny and Monongahela Rivers with a view to the control of floods—Act of Congress May 31, 1924, Public No. 170, Section 2—Acts of June 14, 1923, P. L. 776—July 18, 1919, App. Acts p. 246.*

The proposed agreement submitted to the Department complies with the requirements of the Acts of 1923 and 1919 *supra*. The Chairman of the Water and Power Resources Board, the successor of the Water Supply Commission, may, upon the execution of said agreement draw against said appropriation one-half of the expenses certified monthly by the United States District Engineer of Pittsburgh.

Department of Justice,  
Harrisburg, Pa., May 26, 1925.

Major R. Y. Stuart, Chairman of the Water and Power Resources Board, Harrisburg, Pa.

Sir: I have your letter of April 7, submitting copy of a proposed Agreement between the Secretary of War of the United States and the Water and Power Resources of the Commonwealth of Pennsylvania relative to a survey of the Allegheny and Monongahela Rivers, with a view to the control of floods. You ask my opinion whether the Agreement meets with the approval of this Department as to form and legality.

The Act of Congress referred to in the Agreement (Act of May 31, 1924, Public No. 170, Section 2), authorizes the Secretary of War "to cause surveys to be made of the following streams with a view to the control of their floods in accordance with the provisions of Section 3 of 'An Act to provide for the control of the floods of the Mississippi River and of the Sacramento River, California, and for other purposes', approved March 1, 1917: \* \* \* Allegheny and Monongahela Rivers, and the sum of \$25,000 is hereby authorized to be appropriated for this purpose: Provided, That no money hereby authorized to be appropriated shall be expended unless and until assurances have been given satisfactory to the Secretary of War that the Commonwealth of Pennsylvania will contribute a like sum of \$25,000 for the purpose of making the survey hereby authorized; and the Secretary of War is hereby authorized to receive from the Commonwealth of Pennsylvania such sum of \$25,000 and to expend the same as the \$25,000 hereby authorized to be appropriated may be expended".

The Pennsylvania Act of June 14, 1923, P. L. 776, amended the earlier Act of July 18, 1919 (Appropriation Acts 246) by saving the appropriation thereby made from elapsing into the general fund of the State Treasury. The original appropriation was in the alternative to the Water Supply Commission of Pennsylvania or the Department of Conservation. There is no Department of Conservation and by the Administrative Code the Water Supply Commission was replaced by the Water and Power Resources Board.

The amount of the appropriation was \$25,000. It was made—

“for the purpose of co-operating with the Government of the United States in making examinations, investigations, and surveys on rivers of this Commonwealth and on tributaries of such rivers, whether the same be wholly within or partly within and partly without or wholly without this Commonwealth, and in preparing plans and estimates of cost, with a view to devising and carrying into effect plans for controlling the flood waters of rivers which are either in whole or in part within this Commonwealth. For the purpose of such co-operation, the Water Supply Commission of Pennsylvania \* \* \* is hereby authorized, on behalf of the Commonwealth of Pennsylvania, to enter into such contracts and agreements with the Secretary of War \* \* \*, as to the said Water Supply Commission of Pennsylvania \* \* \* may seem proper”.

I am of opinion that the form of contract submitted by you complies with the requirements of this statute; and further that if it is executed by the Secretary of War and by the Water and Power Resources Board through you as Chairman, the Commonwealth will be under the legal obligation of paying out of said appropriation of \$25,000, one-half (not exceeding \$25,000) of the expense certified monthly as specified in the proposed agreement, by the United States District Engineer at Pittsburgh.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP P. WELLS,  
*Deputy Attorney General.*

*Water and Power Resources Board—Wilsonville Bridge—Responsibility for Maintenance—Act of June 14, 1923.*

The Board, by orders duly made, required the reconstruction of the bridge and fixed the location, manner and extent of such reconstruction. The Act gives no further powers to the Board to impose on the Company or on others any additional duties with regard to the bridge. The Board is without authority to issue a supplemental order fixing responsibility for the maintenance of the bridge.

Department of Justice,  
Harrisburg, Pa., April 5 1926.

Hon. R. Y. Stuart, Chairman Water and Power Resources Board,  
Harrisburg, Pennsylvania.

Dear Sir: By letter of February 18th you requested the opinion of this Department as to the authority of the Water and Power Resources Board (hereinafter called the Board) to issue a supplemental order fixing the responsibility for the maintenance of the new Wilsonville Bridge over Wallenpaupack Creek on State Highway Route No. 7, Pike and Wayne Counties.

From the papers transmitted it appears that portions of said State Highway, including said bridge, were within the area to be submerged by the reservoir to be created by the dam of the Wallenpaupack Project of the Pennsylvania Power and Light Company (hereinafter called the Company); that permit for said dam was issued to the Company by the Board under the Permit Act of June 14, 1923, P. L. 704; that the relocation and reconstruction of said submerged portion of highway and of said bridge on the present bridge site was ordered by the Board on August 27, September 24, and November 26, 1924, under the Condemnation Act of June 14, 1923, P. L. 700.

The Acting Secretary of Highways, by letter of December 11, 1925, (copy transmitted with your request) points to the fourth paragraph of Section 2 of said Permit Act of June 14, 1923, as a basis for the desired supplemental order. That paragraph, though it gives wide discretion to the Water Supply Commission (now the Board—Administrative Code, Section 1606) as to the terms, conditions and stipulations that may be imposed, strictly limits the time for and the manner of the exercise of that discretion. The Commission (Board) shall "specify therein" (in the permit) a reasonable annual charge and "may . . . embody . . . such other terms, conditions and stipulations as the Commission" (Board) "shall deem necessary", etc. The word "embody" clearly means embody in the permit. This paragraph gives no authority to impose additional conditions after a permit has issued.

Section 2 of the Condemnation Act of June 14, 1923, authorizes any "public service company holding a limited power permit" (i. e.

a permit issued under said Permit Act) .... "granted on behalf of a power project ....for use in public service .... to appropriate and condemn, overflow, submerge, occupy and use any .... highway" or "bridge .... whether publicly or privately owned, which the Commission" (Board) "shall find to be necessary for the construction, operation or maintenance of the power project .... in behalf of which such permit was granted: PROVIDED That such permittee shall cause the same .... to be reconstructed at his own proper expense, on such location, in such manner and to such extent as the Commission" (Board) "may require." Copies of the said permit issued under said Permit Act and of the Orders of the Board, transmitted with your request, show that the Company is a public service company holding a limited power permit granted in behalf of a power project for use in public service; and the Board duly found the submergence of the bridge on its old location to be necessary for the construction, maintenance and operation of the power project. They further show that the Board, by orders duly made, required the reconstruction of the bridge and fixed the location, manner and extent of such reconstruction. If these orders were not complied with obedience could, of course, be enforced, but I find nothing in the said Condemnation Act giving further powers to the Board to impose on the Company or on others any additional duties with respect to the bridge.

It follows that the Board is now without authority to issue a supplemental order fixing responsibility for the maintenance of the bridge.

Sincerely yours,

DEPARTMENT OF JUSTICE,

PHILIP P. WELLS,  
*Deputy Attorney General.*

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*Water and Power Resources Board—Construction of Water Works—Extension of time—Act of June 15, 1911.*

Under the Act of June 15, 1911, the Water and Power Resources Board has no authority to grant a second extension of time within which to begin the construction of water works, especially when such second request is made after two years have passed from the date of incorporation. Such requests must be made before the two year period has expired.

Department of Justice,  
Harrisburg, Pa., March 23, 1926.

Hon. Robert Y. Stuart, Chairman Water and Power Resources Board, Harrisburg, Pennsylvania.

Dear Sir: I am in receipt of your request for opinion whether the Water and Power Resources Board can entertain a petition by

the Cold Run Water Company for a second extension of the time limited for the beginning of construction of its works.

From your letter it appears that the Cold Run Water Company was incorporated on May 5th, 1921, for "the supply, storage and transportation of water and water power for commercial and manufacturing purposes in the Township of Blythe, County of Schuylkill, State of Pennsylvania." On the 23rd day of March, 1923, a petition was presented to the Water Supply Commission by said company under the provisions of the Act of June 15, 1911, P. L. 990, requesting approval of an extension of two years in which to begin the construction of its works and said petition was approved on May 1st, 1923, the extension to cover a period of two years computing from the 5th day of May, 1923.

On April 2nd, 1925, the Cold Run Water Company filed a petition with the Water and Power Resources Board requesting approval, under the Act of June 15, 1911, of a further extension of two years in which to begin the construction of its works.

Section 1 of said act of June 15, 1911, reads as follows:

"That subsequent to the passage of this act any water company or water-power company, heretofore or hereafter incorporated under the laws of this Commonwealth, which shall not have begun the construction of its works within two years after the date of its incorporation, or which shall not have completed the same or placed the same in operation within five years thereafter, may, at any time previous to the expiration of said two years or five years thereafter, make application to the Water Supply Commission of Pennsylvania for an extension of such time, as herein provided. Such application shall be made upon a petition, under the common seal of such corporation and verified by its president or other presiding officer, setting forth the grounds of the application, and that the same is made pursuant to a resolution of the board of directors of said company, at a meeting called for the purpose,—a duly certified copy of which shall be annexed to said petition. Thereupon it shall be the duty of said commission to hold a hearing upon said petition, at such date as it may decide, and, after due hearing and examination, said commission may approve said petition, subject to such limitations and restrictions as it may see fit, and file in the office of the Secretary of the Commonwealth a duly certified copy of an order setting forth its approval of said application for extension. In the event of the refusal to approve by the Water Supply Commission, appeal may be taken by such company, within ten days thereafter, to the court of common pleas of the county in which said corporation shall have its principal office; whereupon said court shall review

the papers in the case, and testimony at the hearing before the Water Supply Commission; and, in the event of said court finding that such company had proceeded with due diligence and good faith, it may order the reversal of the order of the commission, setting forth the limit of such extension of the time granted, and file a copy of such order with the Secretary of the Commonwealth.

"In the event of the refusal of the Water Supply Commission to approve such petition for extension of time, and if an appeal shall not be taken within ten days thereafter, said commission shall, on the expiration of the said period of two years or five years, issue a decree declaring such company defunct and its charter void, and it shall be stricken from the books of the Secretary of the Commonwealth and the Auditor General."

The wording of the Section above quoted is not free from obscurity. It seems clear, however, that the purpose of the act is to prevent the tying up of water resources indefinitely without use while giving the Water Supply Commission (now the Water and Power Resources Board, Administrative Code Section 1608 (a) paragraph (8) discretion to extend the time for the beginning or completion of works by action taken "at any time previous to the expiration of said two years" (for beginning) "or five years" (for completion). The only two years mentioned before the phrase "said two years" is contained in the words "which shall not have begun the construction of its works within two years after the date of its incorporation." I am therefore of the opinion that the Water and Power Resources Board is without authority to entertain a petition for extension of time for beginning construction which petition is filed after the expiration of two years following the date of incorporation; and that the extension of time for beginning construction heretofore granted does not extend the time in which the pending application can be filed. It follows that the Board cannot consider the said application for a second extension of time.

Since there seems to be nothing now before the Board for action with respect to the time limited for completion of the company's works there is no basis for an opinion from this Department as to the effect thereon of the extension of time for the beginning of construction heretofore granted.

Very sincerely yours,

DEPARTMENT OF JUSTICE,

PHILIP P. WELLS,  
*Deputy Attorney General.*

*Water and Power Resources Board—Wallenpaupack Project—Act of 1923, P. L. 704, P. L. 498.*

Findings of fact as a basis for the condemnation of certain lands in connection with the so-called Wallenpaupack Project.

Department of Justice,  
Harrisburg, Pa., October 7, 1926.

Honorable R. Y. Stuart, Chairman, Water and Power Resources Board, Harrisburg, Pennsylvania.

Sir: Your letter of September 23 is received requesting the opinion of this Department in the matter of the application of the Pennsylvania Power and Light Company, hereinafter called the Power Company, for a finding of fact as a basis for the condemnation of certain lands in connection with the so-called Wallenpaupack Project.

From your letter and from the minutes of the meeting of your Board held May 26, 1926, the following facts appear:

The Power Company is the holder of a limited power permit issued by the Board under the Act of June 14, 1923, P. L. 704. Under this permit it has constructed a water power dam across Wallenpaupack Creek in Pike and Wayne Counties—and has thereby created the largest lake wholly within the Commonwealth, having a shore line of some fifty miles.

The Power Company has acquired by purchase, or has secured flowage rights on, nearly all of the lands which will be flooded when the lake is filled to the top of the movable gates in the spillway, (1190 feet above mean sea level). The crest of the dam is 10 feet higher than the top of these gates and the additional land that would be flooded if the lake were filled to the crest of the dam, making allowance for height of water increasing upstream in Wallenpaupack Creek at the entrance to the lake due to backwater from the lake and flood flow in the stream, is herein called "the marginal strip".

The Power Company has already acquired by purchase, or has secured flowage rights on, a large part of this marginal strip. Incident to such, and perhaps other, land purchases in connection with the project, it has also acquired extensive tracts of upland which would not be flooded even under the conditions last mentioned. These surplus uplands have been disposed of to a separate company. The Power Company now desires to condemn all the rest of the marginal strip and has made application to the Board for a finding of fact to that end under section 3 of the Act of June 14, 1923, P. L. 700.

The Power Company at the hearing held by your Board under the said section submitted evidence, which was not contradicted, that it needed the marginal strip for three uses in the operation

of the project, namely: for flooding, for washing of the surface by wave action when not flooded and for the gathering and removal or burning of debris floated up on the marginal strip from the lake. The evidence as to the two uses last mentioned shows that the marginal strip will normally not be submerged. No evidence as to the need of the marginal strip for any other use was offered, but the Power Company's representatives stated that the right of exclusive possession was desired in order to meet any unforeseen needs that may arise in the future.

The protestants submitted evidence which was not contradicted, that some, at least, of them, in their deeds granting to the predecessor of the power company lands below elevation 1190, reserved to the grantors the rights of access to the lake, boating, fishing, domestic water use, etc., or that they received back from said predecessor deeds granting these rights. The acquisition by the Power Company now of the right of exclusive possession of the entire marginal strip would destroy the rights thus reserved by or granted to these owners of upland on the shore of the lake.

Your first question is:

"Under the section of the statute above quoted, has the Board, in making its finding of facts as to property needed for reservoir purposes for a hydro-electric project, authority to find that anything less is required for the construction, operation and maintenance of the project than complete and exclusive possession of and control over the lands in question, unless and until the use thereof for hydro-electric purpose is abandoned".

"The exercise of the right of eminent domain, whether directly by the State, or its authorized grantee, is necessarily in delegation of private right, and the rule is that such authority must be strictly constructed." *Lazarus vs. Morris*, 212 Pa. 128. The extent of such a grant is a question of statutory construction. The Legislature, acting within its powers to establish necessary public service, such as schools, highways, canals, railroads, water supply and electricity, is the final judge both as to the land to be used and the estate or interest therein to be taken. By unequivocal words it may authorize the condemnation of a fee simple title. *Wyoming Coal Co. vs. Price*, 81 Pa. 156. An example of this is section 11 of the Act of Congress of March 3, 1909, c. 264 (35 Stat. 815-820) declaring "That the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present St. Mary's Falls ship canal, throughout its entire length and lying between said ship canal at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith,"—also authorizing the Secretary of

War to take immediate possession, file a notice and description in the land records of the proper county, and requiring the proper Federal officials to begin court proceedings. *U. S. vs. Chandler-Dunbar Company*, 229 U. S. 53, note 57 L. Ed. 1065, note. The words "the state shall be seized of such lands as of an absolute estate in perpetuity" are effective to vest in the condemnor for a canal for the ownership of coal deposits in the land taken. *Wyoming Coal Co. vs. Price*, *supra*.

But in Pennsylvania and the other States the Legislature has usually granted to the condemnor corporation in general terms the right to take property necessary for the public purpose it is to serve and has made the corporation the judge of the question whether the use of any piece of land is necessary to its purpose; also the extent of the interest the aim that may be taken is inferred from the nature of the use that the corporation is to make of the land. These statutes are entirely different from that now under consideration.

For example, under the Acts of Assembly respecting highways and lateral or mining railways the condemnor takes a mere easement, the proprietor of the land retaining his exclusive right to all its mines, quarries, springs of water, timber and earth for every purpose not incompatible with the right of way. *Lyon vs. Gormley*, 53 Pa. 261, 263; *Lance's Appeal*, 55 Pa. 16. But a condemnor railroad company takes a base or conditional fee in land condemned for station grounds or for a right of way for railroad tracks, with right of exclusive possession subject to reversion to the condemnee in case of the abandonment of the use of it for railroad purposes. *Pa. Schuylkill Valley R. R. vs. Reading Paper Mills*, 149 Pa. 18; *Pittsburgh, etc. R. R. Co. vs. Peet*, 152 Pa. 488; *Gillespie vs. Reading Co.* 226 Pa. 31. And under the Act of May 11, 1867, P. L. 249 granting to a water company the right to "take the water from any rivulet, creek or stream" it was held that the condemnor takes all the riparian owner's right to the water of the stream, and "if the company deems it necessary it has an undoubted right to enclose its reservoir and prohibit access to it." *Finn vs. Providence Gas and Water Co.*, 199 Pa. 631, 640. The same conclusion was drawn from an Act "similar in . . . respect . . . of" giving the condemnor "the right to take water and land necessary for corporate uses" in *Citizens Electric Co. vs. Susquehanna Boom Co.* 270 Pa. 517 (in equity); but it is to be noted that the Court found another reason for its decision in the wrong doing of the complaining company.

In the two cases last cited the Court makes it clear that the statutes under consideration constituted the condemnor the judge of the necessity for the taking, and this is generally true of the condemnation statutes of this and other states. But the application before you is brought under a statute of an utterly different

character—section 3 of the Condemnation Act of June 14, 1923, P. L. 700, which reads as follows:

“Any public service company holding a limited power permit or a limited water supply permit, granted on behalf of a power project or a water supply project for use in public service, shall have the right and power to condemn and appropriate any lands, waters and other property and rights, as to which the said Commission, after due notice, and public hearing, shall have found that the appropriation of the same is required by the present and future interests of the Commonwealth for the construction, maintenance, or operation of the project in behalf of which such permit is granted, and is not incompatible with the public interests of the region in the vicinity of such project.”

The “Commission” mentioned was the Water Supply Commission, the powers and duties of which in this behalf were transferred to your Board by Section 1608 of the Administrative Code of 1923, P. L. 498, 574.

This statute differs from ordinary condemnation statutes in the following respects:

1. The necessity of the Commonwealth, not that of the condemnor, is the basis for the taking;

2. But even the necessity of the Commonwealth will not authorize the taking unless the taking is compatible with local public interests;

3. The taking is restricted to those rights in land or other property as to which such necessity and compatibility are found to exist; (“lands, waters and other property and rights.” See also Act February 25, 1926 P. L. 55, Section 8, which made the viewers the judges of “the quality and duration of the interest and estate . . . required”); and

4. An administrative agency of the state (The Water and Power Resources Board) is made the judge of necessity and compatibility.

The words of Section 3 above quoted are clear, explicit and controlling. You are therefore advised in answer to your first question that your Board has the power and the duty of finding from the evidence what rights, if any, in the marginal strip less than complete and exclusive control thereover during beneficial use, are required by the present and future interests of the Commonwealth for the operation and maintenance of the project and are not incompatible with the public interests of the region in the vicinity thereof. With respect to the public interests of the region your attention is called to the fact that a part of Wallenpaupack Creek was declared a public highway by the Act of February 4, 1908, P. L. 34,

Your second question is:

“Is the Board limited by the evidence given at said

hearing to a finding that the appropriation of a mere easement in the said marginal strip for the purpose above enumerated is required?"

You are advised that your Board has no authority to find from the evidence before you that anything more is required by the present and future interests of the Commonwealth than the right in the power company to overflow the marginal strip (which includes without further words the right to subject it to wave action when not overflowed), and the right to go upon it for the purpose of destroying or removing debris washed upon it from the lake.

Your third question is:

"May the Board impose in connection with the taking of the property or rights required such conditions as it deems necessary for the protection of the public interests, for example, a condition to insure public access to the lake for the purpose of recreation in accordance with such rules and regulations as may be promulgated from time to time by the permittee subject to the approval of the Department of Forests and Waters?"

The right to condemn is granted to the permittee by the legislature (in the act). It is not granted by the Board.

The sole function of the Board in such matters is to ascertain and declare by formal "finding" what property or rights, if any, there are, the taking of which has been proved by the evidence to be required by the present and future interests of the Commonwealth in the project and not incompatible with the local public interests.

Your third question is therefore answered in the negative.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP P. WELLS,  
*Deputy Attorney General.*

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**OPINIONS TO DEPARTMENT OF WELFARE**

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## OPINIONS TO THE DEPARTMENT OF WELFARE

*Corporations—First class—Religious and charitable organizations—Holding property—Collecting funds—Act of June 20, 1919.*

1. A corporation of the first class incorporated in Lycoming County may hold property in the City of Pittsburgh. The validity of the charter of such a corporation can only be questioned by the State itself.

2. An unincorporated board or organization for the purpose of carrying out charitable purposes may solicit funds for such purposes. The fact that the property of the board or organization is held in trust by a corporation organized in another county does not affect this conclusion.

3. The Salvation Army is a religious organization within the terms of the Act of June 20, 1919, P. L. 505.

Department of Justice,  
Harrisburg, Pa., June 12, 1925.

Ellen C. Potter, M. D., Secretary of Welfare, Harrisburg, Pa.

Madam: I have your request for opinion in reference to Salvation Army Maternity Home, Pittsburgh, as follows:

“The Salvation Army Maternity Home in Pittsburgh is operating under a charter which was applied for and granted in Lycoming County, the purpose expressed being ‘For receiving and holding property, real and personal, of and for unincorporated religious societies and associations belonging to the branch of the Christian Church known as the Salvation Army.’

Are they within their legal rights in collecting funds for a children’s and maternity home in Pittsburgh, with this charter?”

The corporation of the first class organized in Lycoming County, the name of which is not stated in the request for an opinion, was evidently incorporated under the provisions of the Act approved July 15, 1897, P. L. 283, amending the second section of the corporation law of 1874. The Act of 1897 adds an additional purpose for which corporations of the first class may be incorporated by the Court of Common Pleas as follows:

“XIV For receiving and holding property real and personal, of and for unincorporated religious, beneficial, charitable, educational and missionary societies and associations and executing trusts thereof.”

On the petition of Susquehanna Title and Trust Company presented in Susquehanna County in 1903, in refusing the application Searle P. J., said:

“The several unincorporated associations for which the proposed corporation is intending to hold property

in trust should be described with the same particularity as though the application was being made for a charter for such association."

The purpose of the Lycoming County corporation as stated does not indicate that this rule has been complied with; but as the Lycoming County Court presumably passed upon the question and as it granted the charter, the validity of the charter could not now be questioned by any person except the State itself. It follows, therefore, that the Lycoming County corporation would be authorized to hold real estate in trust for one of the unincorporated charitable associations used as an instrumentality by the Salvation Army in administering its various charities. There seems to be no reason, therefore, why this corporation should not hold property in the City of Pittsburgh for the Salvation Army Maternity Home.

The request for opinion has not disclosed whether funds are being solicited in the name of the corporation organized in Lycoming County or in the name of the Salvation Army Maternity Home. The inference would be that funds are being solicited for the Salvation Army Maternity Home.

The Salvation Army Maternity Home is apparently an unincorporated board or organization forming one of the administrative organs of the Salvation Army for the purpose of carrying out one of its charitable purposes. There is no legal reason, assuming that the institution is regular in every other respect, why this unincorporated home should not solicit funds for the purpose of carrying out its charitable purpose. The fact that the property is held in trust by the corporation organized in Lycoming County for that purpose does not affect this conclusion.

The Act of June 20, 1919, P. L. 505, makes it unlawful for any person, copartnership, association or corporation to appeal to the public for donations or subscriptions in money or other property, for any charitable purpose unless the appeal is made or authorized by a corporation, association or individual holding a valid certificate of registration as provided by the Act. Section 14, however, provides that the Act shall not apply to any "religious organization".

The Salvation Army itself would properly be described as a religious organization and the soliciting of money to support a home operated by it would be within the exception. Some technical questions might be raised as to the nature of the board or association used by the Salvation Army in the administration of this home but the request furnishes no data on this point. The conduct of a lying-in hospital is not an essentially religious purpose but it is within the limits of the charitable functions usually performed by religious organizations. The home would necessarily be governed by a board or society or association, and, if under direct control of the Salva-

tion Army would be considered simply as one of its subdivisions or instrumentalities.

Subject to these considerations I am of the opinion that the Salvation Army Maternity Home of Pittsburgh would be within its rights in collecting funds for this charitable purpose.

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. WOODRUFF,  
*Attorney General.*

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*Religious and Fraternal Organizations—Exemption—Definition of Terms—Act of May 13, 1925, P. L. 644.*

A religious or fraternal organization in order to be exempt from the provisions of the Act of May 13, 1925, P. L. 644, must necessarily be organized. The spasmodic and occasional efforts of a few people united in behalf of religion and its affiliated purposes is not an organized effort. The purpose of this Act is to prevent irresponsible and unscrupulous people from soliciting funds and committing frauds upon the charitable and benevolent public.

The term "religious organization" as used in said act includes every religious body definitely constituted, which has for its purpose the propagation of the reverent acknowledgment both in heart and in act of a Divine being, or whose purpose is directly or manifestly ancillary to divine worship or religious teaching, or whose members are associated together not only for religious exercises, but also for the purpose of maintaining and supporting its ministry and providing the conveniences of a church home and promoting the growth and efficiency of the work of the general church of which it forms a co-ordinate part, or one having power to sue or be sued and to hold and minister all the temporalities of a religious society or church as distinguished from the body of communicants or members united by a confession of faith, or one whose officers, agents and members work together for a common religious or spiritual end.

The Department of Welfare has the right to require proof that any organization claiming exemption under said act is entitled to it. Under Section 1 of the Act of July 17, 1919, P. L. 1021, all churches, meeting houses or other regular places of stated worship, with the ground thereto annexed, necessary for the occupancy and enjoyment of the same are exempt from taxation. This test is to be applied in each case, and if that particular organization or church asking exemption is exempt from taxation, it is certain that the said organization is entitled to be exempt from the provisions of the Act of 1925; otherwise, the application should be carefully scrutinized.

Department of Justice,  
Harrisburg, Pa., September 17, 1925.

Doctor Ellen C. Potter, Secretary of Welfare, Harrisburg, Penna.

Madam: You ask for an interpretation of the terms "religious organizations" and "fraternal organizations" as used in Act No. 347, approved May 13, 1925, entitled "An Act relating to and regu-

lating the solicitation of moneys and property for charitable religious, benevolent, humane, and patriotic purposes."

Section 11 of this Act provides:

"This act shall not apply to fraternal organizations incorporated under the laws of the Commonwealth, religious organizations, colleges, schools, universities, labor unions, municipalities or subdivisions thereof, community organizations within the Commonwealth, nor to charitable institutions or agencies required by the provisions of existing law to file reports with the Department of Welfare or with any other department or office of the Commonwealth."

This section expressly exempts religious organizations from the operation of the Act. Included in this term are churches, religious societies, religious corporations (sometimes called ecclesiastical corporations), and religious associations (incorporated and unincorporated). In order to answer your question it is necessary to define each of these various bodies.

The term "church" in its strict application relates to a Christian place of worship. "A church is a body of Christian believers holding the same creed, observing the same rights and acknowledging the same ecclesiastical authority \* \* \*. The term 'church' imports an organization for religious purposes." *In re Douglass Estate*, 143 N. W. 229. But it should be understood that the term "religious organization" includes the spiritual organizations of other creeds or beliefs acknowledging an ecclesiastical authority, as for instance those of the Hebrew or Jewish faith.

Another definition of church as given in *Hartford First Baptist Church vs. Witherell*, 3 Paige (N. Y.) 296 *Ruling Case Law*, under *Religious Societies*, page 421, is as follows:

"A church in the strict sense of the word has been held to consist of an indefinite number of persons of one or both sexes who have made a public confession of religion and who are associated together by a covenant of church fellowship for the purpose of celebrating the sacrament and watching over the spiritual welfare of each other."

Or,

"A church is a voluntary association of its members, united together by covenant or agreement for the purpose of maintaining the public worship of God, observing the ordinances of His house, the promotion of the spirituality of its membership, and the spread of divine

truth among others, as they understand and teach it."

*Hundley vs. Collins, 131 Ala. 234.*

A religious society is defined to be an "assembly met or a body of persons who usually meet in some stated place for the worship of God and religious instruction. The term includes all religious societies or congregations met for public worship without regard to their being incorporated and may or may not include a church or spiritual body." *Silsby vs. Barlow, 16 Gray (Mass.) 329.*

A religious or church society has also been defined as "a voluntary organization whose members are associated together not only for religious exercises, but also for the purpose of maintaining and supporting its ministry, and providing the conveniences of a church home, and promoting the growth and efficiency of the work of the general church, of which it forms a co-ordinate part."

*Mt. Vernon Presbyterian Church vs. Dennis (Iowa) 161 N. W. 183.*

*Runkel vs. Winemiller, 4 Har. and M'H. (Md.) 429.*

*Jones vs. State, 28 Neb. 495.*

"A religious society in ecclesiastical law is defined to be in some of the United States the corporation or secular body organized pursuant to law with power to sue and be sued, and to hold and administer all the temporalities of a religious society or church as distinguished from the body of communicants or members united by a confession of faith." *Century Dictionary Encyclopedia, p. 5745.*

"A religious corporation is one whose purposes are directly and manifestly ancillary to divine worship or religious teaching. It is not necessarily a church in the one acceptance of the term, or even a religious society. A corporation whose charter powers are to be used in and of the propagation and practice of a religious belief is a religious corporation." *In re St. Louis Institute of Christian Science, 27 Mo. App. 633.*

"A religious corporation in American Law is a private corporation formed by or pursuant to law to hold and administer the temporalities of a church." *Century Dictionary Encyclopedia.*

But "a corporation established for purely academic purposes for education in literature is in no sense a religious organization, even though it be given to the care and under the management of a religious body." *State ex rel. Morris vs. Board of Trades of Westminster College, 175 Mo. 52.*

"An organization is a systematic union of individuals in a body whose officers, agents and members work together for a common end or a number of individuals socially united for some end or work." *Standard Dictionary.*

"An organization is any body which has a definite constitution." *Standard Dictionary.*

"Religion is the reverent acknowledgment both in heart and in act of a divine being." *Standard Dictionary*.

In view of the decisions and definitions cited above I am of the opinion that the term "religious organization," as used in this Act includes every religious body *definitely constituted*, which has for its purpose the propagation of the reverent acknowledgment both in heart and in act of a Divine being, *or* whose purpose is directly and manifestly ancillary to divine worship or religious teaching, *or* whose members are associated together not only for religious exercises, but also for the purpose of maintaining and supporting its ministry and providing the conveniences of a church home and promoting the growth and efficiency of the work of the general church of which it forms a co-ordinate part, *or* one having power to sue and be sued and to hold and minister all the temporalities of a religious society or church as distinguished from the body of communicants or members united by a confession of faith, *or* one whose officers, agents and members work together for a common religious or spiritual end.

But such a body in order to be exempt from the provisions of this Act must necessarily be organized. The spasmodic and occasional efforts of a few people united in behalf of religion and its affiliated purposes is not an organized effort. The purpose of this Act is to prevent irresponsible and unscrupulous people from soliciting funds and committing frauds upon the charitable and benevolent public. Your Department has a distinct and positive duty to perform in carrying out the provisions of this Act. You, therefore, have the right to require proof that any organization claiming exemption is entitled to it. Under Section 1 of the Act approved July 17, 1919, P. L. 1021, all churches, meeting houses or other regular places of stated worship with the ground thereto annexed necessary for the occupancy and enjoyment of the same are exempt from taxation. I suggest that this test be applied in each case and if you find that the particular organization or church asking exemption is exempt from taxation it is certain that the said organization is entitled to be exempt from the provisions of this Act; otherwise, the application should be carefully scrutinized.

It is impossible to give an opinion which will cover every case in which exemption is claimed, as it is necessary to know the facts relating to each organization.

You also ask for an interpretation of the term "fraternal organization" as used in Section 11 of this Act No. 347. The Act provides that its provisions shall not apply to fraternal organizations incorporated under the laws of the Commonwealth. Fraternal societies are usually incorporated under the Act of April 6, 1893, P. L. 7 and the Act of April 6, 1893, P. L. 10.

The Pennsylvania Supreme Court defines a fraternal beneficial association as a corporation, society or voluntary association organized and carried on for the sole benefit of its members and their beneficiaries and not for profit and "in which payment of death benefits shall be to family, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon, the member. *Lafferty v. Supreme C. C. Mutual Benefit Association Appel.* 259 Pa. 452. Examination of the charter of the fraternal society requesting exemption will enable you to determine whether such society is entitled thereto.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*Juvenile Courts—Poor Directors—County Commissioners—Institutions Outside the State—Individual Families.*

Juvenile Courts, under the Act of 1903, P. L. 274, as amended, have the authority to commit dependent children to institutions either within or outside the State. Directors of the Poor have a power to place dependent children in an institution or with an individual family within the State, but not outside. County Commissioners have the authority to establish and maintain institutions for the care and training of children but cannot place them in institutions in other states.

Department of Justice,  
Harrisburg, Pa., October 22, 1925.

Dr. Ellen C. Potter, Secretary of Welfare, Harrisburg, Pa.

Madam: You asked for an opinion as to the legality of the commitment of children by the Juvenile Courts, Directors of the Poor and County Commissioners of Pennsylvania, to agencies, institutions or persons in other States.

You state that it has been the practice in the Northwestern Counties to commit Catholic babies to a Roman Catholic Protectory in Lackawanna, near Buffalo, and that it has been the practice of the Juvenile Court of Crawford County to commit Protestant infants to the Protestant Orphan Asylum of Cleveland, Ohio.

You further state that the Division of Charities of the Ohio Department of Public Welfare has written you as follows:

"We should like to raise the question as to the authority of any Judge in Pennsylvania to make a commitment of a child to an institution in another State. Is not his jurisdiction restricted to his own State? If that is true, then we would further question the guardianship which the Cleveland Protestant Orphan

Asylum should have of these children and its right to give consent to adoption in accordance with the Ohio Laws."

The authority of the Court of Quarter Sessions, sitting as Juvenile Courts of Pennsylvania, to commit children to institutions, etc., in other States, has been exercised by virtue of the provisions of the Act of 1903, P. L. 274, as amended. This Act has been declared constitutional in *Commonwealth vs. Fisher*, 213 Pa. 48. Section 1 of this Act, as amended by the Act of 1923, P. L. 898, provides in part, as follows:

"Be it enacted, etc., That the Courts of Quarter Sessions of the Peace, within the several counties of this Commonwealth, shall have and possess full and exclusive jurisdiction in all proceedings affecting the treatment and control of dependent, neglected, incorrigible and delinquent children, under the age of sixteen years."

But Allegheny and Philadelphia Counties have separate courts having control over juveniles.

Section 6 of the Act of 1903, P. L. 274, as finally amended by the Act of 1919, P. L. 445, reads in part, as follows:

"In the case of a delinquent, dependent, neglected, or incorrigible child, the court may continue the hearing from time to time \* \* \* \* \* or the court may commit the child to a suitable institution for the care of delinquent children, or to any society, duly incorporated, having for one of its objects the protection of dependent, neglected or delinquent children. In any case of the commitment of a dependent, neglected, incorrigible or delinquent child, under the provisions of this section, the court committing such child may order and direct that the board and clothing of, and necessary medical and surgical attendance upon, and the care of such child, and its maintenance generally, and the necessary expenses of placing or replacing such child, shall be paid by the proper county, and may fix the amount which shall be paid for such board and clothing."

This Section 6 of the Act of 1903, P. L. 274, was also amended by the Act of 1911, P. L. 543, and the same Legislature by Act of 1911, P. L. 676, provided for the cost of the maintenance of children committed to institutions *outside* the State as follows:

"Be it enacted, etc., That where the courts of quarter sessions of the peace of any county within this Commonwealth heretofore have or hereafter may sentence and commit children or minors, under the various Juvenile Court Acts of this Commonwealth, to homes or institutions *without* this Commonwealth, in every such case such county, from which such child or minor has

been or shall be so sentenced, shall be liable for a reasonable charge for such maintenance, when the amount is ascertained and approved as hereinafter provided for."

Section 2 of this Act of 1911, P. L. 676, provides for the payment of such charges. It is a well known rule of the interpretation of statutes, that two Acts, relating to the same subject, and passed during the same Session of the Legislature, should be read together. So it is clear that the courts of Quarter Sessions of the Peace, sitting as Juvenile Courts, have authority, by Act of Assembly, to make an order committing children who are within the classes named in the Act of 1903, to persons or institutions in other States, and that the County from which such child or minor has been sentenced, shall be liable for a reasonable charge for maintenance. But in some Counties, new courts have been created and to these, control of juveniles have been given.

The question as to whether the jurisdiction of the Pennsylvania Courts in cases of commitment extends over into the State of Ohio, is a matter for decision by the Courts. One method by which it can be raised, in Pennsylvania, is by petition for review by parent or next friend after final order of commitment has been made, and by appeal to the Superior Court, as provided by the Act of June 1, 1915, P. L. 652. Your Department has the right of supervision over the *institutions* of Pennsylvania according to the powers granted by various Acts of Assembly, but the question as to whether children have been legally committed is one for determination by the Courts. If the authorities of the State of Ohio question the guardianship which this Orphanage Asylum has of the children committed by the Courts of Pennsylvania, then it is a matter which should be raised in their Courts by the persons having legal interest in the welfare of these children; or it may be raised by proper action in the Courts of Pennsylvania.

With regard to the powers of commitment by the Directors of the Poor, the Act of June 13, 1883, P. L. 111, provided that

"It shall be the duty of the Directors of the Poor \* \* \* to place all pauper children who are in their charge, and who are over two years of age \* \* \* in some respectable family in this State, or in some educational institution or home for children."

This Act of 1883, *Supra*, was repealed by the Act of 1921, P. L. 1030, Section 3, of which reads as follows:

"Section 3. It shall be the duty of said overseers, guardians, directors of the poor, or other persons having charge of the poor, to place all dependent children who are in or committed to their charge, and who are

over two years of age (with the exceptions named in the second section of this act), in some respectable family in this State, or in some educational institution or home for children; \* \* \*”.

The Directors of the Poor, therefore, have this power of placement, in some educational institution or home for children in other States, but their power to place dependent children in individual families, is limited to this State, by the terms of the Act of 1921, P. L. 1030. If, however, the State of Ohio has laws regulating the placement of dependent children from other States, its authorities, I feel sure, will receive the hearty co-operation of the Pennsylvania courts and Directors of the Poor in their enforcement.

This Act of 1921, *supra*, also gives to the County Commissioners the power of establishing and maintaining an industrial home for the care and training of children, but there is no power given them to commit children to institutions in other States. I cannot find any law giving them that power.

As to the right of the Directors of the Poor to control in other States the custody of these children committed by them to institutions in other States, I am of the opinion that the Courts, in this case also, are the proper tribunals before which this question should be raised.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*Poor Districts—Authority to contribute money directly to charitable organizations to assist them in carrying on their work—Acts of May 14, 1923, P. L. 762, Section 910, June 3, 1911, P. L. 640.*

If the United Charities of Hazleton is an incorporated association maintained by gifts and voluntary contributions, formed for the purpose of assisting, relieving and giving medical care and attention to the poor, injured or sick within its respective poor districts or any municipal division thereof, the Middle Coal Field Poor District may make annual appropriations to said United Charities, provided, however, that the association's objects and purposes are not limited to the members thereof or to any nationality or sect.

Department of Justice,  
Harrisburg, Pa., November 30, 1925.

Dr. Ellen C. Potter, Secretary of Welfare, Harrisburg, Pennsylvania.

Madam: I am in receipt of the communication received by you from Dr. J. H. Wasser, Director of the Middle Coal Field Poor district of Pennsylvania. He states that this Poor District has had a request from the United Charities of Hazleton and the vicinity for

financial aid to assist them in carrying on their work. Dr. Wasser asks to be advised by you whether there is any act or law which enables the Poor Board mentioned above to contribute money directly to the United Charities for the furtherance of their work, which because of the present coal strike, has been greatly increased. The Act of May 14, 1925, P. L. 762, provides as follows:

"Section 910. 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 proper officers of the several poor districts in each and every county of this Commonwealth may, in their discretion, upon an order of relief, or upon satisfactory proof being otherwise produced to them of the advisability thereof, make an appropriation yearly, to incorporated associations maintained by gifts and voluntary contributions, and formed for the purpose of assisting, relieving, and giving medical care and attention to the poor, injured or sick, within their respective poor districts or any municipal division thereof: Provided, That this Act shall in no wise apply to corporations whose objects and purposes are limited to the members thereof or to any nationality or sect."

This Section is a re-enactment of the Act of June 3, 1911, P. L. 649.

In view of the terms of this Act, I am of the opinion that if the United Charities of Hazleton is an incorporated association maintained by gifts and voluntary contributions, formed for the purpose of assisting, relieving, and giving medical care and attention to the poor, injured or sick, within its respective poor districts or any municipal division thereof, it is within the power of the Middle Coal Field Poor District to make annual appropriations to the said United Charities provided, however, that the said association's objects and purposes are not limited to the members thereof or to any nationality or sect.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

*Department of Welfare—Household Necessities—Profits—Charitable Institutions—Certificate—Location—Act of May 13, 1925, P. L. 644.*

The sale of manufactured drugs and various household necessities to consumers, using as an inducement the fact that a percentage of the profits go to charitable institutions, is unlawful under the Act of May 13, 1925, P. L. 644, unless such institutions hold a valid certificate of registration from the Department of Welfare, whether said institutions are located in the State of Pennsylvania or outside the State of Pennsylvania.

Department of Justice,  
Harrisburg, Pa., February 10, 1926.

Mrs. Martha J. Magee, Director, Bureau of Assistance, Department of Welfare, Harrisburg, Pennsylvania.

Madam: I reply to your memorandum of February 3, 1926, enclosing a copy of a letter received from Solomon & Wasserman. You asked for an opinion as to the legal right of this firm to sell manufactured drugs and various household necessities to consumers, using as an inducement the fact that a certain percentage of the profits derived from said sales are given to several charitable institutions outside the State of Pennsylvania.

Section 1 of the Act of May 13, 1925, relating to and regulating the solicitation of moneys for charitable purposes, provides as follows:

“Section 1. Be it enacted, etc., That thirty days after the approval of this act it shall be unlawful for any person, copartnership, association, or corporation, except in accordance with the provisions of this act, to appeal to the public for donations or subscriptions in money or in other property, or to sell or offer for sale to the public any thing or object whatever to raise money, or to secure or attempt to secure money or donations or other property by promoting any public bazaar, sale, entertainment, or exhibition, or by any similar means for any charitable, benevolent, or patriotic purposes or for the purpose of ministering to the material or spiritual needs of human beings, either in the United States or elsewhere, or of relieving suffering of animals or of inculcating patriotism unless the appeal is authorized by and the money or other property is to be given to a corporation, copartnership, association, or individual holding a valid certificate of registration from the Department of Welfare, issued as herein provided.”

For the purpose of answering your question this section of the Act in so far as it relates to the question at issue can be made to read as follows:

“Section 1. Be it enacted, etc., That thirty days after the approval of this act it shall be unlawful for any person, copartnership, association or corporation, except in accordance with the provisions of this act \* \* \* to sell or offer for sale to the public any thing or object whatever to raise money \* \* \* for any charitable,

benevolent, or patriotic purpose, or for the purpose of ministering to the material or spiritual needs of human beings, either in the United States or elsewhere \* \* \* unless the appeal is authorized by and the money or other property is to be given to a corporation, copartnership, association, or individual holding a valid certificate of registration from the Department of Welfare, issued as herein provided."

Section 10 of this Act provides a penalty for the violation thereof, and Section 11 provides that the Act shall not apply to certain organizations. None of these organizations set forth in Section 11 include a firm doing business such as that conducted by Solomon & Wasserman, referred to above.

I am therefore, of the opinion that unless the institutions to which the percentage of profits are given by Solomon & Wasserman hold a valid certificate of registration from the Department of Welfare of the State of Pennsylvania, the selling of such goods, using as an inducement the fact that a percentage of the profits go to said institutions, is unlawful, regardless of whether the said institutions are located in the State of Pennsylvania or outside the State of Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*Department of Welfare—Mothers' Assistance Fund—State Retirement Fund—State Workmen's Compensation.*

Social workers paid from the Mothers' Assistance Fund are not eligible to membership in the State Employees' Retirement Association created by Act of 1923, P. L. 858.

It is a question for the Workmen's Compensation Board and the Courts to determine whether such workers are included within the Workmen's Compensation Act.

Department of Justice,  
Harrisburg, Pa., March 20, 1926.

Ellen C. Potter, M. D., Secretary of Welfare, Harrisburg, Penna.

Madam: Your communication in which you say "We would like to know if paid social workers serving under County Boards of Trustees of the Mothers' Assistance Fund are eligible:

1. To participation in the State Retirement Fund;
2. To the benefits of State Workmen's Compensation."

has been received by this Department.

You also state in your communication, "The County Boards of Trustees have authority to employ workers and pay their salaries from their administrative fund, which is derived half from the State and half from the County."

The Act of July 10, 1919, P. L. 893, as amended, provides for assistance to certain mothers, the appointment of Boards of Trustees for the several Counties of the Commonwealth, the appointment of a State Supervisor and for the general administration of the Act. It also repeals former Acts on the same subject.

By Section 1 of the Act it is provided:

"That in each county of the Commonwealth which by the action of its county commissioners accepts the provisions of this act, the Governor shall appoint a board of trustees, composed of not less than five and not more than seven women, residents of the county, to be called the Board of Trustees of the Mothers' Assistance Fund."

Section 2 provides that the Governor shall appoint a State Supervisor who shall be a woman.

Section 4 provides:

"The administration of this act within the several counties shall be solely in the hands of the boards of trustees appointed by the Governor, subject, however, to the rules adopted and issued by the State Supervisor. The members of the boards of trustees shall serve without compensation, but shall receive all actual and necessary expenses incurred in the performance of their duty."

Section 5 provides that the Board of Trustees shall provide suitable headquarters, appoint competent investigators and clerical assistance and provide for the payment of salaries and incidental expenses. At no time shall the annual expense of administration in any county exceed a certain sum.

However, a proviso is added by Section 14 of the Act, which reads as follows:

"No county shall receive its allotment of the State appropriation available for any year under the classification appointed by the act making an appropriation to carry into effect the provisions of this act, unless such county has accepted the provisions of this act, and has placed at the disposal of the board of trustees a sum equal to the amount available from the State appropriation for such year."

In the appropriation of 1925, made for the purpose of carrying into effect the provisions of the Act of 1919, is found the following provision:

"No county shall receive its allotment of the State appropriation available for any year under the classification appointed by this act unless such county has accepted the provisions of the Act of July tenth, one thousand nine hundred and nineteen (Pamphlet Laws eight hundred ninety-three), as amended, and has placed at the disposal of the board of trustees a sum equal to the amount available from the State appropriation for such year."

The administration of the Act is committed to a Board of not less than five nor more than seven women trustees to be appointed by the Governor in each county desiring to avail itself of the provisions of the Act, subject to the rules adopted and issued by the State Supervisor. The trustees are to serve without compensation, but are to be paid all actual and necessary expenses incurred in the performance of their duties. The trustees shall provide for the payment of salaries and incidental expenses. A maximum amount that may be spent for annual expenses in any county is fixed. The act contains no express provision with relation to the manner in which these salaries and expenses are to be paid, nor does it appear from the language of the Act whether these expenses and salaries are to be paid jointly by the State and the proper county, although that would seem to be the fair inference from the general scope of the Act, and that such construction has been placed upon the Act by the boards of trustees in the several counties is shown by your communication wherein you say "The county boards of trustees have authority to employ workers and pay their salaries from their administrative fund, which is derived half from the State and half from the county."

Mothers' Assistance Fund Social Workers are paid from the appropriations received from the State and the county and not entirely from the State fund, and are, therefore, not eligible to membership in the State Employers' Retirement Association.

The Act of June 27, 1923, P. L. 858, which creates the State Employees' Retirement Association, contains provisions that deductions shall be caused to be made by the head of each Department of the State Government on each and every pay-roll of a contributor, and that the head of each Department shall certify to the Treasurer of the Commonwealth a statement as voucher for the amount so deducted, and the State Treasurer on receipt of these vouchers for deductions, shall pay each of the amounts so deducted into the Members Annuity Savings Fund. It is manifest from all the provisions of the Act creating the Retirement Association that it is intended to apply only to those State employees who are paid salaries entirely out of State funds.

Deputy Attorney General Philip S. Moyer in an opinion dated March 11, 1925, decided the question now under consideration, and I can do no better than to quote his opinion.

"The State Employees' Retirement Association was created by the Act of June 27, 1923, P. L. 858. Section 3 of this Act provides that the membership of the association 'shall consist of all State employes' as defined in paragraph 6 of Section 1 of this Act, who, by written application to the Retirement Board, shall, either as an original member or a new member, elect to be covered by the retirement system.'

"Paragraph 8 of Section 1 of said Act provides that the word—

" 'Member' of the retirement association shall mean a State employe who shall be a member of the retirement association established by this act.

"Said 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). 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.

"From the wording of this last paragraph it will readily be noted that, beyond the exceptions therein provided for, the term 'State employe' shall mean, first, 'Any person holding a State office under the Commonwealth of Pennsylvania,' or secondly, 'Any person employed by the year or by the month by the State Government of the Commonwealth of Pennsylvania in any capacity whatsoever.' However, when we consider the purpose intended by the Legislature as revealed by the Act, and the general scheme set up for the accomplishment of this purpose, we find that the term 'State employe' must necessarily have additional qualification and limitation in its scope beyond the general meaning suggested by the definition itself.

"Paragraph 5 of Section 7 of this Act provides that deductions shall be caused to be made by the head of each department of the State Government, on each and every pay-roll of a contributor, of such per centum of the salary of the contributor in such pay-roll period as shall be certified to the head of each department by the Retirement Board as proper, in accordance with the provisions of this Act. It also provides that the head of each department shall certify to the Treasurer of the Commonwealth a statement as voucher for the amount so deducted. Paragraph 6 of the same section provides further that the State Treasurer on receipt of these vouchers for deductions shall pay each of the amounts so deducted into the 'Members' annuity savings fund. Although the procedure provided for the making of the deductions is an administrative matter, it must readily be seen that the Act is intended to apply only to those State employees who are paid salaries out of State funds. The Retirement System and funds thereunder created are based in part on contributions by the members of the Retirement Association, deducted from their salaries. This fact, together with the certainty sought to be secured by the State Legislature in the collection of these deductions, indicates conclusively that the Act in question was intended only to apply to those persons paid out of State funds."

You are, therefore, advised that Mothers' Assistance Fund Social Workers are not eligible to membership in the State Employees Retirement Association created by the Act of June 27, 1923.

Do the provisions of the Workmen's Compensation Act apply to such social workers?

The question as to the eligibility of certain persons to claim compensation under the Workmen's Compensation Act has been before this Department on numerous occasions, and it has been uniformly the practice to decline to give any opinion upon such a subject. An opinion from this Department would not be binding on anyone and might prove extremely embarrassing in the future. If an opinion was given and the Workmen's Compensation Board disagreed with it the opinion would not bind the Board, and one Governmental Agency so overrule another Agency of the same State Government. It is a question for the Workmen's Compensation Board and the Courts to decide, and as they are the tribunals created by law to decide these questions, we deem it advisable not to give any opinion on this subject.

Yours very truly,

DEPARTMENT OF JUSTICE,

J. W. BROWN,

*Deputy Attorney General.*

*Department of Welfare—Beaver County Prison—Warden—Allowance for Food of Prisoners—Fee System—Act of 1921, P. L. 470.*

If the salary of the warden is not sufficient the county commissioners have the power to increase it, but no warden of a county jail should be permitted to make a personal profit in addition to his salary from moneys appropriated for the care and maintenance of prisoners.

Department of Justice,  
Harrisburg, Pa., May 25, 1926.

Dr. B. L. Scott, Director, Bureau of Restoration, Department of Welfare, Harrisburg, Pennsylvania.

Sir: I reply to your recent memorandum relating to conditions in the Beaver County Prison management. You state that the Board of Prison Inspectors allows the warden a per capita allowance for food of prisoners in the amount of 35 cents per day and you further state:

“In the annual Financial and Statistical Statement for 1924, signed by the warden of the county prison, it is shown that the amount paid for food during the year was \$5,847.35. This statement also shows that the total number of days prisoners spend in prison during the year was 24,058”.

You therefore assume that 35 cents for each of the 24,058 days—amounting to \$8,420.30—was paid to the warden for food and that out of this amount he actually expended \$5,847.35 retaining for his own use the balance, \$2,572.95. This arrangement was approved by the Board of Prison Inspectors and by the County Commissioners after consultation with the County Comptroller. You also state that one member of the warden's family is rendering personal services to the institution and not receiving compensation. This person of course should receive compensation for any services rendered to the institution, but this is a matter for the prison management to determine. Your report shows that in almost every other respect the Beaver County Prison is a splendidly managed institution.

The Act of 1921, P. L. 470 is,

“An Act providing a system of management and control of the Jail or county prison in each county of the fifth class; \* \* \*”

and Beaver County is of the fifth class.

Section 2 of said Act provides as follows:

“\* \* \* The county commissioners shall appoint a warden and fix his salary. The warden shall reside in the jail building.”

Section 8 of said Act reads as follows:

"All of the expenditures required in the government and management of the jail or county prison and for the care and maintenance of the prisoners therein shall be paid from the county treasury by warrants drawn by the county commissioners in like manner as for other expenditures for the county."

Section 10 of said act provides that the provisions thereof shall not affect or repeal any local or special act, but there does not seem to be any local or special act affecting the Beaver County Prison.

Under Section 8, referred to above, the expenditures required for the care and maintenance of prisoners should be paid from the county treasury in like manner as for other expenditures for the county.

By the terms of the Act of 1921 the warden receives a salary which shall be fixed by the county commissioners and shall also be entitled to a residence in the jail building. There is no provision in the Act which permits him to receive compensation or profit from his office other than that fixed by the county commissioners as salary.

I am therefore of the opinion that this fee system should be discontinued. If the salary of the warden is not sufficient the county commissioners have the power to increase it, but no warden of a county jail should be permitted to make a personal profit in addition to his salary from moneys appropriated for the care and maintenance of prisoners.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*Preparation of Plans—Awarding of Contracts—Department of Welfare—Property and Supplies—Art Commission—Administrative Code.*

Under the Administrative Code of June 7, 1923, P. L. 498, there is no conflict in the duties imposed upon the Department of Welfare, Department of Property and Supplies, and the State Art Commission in the preparation of plans, contracting for and construction of State buildings. The duties imposed upon each of these departments are clearly defined and each department should co-operate with the other in the erection of buildings.

Department of Justice,  
Harrisburg, Pa., June 14, 1926.

Dr. Ellen G. Potter, Secretary of Welfare, Harrisburg, Penna.

Madam: We have your request to be advised regarding the respective functions under the Administrative Code of 1923 of your Department, the Department of Property and Supplies and the State Art

Commission as far as concerns the approval of plans and contracts for the erection, alteration or repair of buildings which form part of State Institutions managed by departmental administrative boards within your Department.

You desire to know whether there is any duplication of functions arising from the following provisions of the Administrative Code (Act of June 7, 1923, P. L. 498):

“Section 503. Departmental Administrative Boards and Commissions.—Except as otherwise provided in this act, departmental administrative bodies, boards and commissions within the several administrative departments shall exercise their powers and perform their duties independently of the boards 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 and commissions shall be subject and responsible to the departments with which they are respectively connected.”

“Section 1014. Approval of plans and Mortgages. The Department of Welfare shall have the power and its duty shall be:

“(a) To approve or disapprove all plans for the erection or substantial alteration of any State, semi-State, or supervised institution receiving aid from the Commonwealth;”

“Section 1015. State Institutions.—With regard to state institutions under the supervision of the Department of Welfare, the department shall have the power, and its duty shall be:

\* \* \* \* \*

“(d) To require the submission to the department of any contract for repairs, alterations, equipment, and construction of buildings which any State institutions under its supervision desires to make, and to approve or disapprove such proposed contract. No such contract shall be valid without the approval of the department, as evidenced by the signature of the Secretary of Welfare.”

Section 2102. Grounds, Buildings and Monuments. The Department of Property and Supplies shall have the power, and its duty shall be:

(e) To employ and, with the approval of the Governor, fix the compensation of such capable superintendents or superintendents of construction as may be necessary properly to supervise the expenditure of all funds appropriated by the General Assembly for building, repairing, altering, adding to, or improving state buildings. Such superintendent or superintendents shall see that the plans and specifications of the architect, prepared and adopted for such new buildings or for repairs, alter-

ations, additions, or improvements to existing buildings, shall be faithfully carried out by the contractors for the work, and shall, subject to appeal to, and final decision by, the head of the department, define, determine, and decide all questions of the proper interpretation of the plans and specifications which may be raised by the contractors or architects during the progress of the work ;”

“Section 2108. State Art Commission.—Subject to any inconsistent provisions in this act contained, the State Art Commission created by this act shall have the power, and its duty shall be:

“(a) To continue to exercise its powers and perform its duties as heretofore provided by law ;

“(b) To examine, and approve or disapprove, the design and prepared location of all public monuments, memorials, buildings, or other structures, except in cities of the first or second class, in accordance with the act, approved the first day of May, one thousand nine hundred and nineteen (Pamphlet Laws, one hundred three), entitled ‘An act creating a State Art Commission in the Board of Commissioners of Public Grounds and Buildings; requiring the approval of the commission of the design and location of all public monuments, memorials, buildings, or other structures, and certain private structures, proposed to be erected anywhere in this Commonwealth other than in cities of the first and second classes.’”

You are advised that there is no duplication of functions whatsoever under the above provisions of the Administrative Code.

Whenever the Board of Trustees of a state institution within your Department desires to expend money for the consideration, alteration or repair of buildings it must obtain the approval of your Department for the proposed expenditure as provided in section 503 of the Code.

The proposed expenditure having been approved by your Department the Board of Trustees must proceed as follows:

1. If the expenditure is to be made for the erection of a new building the location and design thereof must be approved by the State Art Commission as provided in section 2108 of the Code, and the plans and contracts must be approved by your Department under sections 2014 and 2015 of the Code.

2. If the proposed expenditure is for the substantial alteration of an existing building the same approvals must be procured unless the design of the building will not be changed, in which event it will not be necessary to consult the State Art Commission.

3. If the expenditure is for repairs or minor alterations the proposed contract therefor must be submitted to your Department for approval, but it is unnecessary to consult the State Art Commission, or to submit the plans to your Department.

Up to the point where the contract has been executed, the Department of Property and Supplies has no function whatever to perform. After the contract has been executed, it is the duty of the Department of Property and Supplies through a superintendent of construction employed by it to see that the contractor does his work in accordance with the plans and specifications, as provided in Section 2102 of the Code. With this function your Department has nothing to do.

As far as the law is concerned, it is clear that there is no conflict between the jurisdiction of your Department, the Department of Property and Supplies, and the State Art Commission. However, it is highly desirable that the same policies should govern the preparation of plans and specifications for all State buildings, whether they are under the control of the Department of Property and Supplies directly or of some other department, board or commission. Co-operation between your Department, the departmental administrative boards within it, and the Department of Property and Supplies is highly desirable. Such co-operation can lawfully be achieved under Sections 501 and 502 of the Administrative Code which require the heads of the several departments to "devise a practical and working basis for cooperation and coordination of work."

However, in co-ordinating the work of the several departments, the functions imposed upon each of them by law, should always be clearly understood. Your inquiry which we have answered is, therefore, entirely pertinent.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

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*Solicitation of money—Certificates—Charitable, religious and humane purposes—  
Act of May 13, 1925—Strikes.*

1. Certificates under the Act of May 13, 1925, P. L. 644, authorizing the solicitation of money by a strike relief committee will be issued, if it appears that the real purpose of the solicitation is to minister to the natural needs of human beings involved in a strike.

2. Where labor unions, exempt from the provisions of the Act of 1925, join with others in acting collectively as a general relief committee, they must apply for a certificate.

Department of Justice,  
Harrisburg, Pa., July 23, 1926.

Mrs. Martha J. Magee, Director, Bureau of Assistance, Department of Welfare, Harrisburg, Pa.

Madam: I am in receipt of your communication of June 4, 1926, asking for an opinion as to the right of your Department to grant

a certificate of solicitation to the Passaic Strike Relief Committee of Philadelphia. You state this certificate has been granted by your Department but the question of your right to do so has been raised by Counsel for the Department of Public Safety, Philadelphia, Pa.

From the letter head of the Passaic Strike Relief Committee submitted with your memorandum, I find that the said Committee has affiliated with it, among others, the following organizations:

Upholsterers No. 77  
Upholsterers No. 124  
Moulders No. 15  
Musicians No. 77  
Paper Hangers No. 316  
Bakers No. 201  
Machinists No. 159  
Carpenters No. 1050  
Carpenters No. 1073  
Carpenters No. 897  
Garment Workers No. 199  
A. C. Workers No. 140  
Tapestry Carpet Weavers  
Knit Good Workers Union  
Labor College of Philadelphia,

all of which I am informed by a proper representative of the Department of Labor and Industry are affiliated with the American Federation of Labor. There has also been submitted to me a newspaper showing a list of contributions made, and included among this list are legitimate labor organizations. The Treasurer of the Committee is Ben Thomas of the Machinists Union No. 159. Those affiliated organizations which I am informed are not members of the American Federation of Labor are the Young Workers' League, Proletarian Party, Workers' Party, and the International Workers' Aid.

The Act under which your Department has authority to issue certificates of solicitation is the Act of May 13, 1925, P. L. 644, entitled "An Act relating to and regulating the solicitation of moneys and property for charitable, religious, benevolent, humane, and patriotic purposes." Section 1 provides as follows:

"That \* \* \* it shall be unlawful for any person, copartnership, association, or corporation, except in accordance with the provisions of this act, to appeal to the public for donations or subscriptions in money or in other property, \* \* \* or by any similar means for any charitable, benevolent, or patriotic purpose, or for the purpose of ministering to the material or spiritual needs of human beings, either in the United States or elsewhere, or of relieving suffering of animals, or of inculcating patriotism, unless the appeal is authorized by and the money or other property is to be given to a corporation, copartnership, association, or individual holding

a valid certificate of registration from the Department of Welfare, issued as herein provided."

Section 4 of said Act provides as follows:

"If the Department of Welfare deems the corporation, copartnership, association, or individual filing such statement a proper one and not inimical to the public welfare or safety and its appeal or proposed appeals to be for truly charitable, benevolent, or patriotic purposes, or for the purpose of ministering to the material or spiritual needs of human beings in the United States or elsewhere, or of relieving suffering of animals, or of inculcating patriotism, it shall issue to such corporation, etc. \* \* \* a certificate of registration for the particular purpose described and for the necessary period. If the Department deems the corporation, \* \* \* an improper one, or the purposes of its appeal improper \* \* \* it shall refuse to issue a certificate of registration."

Section 11 of said Act provides as follows:

"This Act shall not apply to fraternal organizations incorporated under the laws of the Commonwealth, \* \* \* labor unions, \* \* \* nor to charitable institutions or agencies required by the provisions of existing law to file reports with the Department of Welfare or with any other department or office of the Commonwealth."

The question is, therefore, whether the Passaic Strike Relief Committee of Philadelphia is a proper Committee not inimical to the public welfare or safety and organized for the purposes set forth in the Act referred to above. This question having been raised by Counsel for the City of Philadelphia, deserves the utmost consideration but should be answered by your Department. It is our opinion that if upon investigation it is disclosed that any of the organizations affiliated with the said Relief Committee are inimical to the public welfare or safety and that these particular organizations are in actual control and diverting the funds so received from the true purpose of ministering to the material needs of human beings, then the certificate should be revoked. But if it is disclosed that the real purpose of the organization is to minister to the material needs of human beings, as set forth in the application, then the certificate should remain in force. The application filed by the Committee sets forth the following purpose: "To raise funds and clothing for the relief of the needy men, women and children involved in the textile strike in Passaic, New Jersey." If this purpose is being carried out it is quite evident that it meets the provisions of the Act, to-wit: ministration to the material needs of human beings in the United States, and the question of whether these human beings to whom relief is being administered are the families of strikers should not enter into your

decision. The fact is that under Section 11 of the Act of any of these organizations which are labor unions acting individually as such are exempted from the provisions of the Act and are not required to obtain a certificate of solicitation from your Department; but since they have chosen to act collectively as a general relief committee, the law requires them to apply for a certificate.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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*Department of Welfare—Pennhurst State School—Liability of Poor Officials—Annual Charge for Clothing of Inmates—Acts of 1903, P. L. 446; 1913, P. L. 494; 1923, P. L. 998.*

There is no legal basis for the annual charge against Poor Districts for clothing of inmates and such accounts cannot be collected. All agreements made by Poor Authorities on admissions prior to the Mental Health Act of 1923, to pay to the institution the annual charge for clothing are invalid and unenforceable and that all such accounts on the books of Pennhurst State School should be charged off as uncollectible.

Department of Justice,  
Harrisburg, Pa., August 23, 1926.

C. W. Hunt, Deputy Secretary, Department of Welfare, Harrisburg, Pennsylvania.

Dear Sir: I have been requested by your Department to examine the question of the liability of poor officials to Pennhurst State School for the annual charge of Twenty Five Dollars (\$25.00) for clothing of inmates admitted prior to the Mental Health Act of 1923. Incidental to this question is the liability of the estate of the inmate or of his or her parents for such maintenance. The large amounts involved render these questions important.

Pennhurst State School was organized under the Act of May 15, 1903, P. L. 446. This Act provided for admission of minor children on an application endorsed by the Commissioners or Directors of the Poor of the County of applicant's residence. This Act was supplemented by the Acts of June 9, 1911, P. L. 862, and June 30, 1911, P. L. 1090, neither of which touch the present question.

By the Act of June 12, 1913, P. L. 494, however, the method of admission was entirely changed. Under this Act, the proceeding is by petition to the Courts of Quarter Sessions of certain eastern counties. The Court, after hearing, makes an order for admission and directs the payment of maintenance out of the estate of the person or by the parent or husband of the person, if such order is found

advisable. Where a situation exists, not justifying such an order, the person "shall be maintained and cared for in the said institution at the cost of the Commonwealth." This Act became effective October 1, 1914 and remained in effect until its formal repeal by the Mental Health Act of July 11, 1923, P. L. 998 (See Page 1026). During this period the sole power of fixing liability for cost of maintenance was vested in the Courts of Quarter Sessions. The Commissioners or Directors of the Poor could not avoid this authority by making an independent contract covering cost of clothing or any other part of the support or maintenance of the inmate. This Act repeals Sections 11, 12, 14, and 15, of the Act of May 15, 1903, P. L. 446, so that the only method of admission during its effective period, and the only method of fixing liability for maintenance, is the order of the Court of Quarter Sessions. Any agreement between the institution and the Directors of the Poor or between the institution and the parent or guardian of the applicant would be entirely unnecessary and void. During this period, therefore, the order of the Court is the only basis of liability.

Under the Mental Health Act of July 11, 1923, P. L. 998, Section 309, the Poor Authorities, endorsing the application, shall agree to pay the School for clothing as required. Since this provision is mandatory, there can be no question as to liability for clothing since the date of this Act. The Poor Authorities are specifically required to agree to pay the clothing allowance.

There is no possibility, then, of such agreement by Commissioners or Directors of the Poor for payment of an annual allowance for clothing upon applications made between October 1, 1914 and July 11, 1923 being valid. If such contracts were valid, they would amount to a usurpation by the Poor Authorities of a power specifically vested in the Courts of Quarter Sessions. Since July 11, 1923, the Poor Authorities are required by statute to make such contracts. The entire period after October 1, 1914, is thus eliminated from the inquiry and controlled for various periods as outlined above, and the following discussion applies only to applications made before October 1, 1914.

The Act of 1903, P. L. 446, Section 12, provides for admission of children as private patients as follows:

"Any parent or guardian who may wish to have a child admitted to said institution for treatment or improvement, and pay all expenses of such care, may do so under the terms, rules and regulations prescribed by the superintendent and approved by the trustees."

Section 15 of the Act of 1903 reads as follows:

"The board of commissioners or directors of the poor of a county, in approving an application for the admis-

sion of a person to said institution, shall state whether or not such person has an estate of sufficient value, or a parent or parents of sufficient financial ability, to defray the expense in whole or in part of supporting such person in said institution, and, if there be such means of support in part only, then the amount per month which the parents or parent or the legal guardian of such child may be able to pay; and the person or persons who make the application for such admission shall therein make statement, under oath, as to such means of support. Said Board of Trustees, in accepting an application for the admission of any person, shall fix the amount, if any, which shall be paid for such support, according to the ability of the parent or parents of the person, or according to the value of such person's estate, if any, and shall require payment for such support so far as there may be ability to pay, as a condition to the admission or retention of said person. Said account may at any time be changed by said trustees, according to their information concerning such means of support."

Power to recover for the amounts specifically required to be paid by the estate of the inmate or by the parent of the inmate will be definitely determined by this procedure. Liability under these provisions is clearly fixed as to all such admissions prior to the Act effective October 1, 1914.

After quoting Sections 12 and 15, Attorney General Bell, in an Opinion dated July 30, 1912, (Opinions of Attorney General, 1911-12, Page 334) concludes:

"Construing these sections together, it is clear that the trustees of this institution have the power to require any parent or guardian to pay the whole amount of the cost of maintaining a patient where the estate of such patient is abundantly able to pay the same, or to fix the proper proportion which the estate of such person is able to pay."

When the trustees find that the estate of the inmate or the parents of the inmate are no longer of ability to pay the amount fixed, they may at any time reduce the amount or place the inmate on the indigent list. Until such action has been taken, the accrued account may be recovered if the parties liable are collectible.

Where the child or its family are indigent, Section 15 provides for the situation as follows:

"Where the indigence of the child or its family is such as to entitle it to admission upon the full beneficiary fund of the State, the ascertainment of the facts shall be as hereinbefore stated, and the support at the institution shall be provided for by annual appropriations, at such per capita rate as shall be appropriated by the Legislature, on the application of the trustees."

These provisions seem to cover entirely the field of liability for maintenance of children under twenty-one years. The estate of the inmate, if of sufficient value, may be made liable; the parent or parents, if of sufficient financial ability, may be made liable. If the child and its parents are both indigent, it is admitted on the full beneficiary fund of the State. There is no provision here for liability being imposed by contract or otherwise, upon any other person or body. Liability for maintenance has been fully covered.

Under the Act of 1903, the powers of the trustees to make regulations are specified as follows:

“They shall manage and direct the concerns of the institution, and make all necessary by-laws and regulations, not inconsistent with the constitution and laws of the Commonwealth.”

Unquestionably this gives them broad powers to make regulations, and these powers are extended by other Sections of the Act, but nowhere in the Act is anything found which would empower the trustees to impose any liability on a Poor District for clothing or for any other charge for care or maintenance of an inmate. Neither is there any distinction in the Act itself between cost of clothing and other costs for care and maintenance. The expense “of supporting such person” certainly includes expense for necessary clothing.

Investigation by your Department has developed the fact that a regulation imposing an annual charge for clothing upon the Poor Districts endorsing the application was made by the trustees of Polk during the early years of its organization and that the practice was copied when Pennhurst was later organized. Your inquiry, as I understand it, developed no other basis or authority for the attempt to impose on the Poor Districts the charge of Twenty Five Dollars (\$25.00) per annum for clothing.

The Acts under which Pennhurst State School was created and organized are as follows: Act of May 15, 1903, P. L. 446, supplement to the same, Act of June 9, 1911, P. L. 862, a further supplement to the same, Act of June 20, 1911, P. L. 1090, a further supplement to the same, Act of June 12, 1913, P. L. 494, the Administrative Code 1923, P. L. 498, which changed the name and made a redesignation of the board of trustees.

In none of these Acts do I find any authority for a charge upon the County for clothing of inmates; neither is there any authority conferred upon the board of trustees or managers to impose such an obligation upon the Poor Authorities of the Counties. My inference from a reading of these statutes is that expense of indigent inmates, which would include all expenses for clothing and maintenance, are to be paid by the Commonwealth out of the annual appropriations to be made by the Legislature.

I am, therefore, of the opinion that there is no legal basis for the annual charge against Poor Districts for clothing of inmates and that such accounts cannot be collected.

I am advised, however, that in many cases the Poor Districts, in endorsing the application have specifically agreed to pay the annual charge for clothing. The Poor Districts now refuse to comply with these agreements and the question arises as to whether or not such agreements are valid and enforceable.

It may be said in the first place that the Act of Assembly fully covered the field of liability. The estate of the inmate, or the parents of the inmate, might be liable under certain conditions; or they may be made to assume a specified part of the liability; the remaining expense of support at the institution is assumed by the Commonwealth. The term "support," as used in the Act, would certainly include necessary clothing. There is, therefore, no place, or necessity or authority for the agreement by the Poor Directors to assume the liability for clothing.

The application for admission, as specified in Section 13, "shall be endorsed by the Board of Commissioners or Directors of the Poor of the County in which he or she resides at the time of the making of the application." The fifteenth Section provides that "The Board of Commissioners or Directors of the Poor in a County approving an application for admission of a person to said institution, shall state whether or not such person has an estate of sufficient value, or a parent or parents of sufficient financial ability, to defray the expense in whole or in part of supporting such person in said institution, and, if there be such means of support in part only, then the amount per month which the parent or parents or the legal guardian of such child may be able to pay." Here then is the whole duty of the Commissioners or the Directors of the Poor in the premises: they shall endorse the application and they shall state certain data as to the financial ability of the estate or parents of the child. When these things are done, they have not only performed their full duty but they have exhausted their power. A further contract for assuming a part of this support, or for contributing to the School an annual sum for clothing, is clearly in excess of the duty prescribed and beyond the power granted by the Act.

Furthermore, the power of the Poor Authorities to expend the money of the Poor District, and their authority to contract for the payment of money from the poor funds, are purely statutory. Their expenditures must not only be for the purposes specified by the Poor Laws but must also be made in the manner provided by the Acts. Where the Legislature had clearly indicated its intention to impose a liability upon the Commonwealth, no agreement by the Poor Authorities to assume part of it could be within their legal power to contract or can be enforced against the Poor District.

For these reasons I am of the opinion that all agreements made by Poor Authorities on admissions prior to the Mental Health Act of 1923, to pay to the institution the annual charge for clothing are invalid and unenforceable and that all such accounts on the books of Pennhurst State School should be charged off as uncollectible.

Respectfully submitted,  
DEPARTMENT OF JUSTICE,

M. A. CARRINGER,  
*Deputy Attorney General.*

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*Jails and Prisons—Employment of Inmates—Machinery—Manual Labor—Act of May 19, 1923, P. L. 271.*

Under the Act of May 19, 1923, P. L. 271, relating to employment of prisoners in county jails and prisons, the County Commissioners, Board of Inspectors, or other proper authority, have the right to determine the kind and character of the machines to be erected in the jails or prisons and have the right to use power other than manual power for machinery operated by prisoners. It is the spirit of the laws of Pennsylvania that prison labor shall not compete with the honest labor of respectable citizens.

Department of Justice,  
Harrisburg, Pa., October 15, 1926.

Dr. Ellen C. Potter, Secretary of Welfare, Harrisburg, Pa.

Madam: I reply to your memorandum of recent date enclosing letter from the Solicitor of York County, in which he requests an opinion as to the legal right of the York County authorities to use motive power, other than manual labor in the York County prison. He states it is the desire of the County Commissioners, and of the local Court, that some satisfactory employment be provided for prisoners.

As expressed in the title, the Act of June 18, 1897, P. L. 170, is an Act "limiting the number of inmates of State prisons, penitentiaries, State Reformatories, and other penal institutions within the State of Pennsylvania, to be employed in manufacturing goods therein, and prohibiting the use of machinery in manufacturing."

The third Section provides that

"No machine operated by steam, electricity, hydraulic force, compressed air, or other power, except machines operated by hand or foot power, shall be used in any of the State institutions in the manufacture of any goods, wares, articles, or things that are manufactured elsewhere in the State."

This Act, as construed by the Supreme Court of Pennsylvania in a per curiam opinion rendered in 1913 in 238 Pa. 320, clearly forbids the use of motive power in penal institutions in Pennsylvania.

The Act of 1899, P. L. 89 in Section 1 provides as follows:

"That from and after the passage of this act, it shall and may be lawful to require every male prisoner now or hereafter confined within any jail or workhouse in this Commonwealth to do or perform eight hours of manual labor each day of such imprisonment, except on Sundays or such legal holidays as are now or may hereafter be established by law; no steam, electricity or other motive power except manual labor shall be used in the conduct of the said labor, or employment, or on any part thereof."

This Act expressly saves from appeal the Act of 1897, P. L. 170, but was itself repealed and supplied by the Act of 1907, P. L. 247 which provided:

"That this act shall not affect or change the method or manner of employment of prisoners within said prisons, or control thereof."

The method or manner of employment in prisons required up to that time was manual labor.

The Act of 1915, P. L. 654 amended the Act of 1897, P. L. 170, (as originally enacted and as amended by the Act of 1899, P. L. 89), and in Section 2 repeals Section 3 of the said Act of 1897. This repealing Section, however, does not set forth the title of the Act of 1897, and therefore, it is questionable whether this repeal was effective. Section 3 of the Act of 1897 is the Section prohibiting the use of machinery, etc., so that after the passage of the Act of 1915, P. L. 654, there was no Act on the Statute Books of Pennsylvania prohibiting the use of power machinery, or limiting the method of employment of prisoners in County prisons to manual labor.

The Act of May 19, 1923, P. L. 271 provides as follows:

"That all persons sentenced to the several county jails and prisons, who are physically capable, may be employed at labor for not to exceed eight hours each day, other than Sundays and public holidays. Such employment may be in such character of work and the production of such goods as may now be manufactured and produced in such jails and prisons, and may also be for the purpose of the manufacture and production of supplies for said prisons and jails; or for the preparation and manufacture of building material for the construction or repairs of the said prisons and jails, or in the manufacture and production of crushed stone, brick, tile, and culvert pipe, or other material suitable for draining roads, or in the preparation of road building and ballasting material.

"The county commissioners, or board of inspectors, or other person or persons in charge of any such jail or prison, shall determine the amount, kind and character

of the machinery to be erected in such jail or prison, the industries to be carried on therein, and shall arrange for the purchase and installation of such machinery at the expense of the county. They shall also provide for the sale of articles and material produced. The county commissioners shall make available the necessary funds to carry out the provisions of this Act."

I am, therefore, of the opinion that the York County Commissioners or Board of Inspectors, or other proper authority have the right to determine the kind and character of the machinery to be erected in the York County prison; therefore, they have the right to use power other than manual power for machinery operated by prisoners.

It should be observed, however, that it is the spirit of the laws of Pennsylvania that prison labor shall not compete with the honest labor of respectable citizens, except in those markets and on such public works as are designated by law, and that the employment of prisoners shall have for its primary purpose the moral uplift of prisoners which can best be accomplished by the employment of the largest possible number.

Yours very truly,

DEPARTMENT OF JUSTICE,

FRANK I. GOLLMAR,  
*Deputy Attorney General.*

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