Commonwealth of Pennsylvania

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

PENNSYLVANIA

FOR THE YEARS

1927 and 1928

Thomas J. Baldrige
Attorney General

TABLE OF OPINIONS

Rendered to the

DEPARTMENTS, BOARDS AND COMMISSIONS

of the

STATE GOVERNMENT

1927-1928

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OPINIONS TO THE SECRETARY OF AGRICULTURE

OPINIONS TO THE SECRETARY OF AGRICULTURE

Bureau of Animal Industry—Rabid dog—Livestock bitten by. Claim for damages.

Claim for damages must be in writing, supported by a certificate from a duly qualified veterinarian to the effect that such dog was afflicted with rabies. Acts of 1921, P. L. 522; 1923, P. L. 16.

Department of Justice,

Harrisburg, Pa., February 7, 1927.

Mr. C. G. Jordan, Secretary, Department of Agriculture, Harrisburg, Pennsylvania.

Sir: This Department has your request to be advised whether the Bureau of Animal Industry of the Department of Agriculture, before paying claims for damage to or destruction of live stock or poultry caused by dogs as provided under section 26 of the Act of May 11, 1921, P. L. 522, as amended by section 2 of the Act of March 19, 1923, P. L. 16, should require a statement to be presented by the claimant showing that the live stock covered by the claim was bitten by a dog and that the said dog, which inflicted the damage, was rabid.

Section 26 of the Act of May 11, 1921, P. L. 522 as amended by section 2 of the Act of March 19, 1923, P. L. 16, provides:

> "Whenever any person sustains any loss or damage to any live stock or poultry by dogs, or any live stock or poultry of any person is necessarily destroyed because of having been bitten by a dog, such person, or his agent or attorney, may, immediately after the damage was done, complain to any township auditor or to any justice of the peace, alderman, or magistrate of the township, town, borough, or city. Such complaint shall be in writing, shall be signed by the person making such complaint, and shall state when, where, and how such damage was done, and by whose dog or dogs, if known. Claims covering damage resulting from the bite of a rabid dog shall be made immediately following the death of the animal, and shall be supported by a certificate from a licensed and duly qualified veterinarian, or a report from the laboratory of the Bureau of Animal Industry, to the effect that such animal was affected with rabies.

Under Section 26 of the Act of May 11, 1921, P. L. 522 as amended by section 2 of the Act of March 19, 1923, P. L. 16, a person sustaining any loss or damage to live stock or poultry by dogs as set forth in said act is required to file a complaint in writing, signed by the person making such complaint and stating when, where, and how such damage was done and by whose dog or dogs if known. If the

damage claimed resulted from the bite of a rabid dog claim ought to be made immediately following the death of the animal and such claim must be supported by a certificate from a licensed and duly qualified veterinarian, or a report from the laboratory of the Bureau of Animal Industry, to the effect that such animal was afflicted with rabies.

Therefore a person claiming damage resulting from the bite of a rabid dog, to support such claim, must first file a complaint in writing, signed by the person making such complaint and stating when, where and how such damage was done and by whose dog or dogs if known and support the said written complaint by a certificate from a licensed and duly qualified veterinarian or a report from the laboratory of the Bureau of Animal Industry to the effect that such animal was afflicted with rabies.

Very truly yours,

DEPARTMENT OF JUSTICE,

THOMAS G. TAYLOR,
Deputy Attorney General.

Animals—Dog licenses—Acts of April 27, 1927, and May 6, 1927.

There is no inconsistency between the Acts of April 27, 1927, P. L. 473, and May 6, 1927, P. L. 833, with regard to the amount of the fees which county treasurers are permitted to collect for their services in issuing dog licenses.

Department of Justice,

Harrisburg, Pa., November 3, 1927.

Honorable Charles G. Jordan, Secretary of Agriculture, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether there is any inconsistency between the Act of April 27, 1927 (No. 300) and the Act of May 6, 1927 (No. 422) with regard to the amount of the fees which county treasurers are permitted to collect for their services in issuing dog licenses.

The Act of May 6, 1927 amends certain sections of the Act of May 11, 1921, P. L. 522. Section 3 of the Act of 1921 as amended by the Act of May 13, 1925, P. L. 641, provides that all applicants for dog licenses shall pay in addition to the statutory license fee payable to the Commonwealth, the sum of ten cents which shall be the county treasurer's fee for issuing, recording and reporting the license.

Section 4 of the Act of May 6, 1927, amending Section 5 of the Act of 1921, provides that whenever the holder of a dog license shall

have lost the tag issued in connection with the license a substitute tag may be furnished upon the payment of a fee to the Commonwealth and an additional ten cents for the use of the county treasurer.

Section 11 of the Act of 1921, as last amended of the Act of May 6, 1927, provides that applicants for kennel licenses shall also pay to the county treasurer an extra ten cents as his fee for issuing, recording and reporting the license.

The Act of April 27, 1927 amends Section 42 of the Act of April 15, 1834, P. L. 537, as amended by the Act of May 13, 1925, P. L. 656. As amended by the Act of 1927, Section 42 of the Act of 1834 provides:

1. That county treasurers shall be the agents of the Commonwealth for collecting and transmitting money for the Commonwealth;

2. That "except fees paid for fish, hunters and dog licenses which shall be the same as now prescribed by law, namely, ten cents for each license," the county treasurers shall be entitled to deduct from the gross amount of moneys received by them for the Commonwealth on each separate account which they are required to keep and settle, a commission the rate of which is graduated according to the amount collected and transmitted;

3. That out of the commissions thus authorized and the fees for issuing fish, hunters and dog licenses the county treasurers shall be entitled to retain for their own use compensation in amounts equal to twenty per centum of the salaries paid them for acting as county treasurers, and in addition thereto amounts necessary to reimburse them for certain necessary expenses in connection with the work of collecting and transmitting State money.

There is no inconsistency whatever between the Act of 1834 as amended by the Act of April 27, 1927, and the Act of 1921 as amended by the Act of May 6, 1927, insofar as concerns the amount of the fee chargeable by county treasurers for issuing dog licenses. The amount of this fee is fixed exclusively by the Act of 1921 as amended and is not affected by the Act of 1834 as amended. The only effect of the Act of 1834 as amended is to require county treasurers to pay into their respective county treasuries all fees received by them for issuing dog licenses in excess of the compensation and reimbursement for expenses which the Act allows them to retain out of any fees and commissions which they receive for collecting State moneys.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,
Special Deputy Attorney General.

OPINIONS TO THE DEPARTMENT OF THE AUDITOR GENERAL

OPINIONS TO THE DEPARTMENT OF THE AUDITOR GENERAL

Trust Companies—Shares of—Resettlement by Auditor General—State Tax—Penalty—Act of July 11, 1923, P. L. 1071—Act of March 30, 1811, 5 Sm. L. 228.

In a resettlement by the Auditor General of any tax on shares of trust companies imposed by Act of July 11, 1923, P. L. 1071, trust companies have the privilege of paying said tax within sixty days after the date of such resettlement, without incurring liability for the ten per cent. penalty for failure to pay said tax, and are also entitled to the exemption from the four mills state loans tax on bonds, mortgages and judgments owned by them, provided said tax on shares has been paid within sixty days after the date of such resettlement.

Department of Justice,

Harrisburg, Pa., January 14, 1927.

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

Sir: You have advised this department that the Act of Assembly of July 11, 1923, P. L. 1071 provides that trust companies shall pay their tax on shares within sixty days from the date of the settlement of the same by the Auditor General, in order to avoid the ten per cent. penalty provided by said Act of Assembly, and to gain the exemption from the four mills Pennsylvania Loans Tax on bonds, mortgages and judgments owned by them. Briefly, you inquire whether in the case of a resettlement by the fiscal officers of any tax on shares against said trust companies, if the trust companies pay said tax within sixty days from the date of resettlement are they liable for the ten per cent. penalty as provided by said Act, and also are they entitled to the exemption from the four mills Pennsylvania Loans Tax aforesaid.

Section 1 of the Act of June 13, 1907, P. L. 640, as amended by the Act of July 11, 1923, P. L. 1071, which is the particular statute here in question, after making provision for the assessment by the Auditor General of the tax on the shares of the capital stock of trust companies, provides, inter alia, 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, (cashier) 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, That if any such company shall fail or refuse to make such report, or to pay such tax, at the time hereinbefore specified, * * * he (Auditor General) shall, after having ascertained the actual value of each share of the capital stock of such company from the best information he can obtain, add thereto ten per centum as a penalty, assess the tax as aforesaid, and proceed according to law to collect the same from such company: * * * 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."

Let us consider first the latter part of your inquiry, that is, whether in the case of a resettlement by the fiscal officers of any tax on shares against a trust company, if the trust company pays said tax on shares within a period of sixty days after the date of said resettlement by the Auditor General, it is entitled to the exemption from the four mills Pennsylvania Loans Tax on bonds, mortgages and judgments owned by them, as provided by said Act of July 11, 1923. Nothing is said in said Act of July 11, 1923, nor in said Act of June 13, 1907, P. L. 640, of which Act it is an amendment, concerning the "resettlement" of tax on shares of trust companies. We turn to the Act of March 30, 1911, (5 Smith's Laws 228) Section 16, for the authority given to the fiscal officers to revise and resettle a State tax, which provides as follows:

> "The Auditor General and State Treasurer at the request of each other or of the party, shall revise any settlements made by them, except such as have been appealed from or which by any other proceedings have been taken out of their offices, if such request be made within twelve months of the date of settlement; but after that time no settlement on which a final discharge has been granted shall be opened, but the same shall be quieted and finally closed."

As stated by Judge Archbald in the case of In re Wyoming Valley Ice Company, 165 Federal, 789, 791:

> "The construction of this statute is plain. Under it, either of their own motion or at the instance of a party interested, taxes which have been settled, but not, by appeal or otherwise, taken out of their hands, may be re-examined and revised by the accounting officers referred to, provided that action be taken within the time specified and a final discharge has not been allowed."

A resettlement as authorized by said Section 16 of the Act of 1811, where it is referred to as a "revision" of the settlement made by the fiscal officers, has been construed to be a "settlement" by the Court in said case of In re Wyoming Valley Ice Company, supra, where it is said by the Court on page 792, in discussing the question of how far a tax on capital stock, which has been settled and paid, can be resettled and enlarged, as follows:

> "Not only must the tax have been discharged, but the time limited by the statute must also have elapsed. Conceding—contrary to what seems to have been decided in Commonwealth *vs.* Pennsylvania Company, 145 Pa. 266, 23 Atl. 549—that this begins to run not from the time of payment, but from the time when the *settlement which is revised was made,* the settlement here upon which the taxes were paid was February 16, 1906, and the resettlement on which the present claim is based was April 26th following, the two being only a little over two months apart."

Likewise, Deputy Attorney General Kun in an opinion to the Auditor General reported in 43 Pa. C. C. 489, decided that a resettlement by the fiscal officers made under the provisions of said Act of 1811 was a "settlement." Deputy Attorney General Kun in construing part of Section 9 of said Act of March 30, 1811 (5 Smith's Laws 288) which provides:

> "If any person or persons, body politic or corporate, be dissatisfied with the *settlement* of his, her of their accounts by the auditor general and state treasurer, he, she or they may appeal therefrom to the court of common pleas of the county in which the seat of government may then be, and such appeal shall be transmitted by the Auditor General to the clerk of the said court, to be by him entered of record, subject to like proceedings under the direction of the state treasurer as in common suits; provided, however, that the appeal be filed in the office of the auditor general within sixty days after notice of such *settlement,* * * * "

said in his opinion on page 490:

> "It is, of course, within the province of the taxing officers to open and restate any account unappealed from, and by such resettlement made within a year, establish a new date from which the sixty days within which appeals must be made would begin to run. Act of March 30, 1811, 5 Sm. L. 228; *Com. vs. Wyoming Valley Ice Co., 165 Fed. Rep. 789.*"

If a resettlement is a "settlement" within the meaning of said Act of March 30, 1811, it is very difficiult to see how the word "settlement," as used in said Act of July 11, 1923, can have a different meaning. If it did have a different meaning a great deal of confusion would follow. In view of the fact that it has uniformly been held, and the practice uniformly recognized for many years, that settlements or revised settlements, as provided for in said Act of March 30, 1811 are comprehended within the term "settlement," and the further fact that said Acts of March 30, 1811 and July 11 1923 must be construed together in arriving at the proper procedure relative to settlements and resettlements of the taxes on shares of trust companies, the conclusion is irresistible that the expression: "Within a period of sixty days after the date of such settlement by the Auditor General," applies to and comprehends a resettlement of said tax by the Auditor General.

In view of the conclusion which we have just reached in this matter concerning the construction of said Act of July 11, 1923 with respect to resettlement of tax on shares of trust companies, it would follow that the penalty of ten per cent. therein provided to be added by the Auditor General in assessing said tax on shares, in the event, inter alia, that the trust company fails to pay such tax at the time specified, should not be added for the failure of the trust company to pay such tax until the expiration of a period of sixty days after the date of resettlement of said tax by the Auditor General. In this connection we believe that the principal law laid down by Justice Mitchell in the case of *Commonwealth vs. Philadelphia Etc. C. & I. Company, 145 Pa. 283,* where consideration was made of the question of the ten per cent. penalty provided in Section 4 of the Act of June 30, 1885, P. L. 194 for failure of the treasurer of a corporation to assess and pay the tax therein provided for and make report thereof to the Auditor General, is in itself conclusive of the question which here arises as to the penalty to be imposed by said Act of 1923 where resettlements are made of said tax on shares by the Auditor General. This statement by Justice Mitchell in said opinion on page 287 is 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 account or to any delay that may be incident to the proceedings according to law, by appeal or otherwise."

I am, therefore, of the opinion, and so advise you, that in the case of a resettlement by the Auditor General of any tax on shares of trust companies as imposed by said Act of July 11, 1923, P. L. 1071, the trust companies have the privilege under said Act of paying said tax within a period of sixty days after the date of such resettlement by the Auditor General, without incurring liability for the ten per cent. penalty as provided by said Act of Assembly for failure to pay said tax; and that said trust companies are also entitled to the exemption from the four mills Pennsylvania Loans Tax on bonds, mortgages and judgments owned by them, where said tax on shares has been paid to the State Treasurer by said trust companies within a period of sixty days after the date of such resettlement by the Auditor General.

Yours very truly,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,
Deputy Attorney General.

Corporations conducted for profit—First Class—Co-operative Agricultural Associations—Reports—Tax—Act of May 4, 1924, Act No. 386.

The words "not having capital stock and not conducted for profit" do not modify and qualify the expression "corporations of the first class" as the same is found in Act No. 386, approved May 4, 1927, and, therefore, corporations of the first class are not required to file capital stock reports with the Auditor General and pay a capital stock tax even though they may have capital stock and be conducted for profit.

Department of Justice,

Harrisburg, Pa., July 14, 1927.

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

Sir: You have recently inquired of this Department by letter whether under Act No. 386, approved by the Governor on May 4, 1927, which amends sections twenty and twenty-one of the Act of June 1, 1889, P. L. 420, as amended, first class corporations are relieved from filing capital stock reports and paying a capital stock tax even though they may have issued capital stock and are conducted for profit.

The question which you have asked requires this Department to determine whether or not the expression used in the amendments in said act: "not having capital stock and not conducted for profit," modifies not only its immediate antecedent "cooperative agricultural associations" but also modifies the expression "corporations of the first class."

The amendments in this act are in exactly the same words as the amendment in Act No. 385, approved by the Governor May 4, 1927. The same question of construction arises in this case as arose with respect to said Act No. 385, concerning which we rendered you an opinion of even date. The reasons therein given for our conclusion are applicable to this case, and for these reasons we conclude and you are advised that the words "not having capital stock and not conducted for profit," do not modify and qualify the expression "corporation of the first class" as the same are found in said Act No. 386, approved May 4, 1927, and, therefore, corporations of the first class are not required to file capital stock reports with the Auditor General and pay a capital stock tax even though they may have capital stock and be conducted for profit.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,
Deputy Attorney General.

Capital Stock—Concerns Conducted for Profit—Co-operative Agricultural Associations—Loans—Interpretation of Statutes—Act of May 4, 1927, No. 385.

The words "not having capital stock and not conducted for profit" do not modify and qualify the expression "corporations of the first class," as the same is found in Act No. 385, approved May 4, 1927, which amends Section 4, of the Act of June 30, 1885, P. L. 193, as amended, and, therefore, corporations of the first class are exempt from the provisions of the Corporate Loans Tax Act, requiring their treasurer to assess, deduct and return the corporate loans tax and make annual report of the indebtedness of the corporation to the Auditor General.

Department of Justice,

Harrisburg, Pa., July 14, 1927.

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

Sir: You have recently advised this Department by letter that Act No. 385, approved by the Governor on May 4, 1927, which amends Section 4 of the Act of June 30, 1885, P. L. 193, as amended, is under-

stood to exempt first class corporations from liability for loans tax upon their indebtedness. You state that said Section 4, as now amended, contains the following expression:

> "That hereafter, *except in the case of corporations of the first class and cooperative agricultural associations not having capital stock and not conducted for profit,* it should be the duty of the treasurer of each private corporation, etc." (The words in italics cover the amendment to said Section 4 as made by said Act No. 385).

You inquire whether by this amendment first class corporations, regardless of whether they have capital stock or are conducted for profit, are exempt from the provisions thereof requiring their treasurer to assess and collect the tax and make annual report of its indebtedness to the Auditor General?

The question which you have propounded calls upon us to determine whether or not the expression used in said amendment: "not having capital stock and not conducted for profit," modifies not only its immediate antecedent "cooperative agricultural associations" but also modifies the expression "corporations of the first class." The expression in question could modify both antecedents without ambiguity. Furthermore, the words of the amendment are used in no other place in said Act excepting in the title and in said title identically the same words are used as in the amendment itself. Consequently, we are not assisted by a study of the Act as a whole. It is, therefore, necessary to give consideration to rules of construction applicable to cases of this character. Endlich on "Interpretation of Statutes," Sec. 414, says:

> "The strict rule of grammar would seem to require, as a general thing, a limiting clause, or phrase, following several expressions to which it might be applicable, to be restrained to the last antecedent."

Various cases are cited in support thereof. However, certain other cases are cited displacing this rule where the manifest object of the enactment in question suggested otherwise. In the case of *Fisher vs. Connard,* 100 Pa. 63, although the Court admitted that it was correct that, in accordance with grammatical construction, relative and qualifying words and phrases refer solely to the last antecedent, held the rule would not apply to the Act of Assembly there in question because of the intention of the Legislature indicated by previous acts in pari materia. But with respect to the act here under consideration, we find no acts of assembly in pari materia which assist in throwing any light on the construction of the words of the amendment.

In Lewis' "Southerland Statutory Construction," Volume 2 (2nd Ed.), Section 420, the above rule of construction stated by Endlich in his work on "Interpretation of Statutes," is also set forth with authorities in support thereof. However, in view of all authorities, if it is still to be doubted whether said rule is applicable and controls in the construction of the words we are discussing in this case, then we submit, where the Act itself as a whole does not assist us in determining the intent of the Legislature, the most which can be said, so far as to whether or not the words "not having capital stock and not conducted for profit" modify and qualify the expression "corporations of the first class," is, that it is doubtful. If this be true, then we may turn to the history of the Act. In so doing we find that said Act No. 385, as originally introduced in the Legislature as House Bill No. 1699, did not in the amendment contain the words "cooperative agricultural associations not having capital stock and not conducted for profit" but the amendment contained only the words "except in the case of corporations of the first class." In this form the Act passed the House of Representatives. In the Senate the words, "and cooperative agricultural associations not having capital stock and not conducted for profit," were added to the amendment. Thus it will be noted that it was proposed by this amendment to also exempt certain cooperative agricultural associations. The qualifying words used to characterize these cooperative agricultural associations were: "not having capital stock and not conducted for profit." These qualifying words are exactly the same words found in Section 2 of the Act of June 12, 1919, P. L. 466, which Act provides for the incorporation and regulation of cooperative agricultural associations "not having capital stock and not conducted for profit;" and are used in said Section, as well as in the title of said act, to modify and qualify the expression "cooperative agricultural associations." Consequently, it can hardly be doubted that the draftsman of the amendment to the Bill as it appeared in the Senate used these qualifying words as referring only to cooperative agricultural associations. With this amendment of the Senate, the Bill was finally passed by the Legislature and approved by the Governor. It would, therefore, appear that the history of the Bill in the Legislature clearly indicates an intent which supports the construction which would result upon the application of the rule hereinbefore referred to.

In addition, an interpretation of the amendment in question which would construe the aforementioned qualifying words as modifying "corporations of the first class" might lead into a situation that would result in the Act being declared unconstitutional. Corporations of the first class not having capital stock and not operated for profit would not be liable to report to the Auditor General and to

assess and collect the Corporate Loans Tax, while corporations of the first class having capital stock and operated for profit would be required to report their indebtedness and assess and collect the tax. We are not deciding that such a classification would be unconstitutional, but a strong doubt would be raised concerning the same. It is unnecessary to cite authorities in support of the doctrine that that construction of a statute should be adopted which will sustain the Act, where the language used will permit such interpretation.

In light of the foregoing reasons, you are herewith advised that the words "not having capital stock and not conducted for profit" do not modify and qualify the expression "corporations of the first class," as the same is found in Act No. 385, approved May 4, 1927, which amends Section 4 of the Act of June 30, 1885, P. L. 193, as amended, and, therefore, corporations of the first class are exempt from the provisions of the Corporate Loans Tax Act, requiring their treasurer to assess, deduct and return the corporate loans tax and make annual report of the indebtedness of the corporation to the Auditor General.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,
Deputy Attorney General.

Retirement Pension Funds—Term of Years—Out of Service—Not Employees of Commonwealth—Appropriations—Extra Compensation—Amending Act of March 30, 1925, P. L. 85, Article III, Section 11 and 18, of the Pennsylvania Constitution.

The Act of March 30, 1925, P. L. 85, amending the Teachers' Retirement Act of July 18, 1917, P. L. 1043, allowing pensions to be paid certain school teachers who had taught a specified number of years but who were not so employed on July 1, 1919, is unconstitutional, in that it conflicts with Article III, Section 18, and Article III, Section 11, of the Pennsylvania Constitution.

Department of Justice,

Harrisburg, Pa., August 19, 1927.

Honorable Robert G. Woodside, Deputy Auditor General, Harrisburg, Pennsylvania.

Sir: We have your request to be advised with regard to the constitutionality of the Act of March 30, 1925, P. L. 85, as supplemented by the Acts of May 4, 1927 (Act No. 12-A) and by an item in the General Appropriation Act of May 11, 1927 (Act No. 347-A).

The Act of March 30, 1925 amended the so-called Teachers' Retirement Act (Act of July 18, 1917 P. L. 1043) by providing that out

of a fund to be appropriated by the General Assembly for the purpose and to be known as the "Former Teachers' Fund," a retirement allowance should be paid to "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."

To carry this Act into effect the Legislature in 1925 appropriated Seventy-five Thousand ($75,000.00) Dollars, (Act of April 28, 1925, Appropriation Acts, Page 161), and that sum having been inadequate to pay retirement allowances during the biennium to the teachers entitled to them under the Act of March 30, 1925, the 1927 Legislature passed a deficiency appropriation bill which the Governor approved (Act No. 12-A approved May 24, 1927). The 1927 Legislature also included in the General Appropriation Act an item for carrying into effect during the current biennium the Act of March 30, 1925.

You desire to be advised whether you can lawfully make payments out of the 1927 appropriations under Article III, Section 18, of the Constitution which is as follows:

> "No appropriations except for pensions or gratuities for military services shall be made for charitable, educational or benevolent purposes to any person or community or to any denominational or sectarian institution, corporation or association."

July 1, 1919 was the date when the Public School Employes Retirement Act became effective, so that the Legislature's purpose in enacting the Act of March 30, 1925 and making appropriations to carry it into effect was to provide for the pensioning of certain teachers who ceased to be connected with the public school system prior to the date when the Public School Employes Retirement System began to function, and were therefore unable, by voluntarily joining the System, to enjoy its benefits.

Prior to July 1, 1919 there was no contractual or other relationship between the Commonwealth and the teachers whom the Legislature intended the Act of March 30, 1925 to benefit, under which the Commonwealth was obligated to make for them provision of the kind embodied in that Act. Accordingly, the payments authorized by the

Act of 1925 would be in the nature of "pensions or gratuities," and for charitable or benevolent purposes.

If, therefore, the 1927 appropriations out of which payments are directed to be made are appropriations "to any person or community" they are forbidden by Article III, Section 18 of the Constitution.

The appropriation made by the Act of April 23, 1925, (Appropriation Acts, Page 161) was to the Public School Employes Retirement Board. The deficiency appropriation made by Act No. 12-A of the 1927 session was also to this Board. The appropriation for the current biennium included in the General Appropriation Act (Act No. 347-A of the 1927 session) was made to the Department of Public Instruction for "payment into the Former Teachers' Fund of the Pennsylvania Employes Retirement Board."

Two decisions of the Supreme Court of Pennsylvania render it impossible for us to reach any conclusion except that, notwithstanding the form of these appropriations, they are in substance appropriations made directly to the former teachers intended to be benefited thereby. In the first of these cases, *Busser vs. Snyder,* 282 Pa. 440, the Supreme Court held that an appropriation to the Old Age Pension Commission was in substance an appropriation directly to the persons to whom that Commission was authorized to pay pensions at per diem rate. The second case was *Collins vs. Martin et al.,* (the St. Agnes Hospital Case), decided on June 26, 1927 and not yet reported. In that case the Supreme Court held that an appropriation made to the Department of Welfare to enable it to care for indigent sick or injured persons in hospitals not owned by the Commonwealth was in substance an appropriation to the hospitals which would receive the money, so that if any such hospital happened to be a sectarian institution it would be unconstitutional to pay any part of the appropriation to it.

In distributing the Former Teachers' Fund to the teachers intended to be benefited thereby, the Public School Employes Retirement Board was not given any discretion by the Act of March 30, 1925. All former teachers of the ages and with the service records and disabilities specified in the Act are entitled, if the Act of 1925 be valid, to receive retirement allowances in stated amounts. The Retirement Board was, therefore, constituted an agency with merely ministerial duties to perform in distributing the appropriations made by the Legislature to carry the Act into effect. Its function would be almost identical with that which the Legislature endeavored ineffectually to bestow upon the Old Age Pension Commission. As the Old Age Pension Act was held by the Supreme Court to be unconstitutional, we are bound to say that the Act of March 30, 1925 is unconstitutional.

In considering the validity of this Act, another provision of the

Constitution must be mentioned, namely, that contained in Article III, Section 11, which is as follows:

> "No bill shall be passed giving any extra compensation to any public officer, servant, employee, agent or contractor after services shall have been rendered or contract made, nor providing for the payment of any claim against the Commonwealth without previous authority of law."

This section of the Constitution renders it impossible to regard the Act of March 30, 1925 as an Act making provision for the payment of compensation to former employes of the Commonwealth. The teachers intended to be benefited are no longer in the service of the Commonwealth and any compensation which might now be given them would necessarily be "extra compensation * * * after services shall have been rendered." Accordingly, even were the payments authorized by the Act of 1925 to be regarded otherwise than as gratuities, Article III, Section 11, would prohibit them.

We regret, exceedingly, that we are obliged to advise you that you cannot consistently with the Constitution as interpreted by the Supreme Court in the cases mentioned, make payments out of the two appropriations of the 1927 Legislature to which your inquiry refers.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,
Special Deputy Attorney General.

Corporations—Taxation—Bonus on stock —Corporations of the first class—Act of April 20, 1927.

1. Under the Act of April 20, 1927, P. L. 322, a corporation of the first class organized since the passage of the act is liable for a bonus upon its authorized capital stock and upon any subsequent increase thereof.

2. A corporation of the first class having a capital stock, incorporated prior to the Act of April 20, 1927, P. L. 322, is liable for bonus upon the amount of any actual increase of such capital stock made after the passage of the act.

Department of Justice,
Harrisburg, Pa., October 24, 1927.

Honorable Edward Martin, Auditor General, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your letter of October 20th asking to be advised upon the following questions:

> (1) Is a corporation of the first class having capital stock and organized since the passage of the Act of April 20, 1927, No. 193, required to pay Bonus upon

incorporation on the amount of capital stock which it is authorized to have, and on subsequent actual increases thereof?

(2) Is a corporation of the first class, having capital stock, incorporated prior to the Act of April 20, 1927, No. 193, liable for Bonus on the amount of actual increase of its capital stock made after the passage of said act?

The Act of April 20, 1927, No. 193 reads in part as follows:

"Section 2. Imposition of Bonus.—A bonus of one-fifth of one per centum is hereby imposed for State purposes as follows:

(a) Upon the amount of the capital stock which *any* corporation, hereafter incorporated, is authorized to have, and upon the amount of actual increase of the capital stock of *any* corporation heretofore or hereafter incorporated;

* * * * *

Section 3. Exceptions.—No bonus shall be imposed or be collected, under the provisions of this act, * * * (b) from any corporation named in the first class, of section two of the act, approved the twenty-ninth day of April, one thousand eight hundred and seventy-four (Pamphlet Laws, seventy-three) entitled 'An act to provide for the incorporation and regulation of certain corporations,' *which does not have any capital stock* * * *"

Clearly the general language of Section 2 (a) is sufficiently broad to comprehend corporations of the first class.

It is equally clear that the Legislature has expressed its intention awkardly in Section 3 (b). Section 3 purports to specify three exceptions, and yet, that which is comprehended in subdivision (b) cannot, strictly speaking, be said to be an exception, since with respect to a domestic corporation, bonus for many years has necessarily been strictly incident to capital stock. In other words, if by subdivision (b) the Legislature meant merely to except from the class of corporations subject to bonus those of the first class which have no capital stock, it has done a vain thing for that would have been the law had there been no such express exception specified. Neither is it reasonable to suppose that in employing the wording found in Section 3 (b) the Legislature desired to make it clear that in the case of first class domestic corporations, without any capital stock, bonus would not be charged upon capital, as distinguished from capital stock, as in the case of foreign corporations doing business in Pennsylvania, and certain limited partnership associations, inasmuch as there was then in force in Pennsylvania no statute imposing bonus upon the capital, as distinguished from the capital stock, of a domestic corporation.

We cannot impute to the Legislature an intention to do a vain thing or an intention to use words which are entirely meaningless. It is to be presumed therefore that when the words "which does not have any capital stock" were employed to conclude subdivision (b) respecting the exception of corporations of the first class from the general group of corporations subject to bonus, the Legislature intended that corporations of the first class *with capital stock* should be subject to bonus. This conclusion finds further support, if any is needed, in the wording of the former bonus Act of May 3, 1899, P. L. 189, (repealed by Act No. 193 of the 1927 Session, here under consideration) which reads in part as follows:

> "Section 1. Be it enacted, &c., That all corporations hereafter created under any general or special law of this Commonwealth, except building and loan associations, and excepting all corporations named in the first class of section two of an act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four, shall pay to the State Treasurer * * *"

It is noted that the 1899 Bonus Act did not conclude the provision which excepted corporations of the first class from the imposition of bonus with the words "which does not have any capital stock." It thus excepted all corporations of the first class from liability for bonus, whether they had a capital stock or not.

Construing Section 2 (a) and Section 3 (b) together we accordingly advise you:

(1) That a corporation of the first class, organized since the passage of the Act of April 20, 1927, No. 193, which first provides for an authorized capital stock upon incorporation, or at a later time, is liable for bonus upon such authorized capital stock; also that it is liable for bonus upon any subsequent actual increases thereof.

(2) That a corporation of the first class, having a capital stock, incorporated prior to the Act of April 20, 1927, No. 193, is liable for bonus upon the amount of any actual increase of this capital stock made after the passage of said Act. This conclusion does not give to the Act any retroactive effect and Section 6 provides that:

> "Upon the actual increase of the capital stock of *any* corporation, it shall be the duty of the president or treasurer thereof, within thirty days thereafter, to make a return to the Secretary of the Commonwealth of the amount of increase actually made; and, concurrently therewith, such corporation shall pay to the Secretary of

the Commonwealth the bonus due on such increase of capital stock."

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON D. METZGER,
Deputy Attorney General.

Taxation—Corporations—Capital stock tax—Bonus—Steamship companies—Vessels—Home port—Situs.

1. Steamship companies incorporated under the laws of another state with their principal office therein are not liable for the Pennsylvania capital stock tax on that portion of their capital represented by steamships and other vessels owned by such companies and registered at a port in Pennsylvania as their home port, if said vessels have not acquired an actual *situs* in Pennsylvania.

2. Nor are such companies liable for bonus upon an increase in the capital stock as represented by an investment in such vessels.

Department of Justice,

Harrisburg, Pa., November 23, 1927.

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

Sir: You have forwarded to this office the Capital Stock and Bonus Reports of the Cape Steamship Company and the Pure Oil Steamship Company for the year 1925, together with the Petitions of these companies for resettlements of the Capital Stock Tax and Bonus settlements made against said companies for said year, with affidavits of the officers of said company, setting forth in detail the voyages of the various steamships and vessels of said companies during the year in question. Your inquiry is whether these companies, both of which are incorporated under the laws of Delaware, with their home offices in said State, and qualified to do business in Pennsylvania, are liable for the Pennsylvania Capital Stock Tax on that portion of the value of the capital stock represented by steamships and other vessels owned by said companies and registered at a port in this State, but which steamships and vessels had not acquired an actual situs in Pennsylvania; and further whether said steamship companies are liable for bonus upon an increase in the capital of said companies as represented by their investment in said steamships and other vessels?

Let us consider first the case of the Cape Steamship Company. The Cape Steamship Company is a corporation incorporated under the laws of the State of Delaware, with its principal or home office at Dover, Delaware, and chartered for the purpose of owning, leasing and operating ships and other vessels for carrying oil, merchandise and freight of any kind "to and from any ports and in all parts of

the world." According to the affidavits filed by officers of this company, it owned three oil tank ships. Two of these oil tank ships did not touch a port in Pennsylvania during said tax year, and the other vessel only touched a port in Pennsylvania seven times during the year while actually engaged in discharging interstate commerce.

The Pennsylvania Capital Stock Tax is provided for by various acts of assembly. The principal act under which the Capital Stock Tax here in question was imposed is the Act of July 22, 1913, P. L. 903. The bonus settlement in this case was made under the provisions of the Act of May 8, 1901, P. L. 150. We deem it unnecessary to further refer to or discuss these various acts of assembly, inasmuch as their construction is not at issue here.

The general rule is that tangible personal property is subject to tax by the State in which it is, no matter where the domicile of the owner may be, and notwithstanding the fact that the property may be employed in Interstate transportation. *Pullman's Palace Car Company vs. Pennsylvania,* 141 U. S. 18, 35 L. Ed. 613. However, in the instant case, in light of the affidavits filed by the officers of the company, the oil tank ships and barges in question did not acquire an actual situs in Pennsylvania. The question which you have presented to this department arises because of the fact that said oil tank ships and barges are registered or enrolled at a port in Pennsylvania. The Supreme Court of this State in the case of *Commonwealth vs. American Dredging Company,* 122 Pa. 386, held that the rule as to vessels engaged in foreign or interstate commerce is that their situs for the purpose of taxation is their home port of registry, or the residence of their owner if unregistered. I presume that it was because of this decision that the settlements which comprehended the value of the ships and barges referred to, were made against the Cape Steamship Company. The rule laid down in said case of *Commonwealth vs. American Dredging Company,* supra, appears to have been based upon the decision of the U. S. Supreme Court in the case of *Hayes vs. Pacific Mail Steamship Company,* 17 Howard, 596. In this case it so happened that the home port of the vessels in question was the same port at which they were registered, to wit, New York City. The corporation which owned the vessels was incorporated in the State of New York and had its principal office in New York City.

The case of *Commonwealth vs. American Dredging Company,* supra, was decided in 1888. That rule therein referred to, to the effect that the situs for the purpose of taxation is the home port of registry of the vessel, is not the rule today, is conclusively shown by the decision of the United States Supreme Court in the case of *Ayer & L. Tie Company vs. Kentucky,* 202 U. S. 421, 50 L. Ed. 1086, decided in 1906. In this case the boats in question were engaged in interstate commerce between the ports of Kentucky, Illinois, Mississippi, Tennessee, and

Arkansas. They were owned by an Illinois corporation which had its principal office at Chicago, where taxes had been paid under the laws of the state, both to the state and to the city. Brookfield, in the extreme southern part of the state, and upon the Ohio River, was a port of call, and an office was probably maintained there, it being a place where cargoes were often discharged. The general manager of the transportation department of the company resided in Kentucky, and the boats of the fleet were enrolled at Paducah in that state, and bore upon their sterns the name "Paducah," as the home port or port of hail under the statute. Paducah was the place where the boats received their supplies and repairs, where seamen were hired and laid up when not in use, though it seems that Paducah was not a point where cargo was either received or discharged. Upon this state of facts it was held that the boats of the company had neither such artificial situs through enrollment or the marking upon their sterns, nor such actual situs by reason of the temporary stoppage at Paducah and other ports of the state, as to draw to it jurisdiction for purpose of taxation. In this case Justice White in his opinion on p. 1087 (50 L. Ed.) states the general rule as follows:

> "The general rule has long been settled as to vessels plying between the ports of different states, engaged in the coastwise trade, that the domicil of the owner is the situs of a vessel for the purpose of taxation, wholly *irrespective of the place of enrollment,* subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a state other than the place of the domicil of the owner, it may there be taxed because within the jurisdiction of the taxing authority."

In this case the Federal Statutes pertaining to registry or enrolment of a vessel in an American port were fully referred to. In view of this general rule it will serve no purpose to discuss them here.

In support of the general rule laid down by the case of *Ayer & L. Tie Company vs. Kentucky, supra,* we also wish to cite the case of *Southern Pacific Company vs. Kentucky, 222 U. S. 63, 56 L. Ed. 96,* where the Supreme Court of the U. S. fully discussed all the important cases on the subject.

In the case of *Old Dominion S. S. Company vs. Virginia, 198 U. S. 299, 49 L. Ed. 1059,* the domicile of the owner of the vessels there in question, as a taxing situs, was held to have been lost and a new taxing situs acquired by reason of a permanent location within another jurisdiction. The Supreme Court of the U. S. said in the case of the *Southern Pacific Company vs. Kentucky, supra,* with respect to this case (p. 156 L. Ed.):

> "But in that case the judgment was rested upon the

> fact that the vessels had *for years been continuously and exclusively engaged in the navigation of the Virginia waters,* which state had thereby acquired jurisdiction for imposing a tax as upon property which had become incorporated into the tangible property within her territory."

In the instant case although the Cape Steamship Company owns three oil tank ships which are enrolled at the port of Philadelphia, for the purpose of protection on the high seas, nevertheless under the facts shown in the affidavits filed by the company, these ships have acquired no actual situs in this State. As previously referred to, two of the ships did not touch a port in Pennsylvania during said tax year, and the other vessel only touched a port in Pennsylvania on seven different occasions. These occasions were when the ship in question was engaged in lawful commerce between the States. This ship was here only temporarily, depending at the time upon the amount of business transacted at the particular port incident to its interstate commerce. The situation here is entirely different from that found in the case of *Old Dominion S. S. Co. vs. Virginia,* just referred to.

You are, therefore, advised that the Cape Steamship Company, a foreign corporation qualified to do business in Pennsylvania, is not liable for the Pennsylvania Capital Stock Tax, during the year 1925 in question, on that portion of the value of the capital stock represented by oil tank ships owned by it, although registered at a port in this State, because these ships had not acquired an actual situs in Pennsylvania; and you are further advised that, for the same reason, this corporation is not liable for bonus upon the increase in the capital of said company as represented by its investment in said oil tank ships during the same year.

As to the Pure Oil Steamship Company, the facts are quite similar to the Cape Steamship Company. The Pure Oil Steamship Company is the owner of three oil tank ships and three barges used for transporting oil. According to the affidavit filed by the company, three of the oil tank ships and two of the barges are registered at a port in Pennsylvania, the remaining barge is registered at a port in Texas. A detailed statement of the voyages of the three ships and two barges show that they visited Pennsylvania ports on numerous occasions, but only when engaged entirely in the business of Interstate Commerce, and that they were here only temporarily for the purpose of this commerce. They did not acquire an actual situs in this State. The barge which was registered at a port in Texas did not touch a Pennsylvania port during the tax year in question.

You are accordingly advised that, for exactly the same reason as in the case of the Cape Steamship Company, just discussed, the Pure

Oil Steamship Company, a foreign corporation qualified to do business in Pennsylvania, is not liable for the Pennsylvania Capital Stock Tax during the year 1925 in question on that portion of the value of the capital stock represented by oil tank ships and barges owned by it; and likewise, it is not liable for bonus upon the increase in the capital of said corporation as represented by its investment in said oil tank ships and barges during said year.

I am herewith returning to you all reports, affidavits and papers pertaining to these cases which were submitted with your request for an opinion, in order that you may effect the necessary resettlements of the accounts of these corporations for Capital Stock Taxes and Bonus.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,
Deputy Attorney General.

Taxes—Receivership—Interest—Effect of receivership upon interest running against delinquent corporation tax accounts.

The appointment of a Receiver for a corporation does not stop the running of interest on accounts for corporation taxes settled for periods prior to, or during, the receivership.

Department of Justice,

Harrisburg, Pa., April 12, 1928.

Honorable Edward Martin, Auditor General, Harrisburg, Pa.

Sir: You have asked to be advised whether the interest accounts, settled against the Jersey Shore Water Company because of its delinquency in paying corporate loans taxes imposed for the years 1909 to 1914 inclusive, were properly settled in view of the fact that the company was in receivership from December 23, 1914, to June 10, 1920.

The interest settlements in question were made September 28, 1920 when the loans tax accounts for the years 1909 to 1914 inclusive were paid. Thus, with the exception of the last eight days of the year of 1914, all interest in question is upon claims accruing prior to the appointment of a receiver.

By statute, the corporate loans tax accounts in question are all made prior liens. The statute also provides that interest shall run against such accounts from sixty days after date of settlement and such interest accounts shall likewise be prior liens.

In *Commonwealth vs. Philadelphia, etc., C. & I. Co., 137 Pa. 481,* it was held that a corporation is subject to the corporate loans tax

on obligations upon which it pays interest during the period that it is in the hands of a receiver. We do not understand, however, that counsel for the Jersey Shore Water Company dispute liability for corporate loans tax during the period of receivership; their position is that interest cannot legally be imposed for the delinquency in paying the tax within the time required by law, because of the receivership.

In the case of *Commonwealth vs. Buffalo, N. Y. & Phila. R. R. Co., 2 Dauphin 216,* it was held that a railroad company in the hands of a receiver was subject to gross receipts tax and in computing the amount of the judgment, the Court calculated interest on the settlement at the rate of twelve per centum from sixty days after the date thereof.

In *Commonwealth vs. Wabash-Pittsburgh Terminal Railway Co., 47 Pa. C. C. 74,* it was held that certificates of indebtedness issued by a receiver were obligations of the company as much as loans made by officers of the company and were, therefore, subject to the tax on loans. In computing the judgment, the Court calculated interest on the tax as settled from sixty days after the date of settlement.

The general rule appears to be that on claims of equal rank, interest does not run after possession of the property is taken by the Court through a receiver, but that where the claims are not of equal rank, the appointment of a receiver does not stop the running of interest. See note on "Interest During Receivership" in L. R. A. 1917 D, p. 1157.

In one of the leading cases on the subject, *American Iron & Steel Mfg. Co. vs. Seaboard Air Line R. Co., 233 U. S. 261, 58 L. Ed. 949,* it was held that interest as well as principal, accruing during receivership, is payable on debts of the highest dignity, even though what remains is not sufficient to pay claims of a lower rank in full.

In *Moore vs. Watauga & Y. R. Co., (N. C.) 92 S. E. 361,* it was held that the appointment of a receiver for a railroad company did not stop the running of interest on claims for labor and material furnished in the construction of the road, which were a lien on the property and entitled to a preference over other indebtedness.

In *Sparks vs. Lowndes County, 98 Ga. 284, 25 S. E. 426,* the Court held that interest on claims for taxes accruing *during the receiver's possession* was properly due and payable. There the taxes accrued during the period of receivership while in the instant case, they had practically all accrued prior to the receivership.

In the recent case of *Boston Penny Savings Bank vs. Boston & Maine R. R., (Mass.) 138 N. E. 907,* the Court recognized the principle that interest which has accrued during the period of receivership on preferred obligations is payable when the receivership ter-

minates, even where the decree establishing the receivership does not permit its payment during the period of receivership.

The general rule, established by these and many other decisions, applies particularly in the case of an active as distinguished from a liquidating receivership. *Spring Coal Co. vs. Keech, 239 Fed. 48.*

In our opinion the case of *State vs. Bradley, 207 Ala. 677, 93 So. 595 (1922),* goes much further in holding that the appointment of a receiver does not absolve a corporation from liability to the *penalty* imposed by statute for failure promptly to pay a franchise tax.

We are, therefore, of the opinion that the interest accounts in question were correctly settled and that they should not be disturbed.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON D. METZGER,
Deputy Attorney General.

Building and loan associations—Transfer of decedent's stock—Inheritance tax —Act of June 20, 1919.

Where a building and loan association permits the withdrawal or cancellation of its stock standing in the name of a decedent, without formal transfer thereof to it, the executor or administrator of a deceased stockholder need not obtain the Auditor General's consent to such withdrawal prior to the payment of the transfer inheritance tax to which such estate may be subject under the Act of June 20, 1919, P. L. 521.

Department of Justice,

Harrisburg, Pa., May 2, 1928.

Honorable Edward Martin, Auditor General, Harrisburg, Pa.

Sir: You have advised this Department that in a letter of Honorable George W. Woodruff, former Attorney General, dated March 27, 1925, addressed to Honorable S. S. Lewis, then Auditor General, it was held by the Attorney General that where the practice of a building and loan association is to require the executor or administrator of a decedent's estate to transfer (or "retransfer" as the term is used by some associations) to the Association the certificates of stock, which were standing in the name of such decedent, for the purpose of cancellation before paying to the estate the amount due on said stock, Sections 35 and 36 of the Act of June 20, 1919, P. L. 521, prohibit such transfer of stock to be made until the tax due the Commonwealth has been paid and a waiver or consent by you as Auditor General presented to the building and loan association, unless you consent thereto in writing prior to such payment. You now inquire whether, in the case where the practice of a building and loan asso-

ciation is to permit the cancellation or withdrawal of its stock without a formal transfer thereof to it, the executor or administrator of a deceased stockholder must likewise obtain from you as Auditor General a consent or waiver in writing and present the same to the association before allowing such stock to be withdrawn or cancelled.

Section 35 of the Act of June 20, 1919, P. L. 521, provides, inter alia, as follows:

> "No executor, administrator, or trustee of any decedent, resident or nonresident, shall assign or transfer any stock of any corporation of this Commonwealth * * * standing in the name of such decedent * * * subject to the tax hereinbefore imposed, until such tax has been paid, unless the Auditor General consents to such transfer prior to such payment in manner hereinafter provided."

Section 36 of said Act provides, inter alia, as follows:

> "No corporation of this Commonwealth * * * shall transfer any stock of such corporation * * * standing in the name of a decedent, whether resident or nonresident * * * unless the Auditor General has filed with said corporation * * * a certificate that the tax imposed by this act on the transfer of such stock has been fully paid, or otherwise consents thereto in writing. * * *."

I have read a copy of the letter of former Attorney General Woodruff, referred to by you. I am in accord with the determination of the former Attorney General that where the practice of a building and loan association requires the actual transfer to it by the executor or administrator of a decedent of stock standing in the name of the decedent, for the purpose of cancellation before paying to the estate the amount due on said stock, that under the express terms of Section 35 and 36 of the Act of June 20, 1919, P. L. 521, such transfer or assignment of the stock of the building and loan association cannot be made until such tax has been paid unless the Auditor General consents in writing to such transfer prior to such payment.

Under the question as you have propounded it in your letter a different practice is followed by the building and loan association. The association allows the cancellation or withdrawal of its stock without a formal transfer thereof to it. The executor or administrator presents to the association the certificates of stock standing in the name of the decedent, the association pays to the representative of the estate the withdrawal value of said stock, requires said representative to sign a receipt, the form of which is usually printed on the back of the certificate, showing receipt of payment of the amount due on said certificate or certificates of stock which are thereupon surrendered to said association and the executor or administrator

makes acknowledgment in said receipt that said stock is surrendered to the association. This practice followed by most building and loan associations is in pursuance to the provisions of Section 37 of the Act of April 29, 1874, P. L. 73, which provides that any stockholder of a building and loan association "wishing to withdraw from said corporation, shall have power to do so by giving thirty days' notice of his or her intention to withdraw, when he or she shall be entitled to receive the amount paid in by him or her, less all fines and other charges; * * * upon the death of a stockholder, his or her legal representatives shall be entitled to receive the full amount paid in by him or her and legal interest thereon, first deducting all charges that may be due on the stock; no fines shall be charged to a deceased member's account from and after his or her decease, unless his legal representatives of such decedent assume the future payments on the stock." Under this provision the legal representatives of a decedent are authorized to withdraw the stock, of a building and loan association, in the name of such decedent, and receive the withdrawal value thereof.

Several provisions of the Act of April 10, 1879, P. L. 16, also have to do with the withdrawal and cancellation of the shares of stock of building and loan associations. We deem it unnecessary, however, to discuss these provisions here.

It appears from the provisions of said Act of 1874 and 1879 that the holders of the stock of building and loan associations, unlike the holders of stock of other corporations, have the right to receive from the association the withdrawal value of their stock without a sale and formal assignment and transfer thereof. His Honor Judge Fox, writing the Opinion of the Dauphin County Court in the case of *Handler vs. Harrisburg Mutual Loan Association,* just recently reported in the advance sheets of the Dauphin County Reports, Volume 31, page 246, said (page 247):

> "* * * If it is operating as a building and loan association, members under certain conditions as provided by the statute may withdraw their stock and receive money therefor. This is a power and privilege peculiar to building and loan associations and their members but to no other corporation of our State."

The withdrawal of stock from a building and loan association and the receipt of the withdrawal value thereof is not an assignment or transfer of said stock within the meaning of the provisions of Section 35 and 36 of the Act of June 20, 1919, P. L. 521.

You are, therefore, advised that in the case where a building and loan association permits the withdrawal or cancellation of its stock standing in the name of a decedent, without a formal transfer thereof

to it, the executor or administrator of a deceased stockholder need not obtain the Auditor General's consent to such withdrawal prior to the payment of transfer inheritance tax to which said estate may be subject.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,
Deputy Attorney General.

Taxation—Corporate indebtedness—Life and fire insurance companies without capital stock—Exemption—Acts of June 17, 1913, July 15, 1919, and July 13, 1923.

Evidences of indebtedness of all life and fire insurance companies having no capital stock are exempt from the State tax of four mills, under section 17 of the Act of June 17, 1913, P. L. 507, as amended July 15, 1919, P. L. 955, and July 13, 1923, P. L. 1085.

Department of Justice,

Harrisburg, Pa., July 19, 1928.

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

Sir: You have asked this department to advise you whether a life or fire insurance company not having capital stock and writing cash policies is subject to the provisions of the Act of July 13, 1923, P. L. 1085.

This Act of 1923 is an amendment of Section 17 of the Act of June 17, 1913, P. L. 507 as amended by the Act of July 15, 1919, P. L. 955. Said Section 17 of the Act of 1913 as amended provides, inter alia, as follows:

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

Several provisos are added to said Section 17 following this quotation. Among these provisos is one to which you have made special reference, which reads as follows:

> "And provided further. That the provisions of this act shall not apply to fire companies, firemen's relief associations, life or fire insurance corporation having no capital stock, secret and beneficial societies, labor unions and labor union relief associations, and all beneficial organizations paying sick or death benefits, or either or both, from funds received from voluntary contributions or assessments upon members of such associations, societies, or unions."

The inquiry which you have made raises two problems,—first, do the words in said proviso "from funds received from voluntary contributions or assessments upon members of such association, societies, or unions" modify the expression "life or fire insurance corporations," and, second, if it is determined that said words do modify the expression "life or fire insurance corporations," then do the words "voluntary contributions or assessments" include corporations collecting a premium at the time the policy is issued—a cash policy, as you have termed it?

Let us consider the first problem, that it, whether the words "from funds received from voluntary contributions or assessments upon members of such associations, societies, or unions" modify the expression "life or fire insurance corporations having no capital stock." Making an examination of this latter expression, it is to be noted immediately that we are dealing with corporations. The expression is: "Life or fire insurance *corporations.*" But in the case of the words "funds received from voluntary contributions or assessments upon members of such associations, societies or unions," we are dealing with associations, societies or unions. Therefore, it would appear to be clear that this expression cannot be construed to modify the words "life or fire insurance corporations" for the reason that these corporations are not "associations, societies or unions."

A study of the Act in question as a whole does not shed further light on the intention of the Legislature. Consequently, let us give some consideration to the rules of construction applicable to cases of this character. Endlich on "Interpretation of Statutes," Section 414 says: "The strict rule of grammar would seem to require a general thing, a limiting clause, or phrase, following several expressions to which it might be applicable, to be restrained to the last antecedent." Various cases are cited in support of the application of this principle except where the manifest object of the enactment question suggests otherwise.

In Lewis' "Sutherland Statutory Construction," Vol. (2nd Ed.),

Section 420, this rule of construction referred to by Endlich is also set forth with further authorities in support thereof.

By applying this rule of construction to the matter at issue, the expression "from funds received from voluntary contributions or assessments upon members of such associations, societies, or unions" only modifies the expression which it follows, that is, "secret and beneficial societies, labor unions and labor union relief associations and all beneficial organizations paying sick or death benefits."

It is also clear that the qualifying and limiting phrase which does modify the expression "fire or life insurance corporations" is "having no capital stock." This particular qualification immediately follows these words and directly modifies and applies to them.

In light of the fact, therefore, that we have concluded that the expression "from funds received from voluntary contributions or assessments upon members of such associations, societies, or unions," does not modify or qualify the phrase "life or fire insurance corporations, having no capital stock," it is unnecessary to consider the second problem hereinbefore referred to.

The expression "life or fire insurance corporations having no capital stock" is general. The fact that some of these corporations may issue policies on solely a cash premium basis as authorized by the law, does not change the situation with respect to such corporations.

You are, therefore, advised that all life insurance corporations having no capital stock and all fire insurance companies having no capital stock are not subject to the provisions of the Pennsylvania Loans Tax Act of June 17, 1913, P. L. 507 as amended, the last amendment being the Act of July 13, 1923, P. L. 1085, which you have expressly referred to.

Very truly yours,

DEPARTMENT OF JUSTICE,

PHILIP S. MOYER,
Deputy Attorney General.

OPINIONS TO THE DEPARTMENT OF BANKING

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Charter Rights—Dissolution and merger into one corporation—New Legal entity —Special privileges—Legislative powers—Period of corporate existence.

When two banks consolidate and are merged into one corporation so that all the property, rights, franchises and privileges then or therefore by law vested in either or each of such corporations so merged, shall be transferred to and vested in one corporation, the charter rights and franchise of the consolidated corporation will expire on the date of the corporation having the longer term.

Special privileges, granted a bank by a particular act of assembly incorporating it, will, on its dissolution by consolidation with another bank into one corporation, pass to the new corporation, and its charter rights as to these special privileges will continue to exist for the longer charter period of either of the original banks.

Department of Justice,

Harrisburg, Pa., February 2, 1927.

Honorable Irland M. Beckman, Second Deputy Secretary, Department of Banking, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your letter of January 17th, in which you ask to be advised concerning the date of expiration of charter of the People's Savings and Dime Bank and Trust Company, a Pennsylvania corporation formed by the consolidation of two State banks, and in view of the period of existence of one of the constituent banks, the effect of such merger upon certain special privileges possessed by such constituent.

The facts are as follows:

The Scranton Savings Bank was incorporated by special act of the Legislature approved February 28th, 1867, (P. L. 292), and it was re-chartered on August 24, 1906 to exist twenty years from February 28, 1907.

The Dime Deposit and Discount Bank of Scranton, Pennsylvania, was incorporated under the General Banking Act approved May 13, 1876 (P. L. 161) and it was re-chartered on June 7, 1910 to exist twenty years from June 10, 1910.

On June 3, 1913 these two institutions merged and consolidated under the provisions of the Act of May 3, 1909, P. L. 408 forming a new corporation under the title People's Savings and Dime Bank and Trust Company.

You ask the following questions:

1. When will the charter of the consolidated corporation expire?

2. Will such special privileges of the Scranton Savings Bank, acquired under the Act of February 28, 1887, as vested in the consolidated corporation, expire on February 28, 1927, unless the consolidated corporation renews its charter prior to such date?

3. If the consolidated corporation renews its charter prior to February 28, 1927, will it be necessary to renew the charter of the Dime Deposit and Discount Bank, one of the constituents, prior to June 19, 1930?

1. Taking these questions up in order we find that Section 1 of the said Act of May 3, 1909 provides that,—

> "It shall be lawful for any corporation * * * to merge its corporate rights, franchises, powers, and privileges with and into those of any other corporation or corporations * * *, so that by virtue of this Act such corporations may consolidate, and so that all the property, rights, franchises, and privileges *then* by law vested *in either* of such corporations, as merged, shall be transferred to and vested in the corporation into which such merger shall be made."

Section 3 of said Act provides,—

> "* * * upon the issuing of new letters patent thereon by the Governor, the said merger shall be deemed to have taken place, and the said corporations to be one corporation under the name adopted * * * possessing all the rights, privileges and franchises *theretofore* vested *in each* of them, and all the estate and property, real and personal, and rights of action of each of said corporations, shall be deemed and taken to be transferred to and vested in the said *new* corporation * * *."

Clearly the language of this Act contemplates a consolidation strictly speaking, that is, the formation of a new corporation. It has been uniformly held that when a new corporation is created as a result of a consolidation under the Act, it is an entity distinct from its constituents although it takes over their rights, privileges, franchises and property and assumes their liabilities. *Pa. Utilities Co. v. Public Service Commission, 69 Pa. Superior Ct. 612.*

Many text writers state that the life of a new corporation created by a consolidation is not the unexpired term of the constituents but is that of any like corporation formed under existing laws. 7. R. C. L. 170; Thompson on Corporations, 2nd Ed. Section 6048; Fletcher's Cyclopedia Corporations, Sec. 4702; Note 39 A. S. R. 631. When the cases cited in support of this statement are examined it is found without exception that the statutes which authorized the particular consolidation in question, either expressly provided that a new period of existence might be inserted in the consolidation agreements, or provided that the consolidation agreement should contain provisions similiar to those contained in original Articles of Incorporation, or

in some general language contained provisions which clearly conferred upon the merging corporations the authority to insert a clause with reference to corporate existence in such agreement.

The authorities uniformly hold that the rights of the consolidated corporation must be determined by a study of the statute authorizing the consolidation. Section 1 of the said merger act provides that "all the property, rights, franchises, and privileges *then* by law vested in either" of the constituents shall be vested in the new corporation; Section 3 states that all the "rights, privileges and franchises *theretofore* vested in each" constituent shall be vested in the new corporation. Clearly this language contemplates that the new corporation shall be vested merely with that which the constituents had. Paragraph 1 of Section 2 of the Act provides what shall be inserted in the merger agreement; it makes no reference either in specific or general terms to a provision as to the corporate existence of the new company growing out of the consolidation and it had accordingly been ruled that no such provision may be inserted. In interpreting the entirely similar provisions of the merger act of May 29, 1901, P. L. 349, John F. Whitworth, Corporation Deputy, in an opinion, approved by the Attorney General April 9, 1907 (Opinions Corporations by Whitworth page 125) said:

> "* * * as to the term of existence of the new corporation, the Act does not prescribe; but as all the rights and franchises of the constituent companies are transferred to the new corporation, its corporate life would depend upon that of the constituent corporations. The term of the corporate existence of the new corporation should not be set forth in the agreement of merger and consolidation, unless it be shown therein that all the constituent corporations were incorporated for the same term as that named in the agreement."

See also Opinion of Attorney General Carson in re Belleview and Perrysville Street Railway Company, 32 Pa. C. C. 243, 248.

In only one case which has come to the writer's attention has a Court indicated that the consolidated corporation might be limited in its existence to the life of the constituent company having the shortest period of existence when no period of existence was authorized to be fixed in the merger agreement. Such was the query made in *New Orleans Gas Light Company vs. Louisiana Light etc. Co., 11 Federal 277,* a very old case, but it is now commonly admitted that such is not the law. Thompson on Corporations, 2nd Ed. Sec. 6048.

Furthermore the ordinary meaning of the language used in sections 1 and 3 of the merger act here in question shows a legislative intention to give to the new corporation all that "either" or "each" of the constituents had; this would vest in it the right or franchise to

exist during the longest period of existence possessed by any constituent. I am therefore of the opinion that the charter of the consolidated corporation will expire June 19, 1930 unless it is previously renewed in the manner provided by law.

2. I am likewise of the opinion that such of the special privileges possessed by the Scranton Savings Bank as vested in the consolidated corporation at the time of consolidation, will not expire on February 20, 1927. As a result of the merger and consolidation on June 3, 1913, the constituents were dissolved and a new corporation formed. This new corporation obtained all of the property, rights, franchises and privileges then by law vested in "either" or "each" of the constituents. From the Scranton Savings Bank it may have acquired certain special privileges. From the Dime Deposit and Discount Bank it obtained the right to exist until June 19, 1930. The new corporation as a single entity manifestly cannot possess two separate and distinct periods of existence; if it could, great uncertainties would arise and it could scarcely be considered a new corporation and a single entity. Pertinent here is the language of Judge Kephart in explaining the effect of a merger under this Act in the case of *Penna. Utilities Company vs. Public Service Commission, supra,* page 618:

> "It is clear the ultimate effect of this Act is to provide a *method of incorporation,* and, as individuals are associated to form a corporate entity, so two or more corporations may be associated to form a single corporate entity. Upon consolidation thereunder the constituent companies are deemed *dissolved* and their powers and faculties to the extent authorized are vested in the merged company as a new corporation. It is an entity entirely distinct from that of its constituents. *It draws its life from the act of consolidation.*"

Thus any suggestion that this conclusion attempts by implication to extend in duration the special privileges of the constituent that would have expired in 1927 but for the consolidation, is unwarranted; consolidation is a method of incorporation and from this incorporation springs the life of the new company with the right to exist for a certain period, that it, the longest period of life possessed by any constituent. If this amounts to an extension in duration of the special privileges of one constituent, it is an extension properly effected under the legislation contained in the merger statute. As stated by Mr. Justice Strong, as to the effect of a consolidation in the case of Atlantic & Gulf Railroad Co., vs. Georgia, 98 U. S. 359, 364:

> "What, then, was left of the old companion? Apparently nothing. They must have passed out of existence, and the new company must have succeeded to their

> rights and duties. But the new company comes into existence under a fresh grant. Not only its being, but its powers, its franchises and immunities, are *grants of the Legislature which gave it existence.*"

Thus from the one constituent, the new corporation as a distinct entity and in its entirety, not merely a certain part of it, acquired the right to exist until June 19, 1930; from the other constituent it may have acquired certain special privileges. As a result of the consolidation the special privileges so acquired will be possessed by the new corporation during its entire period of existence. In deciding an exactly similar question is was said in the case of *Board of Administrators of Charity Hospital vs. New Orleans Gas Light Company, 4 Southern 433, 435:*

> "It is not disputed by the defendant company that, as a legal result of the amalgamation, the obligation theretofore resting on the New Orleans Gas-Light Company to supply gas, free of charge, to the Charity Hospital, adhered to the consolidation company, but the contention is that the obligation was only co-equal with the duration of the charter of the company which was burdened with that duty, and that, therefore, the obligation became extinct on the 1st of April, 1875, at which time the charter of the company is alleged to have expired. That conclusion is predicated on the proposition that the consolidation of the two previous companies operated merely a merger of one of the corporations into the other, and that the measure of the rights, privileges, and franchises or vitality infused in the consolidated company, by each of the consolidating corporations, was the respective terms of duration of the charters of each. But that argument finds no support either in the facts of the case, or in well-settled jurisdiction on the question of the effects of an amalgamation of two distinct and co-existing corporations. In dealing with the question of the legal effects of the consolidation of the identical companies now under discussion, this court said: 'The articles of consolidation, and the legislation act, by authority of which they were executed, evidently present a case of complete and perfect amalgamation, the effect of which was, under American authorities, to terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into members of the latter, and to operate a transfer of the property, rights, and liabilities of each old company to the new one.'"

And on page 426:

> "Hence we cannot adopt the reasoning which would measure the consolidated *powers, privileges,* or *obliga-*

tions of the present company by reference to the term of duration of the charters of the former companies."

3. The answers to your first two questions practically dispose of the third question. If the charter of the consolidated corporation is renewed prior to February 28, 1927, it will not be necessary to renew the charter of "the other individual institution," the Dime Deposit and Discount Bank, prior to June 19, 1930. This, for the reason that such constituent no longer has a charter in its individual capacity. The renewal of the charter of the consolidated corporation any time prior to June 19, 1930 will, therefore, be a sufficient compliance with the law to insure in the consolidated corporation all of the rights, franchises, and privileges possessed by either constituent.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON D. METZGER,
Deputy Attorney General.

Trust companies—Trust funds—Mortgage guarantee company.

Trust company may not invest trust funds in its care in participation certificates issued by mortgage guaranty company.

Department of Justice,

Harrisburg, Pa., February 8, 1927.

Honorable Irland M. Beckman, Second Deputy Secretary of Banking, Department of Banking, Harrisburg, Pa.

Sir: Your communication of February 7, 1927, to this Department, asking to be advised, first, whether a Mortgage Guaranty Company may issue participation certificates in its guarantees of mortgages and the bonds secured thereby, which it has first acquired and then assigned to trustees for the benefit of the holders of the certificates of participation in the guarantees; and second, whether trust funds may be legally invested in such certificates of participation in guarantees, has been fully considered.

The answer to your first question arises by implication from the purpose for which the Guaranty Company was incorporated, namely, "buying, selling, owning, holding, exchanging, collecting, and guaranteeing payment of ground rents, mortgage bonds, mortgages and other real estate securities." A corporation organized for that purpose and object need not restrict its guarantees of mortgages to one instrument, obligating it to pay the principal and interest of the mortgage loan, but may divide its guarantee into as many fractional

parts, each represented by a participation certificate, as it has declared the bond and mortgage to be divided into; and it may assign the bond and mortgage to a third party as trustee for the holders of the certificates of participation in its guarantees. The title to a bond and mortgage passes only by assignment.

But the trustee selected to represent the holders of such participation certificates has no power or authority to invest therein any funds which it holds in a fiduciary capacity. Such a trustee may legally invest funds that are not impressed with any trust in such certificates, the only question in that regard being as to the commercial value of the security and of the guarantee.

Therefore, the answer to your second question is that the trust company to which you refer may not invest trust funds in its care in the participation certificates issued by the Mortgage Guaranty Company named in your letter. For a more extended discussion of the reasons leading up to this conclusion, you are referred to the opinion of this Department, to the Secretary of Banking, dated December 10, 1926, which in turn was largely based upon an opinion to the same official dated May 10, 1926.

Yours very truly,

DEPARTMENT OF JUSTICE,

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

Banks and banking—Collection of deposits by banks—Payments by war veterans—Reinstatements of lapsed insurance—Collection by street-car conductors—Banking Department—Acts of June 19, 1911, June 7, 1923, and June 15, 1923.

1. Under the Act of June 19, 1911, P. L. 1060, conductors of a street railway company, who collect small amounts from war veterans and pay them over to a bank and trust company organized under the laws of Pennsylvania, to be used to reinstate lapsed Government insurance of the veterans, need not be licensed for that purpose, where the bank assumes responsibility for the fidelity of the conductors.

2. Under the Acts of June 7, 1923, P. L. 496, and June 15, 1923, P. L. 509, the Banking Department may determine whether such a plan is an unsafe manner of conducting a banking business, or whether it affords an adequate security and protection to depositors.

Department of Justice,

Harrisburg, Pa., February 17, 1927.

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

Sir: I am in receipt of your letter of February 3rd asking for an opinion respecting the plan of the Mitten Men and Management Bank

and Trust Company of Philadelphia, hereinafter referred to as the Mitten Bank, to collect and transmit funds for deposit.

The Mitten Bank is a corporation organized under the Act of April 29, 1874, its supplements and amendments, and has accepted the provisions of the Act of May 9, 1889.

This corporation desires to have approval of a system whereby the World War veterans who desire to reinstate their lapsed government insurance may arrange to do so by making small weekly payments to the conductors or cashiers of the Philadelphia Rapid Transit Company, who, in exchange for the cash thus received, will furnish the depositors with receipts in the name of the Mitten Bank. The funds collected by the conductors are to be turned over to the transit company's cashiers located in different parts of the City, who in turn will deliver it to the Mitten Bank at their principal place of business.

The conductors and cashiers are the employes of the Philadelphia Rapid Transit Company, but the Mitten Bank is to assume responsibility for their actions and their fidelity. This present plan contemplates that the conductors and cashiers will receive from any one depositor cash up to and including twenty dollars ($20.). The depositor is supplied with an envelope bearing his account number, which number the conductor or cashier, notes upon the stub he retains. The money intended to be deposited in the Bank is required to be transported thereto within 24 hours after it has been receipted for by the conductor or cashier, as well as the receipt stubs so that credit may be entered upon the books of the bank to the proper individual.

Section 20 of the Banking Act of June 13, 1923, P. L. 809 provides "whenever it shall appear to the Secretary that any corporation or person under the supervision of the department has violated any provision of this act or any law regulating the business of such corporation or person, or is conducting business in an unauthorized or unsafe manner, or that any such corporation has an impairment of capital, the Secretary may issue an order, under his hand and seal of office, directing such corporation or persons to discontinue such violation of law or such unauthorized or unsafe practices, or directing such corporation to make good, within a time of not more than sixty days after notice by the Secretary, any impairment or deficiency of capital."

Section 1 of the Act of June 19, 1911, P. L. 1060, to which you refer provides: "That, except as provided in section eight, no individual, partnership, or unincorporated association shall hereafter engage, directly or indirectly, in the business of receiving deposits of money for safe-keeping or for the purposes of transmission to another. or for any other purposes, without having first obtained from a board—a license to engage in such business." The purpose of this

legislation was to afford protection to the depositor or party giving money for transmission.

The question raised is whether under the proposed plan the Mitten Bank would be conducting business "in an unauthorized or unsafe manner" or in violation of the Act of 1911. We shall discuss the latter branch of the question first.

The Mitten Bank under the proposed plan would be the responsible party and not its agents, to wit, the conductors and cashiers acting within the scope of their authority.

The Act of 1911 does not contemplate covering messenger service or agents of the character under consideration. It cannot be said that the street car conductors or cashiers are engaged in the business of receiving deposits or of transmitting them to another. Their receipt of money under the proposed plan would merely be an incidental duty in connection with their employment. The transaction is one between the bank and the depositor, and therefore, it would not be necessary to obtain a license under the Banking Act of June 19, 1911.

This statutory provision is not applicable, and I find no other law prohibiting the service contemplated.

It is entirely within your authority, however, as Secretary of Banking to determine whether such a plan is an unsafe manner of conducting business. Under the Administrative Code of June 7, 1923, P. L. 490, 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."

Under the authority vested in you by the provisions last quoted when read in conjunction with Section 20 of the Act of June 15, 1923, it is within your rights to determine whether this plan affords adequate security and protection to depositors.

Very truly yours,

DEPARTMENT OF JUSTICE,

THOS. J. BALDRIGE,
Attorney General.

Building and loan associations—Annual reports—Banking Department—Call for reports—Act of June 15, 1923.

Under the Act of June 15, 1923, P. L. 809, the Secretary of Banking may issue a call for annual reports on the first of each month to building and loan associations which have closed their fiscal year during the preceding month, instead of waiting until the end of the calendar year and then sending the

call to all associations for reports as of the close of their respective fiscal years.

Department of Justice,

Harrisburg, Pa., March 1, 1927.

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

Sir: You desire to be advised as to whether or not the Secretary of Banking may issue a call for annual reports on the first of each month to building and loan associations which closed their fiscal years during the preceding month, instead of waiting until the end of the calendar year and then sending the call to all associations for reports as of the close of their respective fiscal years. Your practice heretofore has been to send a call to each association about January first, of each year, for a report as of the close of its fiscal period during the preceding calendar year. As a result, you receive reports as of each month of the year and as of various days in the month.

Section 15 of the Banking Act of June 15, 1923, P. L. 809, provides as follows:

> "Every corporation and person subject to the supervision of the Department except building and loan associations doing business exclusively within this state, shall make and render to the Secretary not less than two or more than five reports of its or his condition during each year. The number, form and manner of such reports shall be prescribed by the Secretary by general rule or regulation.
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> * * * * *
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> "Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the corporation or person at the close of business on any past day specified by the Secretary * * *.
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> * * * * *
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> "Building and loan associations doing business exclusively within this state shall, in the manner hereinbefore provided, make and render one report during each year. No abstract summaries of such reports need be published.
>
> "The secretary shall have power to call for a special report from any corporation or person under the supervision of the department, including building and loan associations, whenever, in his judgment, the same may be necessary to a full and complete knowledge of its or his conditions."

By reference to Section 4 of that Act, it appears that the supervision of the Secretary of Banking over corporations and persons

extends and applies to building and loan associations. This supervision is part of the duty of the Secretary of Banking of taking care that the laws of this Commonwealth in relation to the corporations and persons described in the Banking Act shall be faithfully executed and that the greatest safety to depositors therein and therewith, and to other interested persons, shall be afforded.

The provisions of the Act in question relative to the examination of building and loan associations also throw light on the situation. In Section 9 of the Act it is provided that building and loan associations shall be examined at least once in each year, and more frequently if the condition of any building and loan association shall be such that in the opinion of the Secretary of Banking an additional examination is necessary. Section 14 of the Act makes it the duty of the Secretary, at least once in each year, to examine, or cause to be examined, the books, papers and affairs of each and every corporation and person subject to the supervision of the Department.

It is to be noted that nowhere in any of the statutory provisions above cited is there any date in any particular year for the filing of reports or for the making of examinations of either building and loan associations or other institutions which are subject to the supervision of the Banking Department. The only limitation as to the calling for reports from building and loan associations to which the Secretary of Banking is subjected, is that under ordinary circumstances, such reports are to be annually made. There is no reference in the Banking Act to a calendar year. It is, therefore, within both the power and the duty of the Secretary of Banking to adopt a fiscal year, the transactions in which must be covered by a building and loan association report. His duty to take care that the greatest safety is afforded to depositors and other persons interested in building and loan associations forms the basis of his power to prescribe and define the year as to which any such association must report.

The practice which has heretofore prevailed in the Banking Department with respect to annual reports of building and loan associations is necessarily not as efficient a means of bringing such associations under the complete view and supervision of the Banking Department as that as to whose legality you are inquiring. Inasmuch as the Banking Act contains no obstacle in the way of the adoption of the new practice, and inasmuch as that new practice will no doubt promote the efficiency of the Department's supervision over such associations, you are advised that the Secretary of Banking may lawfully issue a call on the first of each month to building and loan

associations whose fiscal years closed during the preceding months for reports covering those fiscal years.

Yours very truly,

DEPARTMENT OF JUSTICE,

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

National Banks—Trustee—Executor or administrator—Capital stock—Paid up —State banking authorities—Federal Reserve Boards—Permits—Act of Congress of 1913 and 1918.

National banks having a capital of less than $125,000.00 are not entitled to conduct a fiduciary business in the State of Pennsylvania, either under Section 11 (k) of the Act of Congress of December 23, 1913, or under said section as amended by the Act of September 16, 1918, and the Secretary of Banking has the power and authority to enforce the requirement of a paid-up capital of $125,000.00 as a prerequisite to the engaging in fiduciary business of national banks in this state, regardless of the date upon which permits to engage in such business were issued to such banks by the Federal Reserve Board.

Department of Justice,

Harrisburg, Pa., March 24, 1927.

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

Sir: I beg to acknowledge receipt of your letter of March 16th, addressed to the Attorney General, in which you request that you be advised whether a national bank with a paid-up capital of less than $125,000 has the right to engage in fiduciary business in Pennsylvania provided its permit so to do was granted by the Federal Reserve Board under Section 11 (k) of the Federal Reserve Act as originally enacted by the Act of Congress of December 23, 1913, and prior to the amendment of said Section 11 (k) by the Act of Congress of September 26, 1918.

Section 11 (k) of the Act of Congress, approved December 23, 1913, (38 Stat. at L., Chap. 6, 262) known as the Federal Reserve Act, authorized and empowered the Federal Reserve Board

> "to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said Board may prescribe."

This section was the subject of an opinion rendered to you by former Deputy Attorney General Joseph L. Kun on June 26, 1918, in which it was held that a national bank having a paid-up capital

of less than $125,000 was not authorized to act in a fiduciary capacity in the State of Pennsylvania, even though a permit so to do had been granted it by the Federal Reserve Board in accordance with the provisions of the section above quoted, in view of the fact that the section limited the right of a national bank to act to cases "when not in contravention of State or local law," and Paragraph 13th, Clause 1, Section 1 of the Act of May 9, 1889, P. L. 159, which amended the 29th section of the General Corporation Act of 1874, required all corporations to have paid-up capital of not less than $125,000 before exercising fiduciary or trust powers within the State.

This interpretation of Section 11 (k) of the Federal Reserve Act is in accord with an opinion of the Attorney General of the United States, (31 Op. Atty. Gen. 186) rendered to the President under date of November 26, 1917, in which the Attorney General advised the President that the Federal Reserve Board had no authority to grant to national banks located in New York the power to act as trustee, executor, or administrator, in view of the fact that a statute of the State of New York provided that "no corporation other than a trust company organized under the laws of this State shall have or exercise in this State" the powers and rights of trust companies and fiduciaries.

Likewise, in *Woodbury's Appeal, (96 Atl. 299; 78 N. H. 50),* decided in 1915, it was held that a statute of the State of New Hampshire prohibiting trust companies, loan and trust companies, loan and banking companies, banks or banking companies, or similar corporations from acting as administrators, executors or guardians, was valid and effective to preclude national banks from doing a fiduciary business in the State even though licensed so to do by the Federal Reserve Board. The State statute involved in this case was passed after the Federal Reserve Act, a fact which was held to be immaterial.

In *First National Bank vs. Fellows, etc., (244 U. S. 416; 61L. Ed. 1233),* which is relied upon in the opinion of the former Deputy Attorney General of June 26, 1918, Mr. Chief Justice White held that the subject of banking was one peculiarly within the regulation of the State provided there was no discrimination against national banks.

Section 11 (k) as quoted above was amended by the Act of Congress approved September 26, 1917 (40 Stat. at L., Chap. 177, Section 2, 968). The amended section reads as follows:

> "(k) To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds of estates, assignee,

receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

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

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

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

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

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

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

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

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

"It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than $5,000. or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the Court.

"In passing upon applications for permission to exercise the powers enumerated in this subsection, the Federal Reserve Board may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to it proper, and may grant or refuse the application accordingly: Provided, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers."

The present question arises by reason of the proviso in the last paragraph of the above amendment to the effect that no permit shall be issued to a national bank having a capital and surplus less than the capital and surplus required by State law of State institutions exercising fiduciary powers. It is argued that the inclusion of this prohibition in the amendment indicates that prior to the passage of the amendment the prohibition was not effective.

It is my opinion that this position is untenable. A proper reading of the amendment indicates that its purpose was to explain and amplify the provisions of Section 11 (k) of the original Act and in some cases to extend the powers conferred upon national banks and the Federal Reserve Board by the original section. This is confirmed by the decisions rendered after the passage of the amendment.

In *Missouri ex rel. Burnes National Bank vs. Duncan, (265 U. S. 17; 68 L. Ed. 881)* was involved the question whether a national bank was entitled to act as executor in the State of Missouri in the face of the State statute prohibiting a national bank from so acting. Mr. Justice Holmes, in delivering the opinion of the Court holding that a national bank was entitled to act under such circumstances, said after quoting the first paragraph of the amendment which is in substance the same as the original section, that if the section

stopped there the decision of the State court prohibiting a national bank from acting might be final but that the subsequent paragraphs of the amendment indicated that a national bank should have larger powers. It is evident from this opinion that the purpose of the amendment was to enable national banks to compete on equal terms with State institutions in doing a trust business.

In numerous other cases decided in the various State courts it has been held that the purpose of the amendment was to amplify and make more certain the provisions of Section 11 (k) of the original Act and to enlarge the powers of national banks in doing a fiduciary business. See *Turner's Estate, (227 Pa. 110, affirmed in 80 Pa. Super. Ct. 88)* decided in 1923; *Re Stanchfield 171 Wis. 553; 178 N. W. 310),* decided in 1920; and *Re Mollineaux 179 N. Y. Supp. 90),* decided in 1919. A consideration of the amendment of September 26, 1918, in the light of these cases indicates that the inclusion of the proviso that no permit shall be issued to a national bank having capital and surplus less than the capital and surplus required for a State institution exercising the same powers, was not set up a prohibition which did not exist prior to the passage of the amendment, but instead a prohibition upon the authority given to the Federal Reserve Board by the amendment in passing upon applications for permits to take into consideration the amount of capital and surplus of the applying bank under the circumstances of the particular case under consideration.

I am of the opinion, therefore, that national banks having a capital of less than $125,000 are not entitled to conduct a fiduciary business in the State of Pennsylvania, either under Section 11 (k) of the Act of Congress of December 23, 1913, or under said section as amended by the Act of September 26, 1918, and you are advised to continue to enforce the requirement of a paid-up capital of $125,000 as a prerequisite to the engaging in fiduciary business of national banks in this State, regardless of the date upon which permits to engage in such business were issued to such banks by the Federal Reserve Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

PAUL C. WAGNER,

Deputy Attorney General.

Trust companies—Corporate securities—Legal investments—Participation certificates—Bonds—Mortgage—Article III, section 22, of Constitution—Act of June 7, 1917.

1. Under article III, section 22, of the Constitution and the Act of June 7, 1917, P. L. 447, a trust company or other fiduciary is not authorized to invest trust funds in a bond or bonds of a private corporation through the medium of participation certificates issued by the mortgagee.

2. A bond to be considered a legal investment must be the bond of an individual, and, if it is one of a series, the series of bonds must be issued by an individual.

3. But, even though the bond and mortgage in which participation certificates are issued by a guaranty company are the bond and mortgage of an individual, such participation certificates are not legal investments for trust funds in Pennsylvania.

4. The Act of April 6, 1925, P. L. 152, relating to the division of an investment among different estates held in trust by a trust company, has no bearing on the question of participation certificates issued by a general company.

Department of Justice,
Harrisburg, Pa., April 26, 1927.

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

Sir: I beg to acknowledge receipt of your letter of March 30th, requesting that you be advised whether participation certificates representing an undivided share or interest in a bond and mortgage made and executed by an individual or a corporation to a second corporation, hereafter referred to as the "guaranty company," and assigned and transferred by the guaranty company to a trust company incorporated under the Act of Assembly approved April 29, 1874, as trustee for the holders of such certificates, which certificates are issued by the guaranty company assigning and transferring the bond and mortgage, are legal investments for trust funds in the State of Pennsylvania. A sample participation certificate is enclosed with your letter.

A bond and mortgage are originally made and executed by some individual or corporation to a corporation known as the guaranty company. The guaranty company then issues participation certificates representing shares in said bond and mortgage and guarantees the payment of the principal thereof and the interest thereon. Simultaneously therewith it assigns and transfers the bond and mortgage to a trust company which acts as trustee both for the guaranty company and for the holders of the participation certificates.

If the bond and mortgage are made and executed to the guaranty company in the first instance by a corporation (as distinguished from an individual), then it is my opinion that the participation certificates are not legal investments for trust funds in Pennsylvania. Section 22 of Article III of the Constitution of 1874, 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, * * * *''

Section 41 (a) 1 of the Fiduciaries Act of 1917, (June 7, 1917, P. L. 447), as amended by the Act of June 29, 1923, P. L. 955, reads as follows:

> ''When a fiduciary shall have in his hands any moneys, the principal or capital whereof is to remain for a time in his possession or under his control, and the interest, profits, or income whereof are to be paid away or to accumulate, or when the income of real estate shall be more than sufficient for the purpose of the trust, such fiduciary may invest such moneys in the stock or public debt of the United States, or in the public debt of this Commonwealth, or in bonds or certificates of debt now created or hereafter to be created and issued according to law by any of the counties, cities, boroughs, townships, school districts, or poor districts, of this Commonwealth, or in bonds of one or more individuals secured by mortage 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, or in ground rents, in this Commonwealth: Provided, That nothing herein contained shall authorize any fiduciary to make any investment contrary to the directions contained in the will of the decedent in regard to the investment of such moneys.''

The above sections of the Constitution and Fiduciaries Act, when read together, can be construed only to mean that a fiduciary is not authorized to invest trust funds in a bond or bonds of a private corporation through the medium of participation certificates issued by the mortgagee.

If, however, the bond and mortgage, in which participation certificates are issued by the guaranty company, are made and executed to the guaranty company by an individual, a different question arises. While the participation certificates are issued by the guaranty company, and are the obligations of the guaranty company they represent shares or interest in the bond and mortgage of an individual. The relevant portion of Section 41 (a) 1 quoted above is—

> ''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.''

This section contemplates that the bonds which are to constitute legal investments shall be the bonds of individuals. It is true that

such bonds may be single bonds or one of a series of bonds, but there is nothing in the section to permit investment in one or more of a series of bonds or obligations issued by a corporation. The bond, to be considered a legal investment, must be the bond of an individual, and if it is one of a series the series of bonds must be issued by an individual. The section contemplates the ordinary case of the issuance of a series of bonds by a mortgagor, who must be an individual, who transfers the property securing the bonds by mortgage or deed of trust to a trustee who holds for the benefit of all the bondholders, and not the execution of a bond and mortgage by an individual to a corporation which then issues participation certificates therein.

It is, therefore, my opinion that even though the bond and mortgage in which participation certificates are issued by a guaranty company are the bond and mortgage of an individual, such participation certificates are not legal investments for trust funds in the State of Pennsylvania.

It is immaterial whether the trust company desiring to invest its trust funds in such participation certificates is the trust company acting as trustee for the holders of the particular participation certificate which it is desired to purchase or a trust company other than the one acting as such trustee.

It is not considered that the Act of April 6, 1925, P. L. 152 has any bearing upon the question involved. That Act, requiring trust companies to keep trust funds and investments separate and apart from the general assets of the companies, expressly authorized such companies to assign to various trust estates "participation in a general trust fund of mortgages upon real estate securing bonds." It was intended to cover only the case in which a trust company has one large mortgage in which it is desired that two or more trust estates shall participate, or in which it has a large number of small mortgages in which it is desired that a limited number of trust estates shall participate, all of the mortgages being held in one fund. The Act does not require the execution of a mortgage or deed of trust covering the mortgages held in the fund nor the issuance of any certificates or other evidence of participation in the fund. All that is required is a clear record on the books of the trust company showing the mortgages composing the trust fund, the names of the trust estates participating, and the amounts of the respective participations.

For a further discussion of this entire subject, reference is made to the opinions of this Department to the Secretary of Banking, dated

May 10, 1926, and December 10, 1926, and to the Second Deputy Secretary of Banking, dated February 8, 1927.

Very truly yours,

DEPARTMENT OF JUSTICE,
PAUL C. WAGNER,
Deputy Attorney General.

Banks—Reserve funds—Mandamuses of city—Bonds—Acts of 1889, 1909 and 1917.

1. Mandamuses of the City of Philadelphia, which are short-term obligations issued in compliance with orders of court, are not legal reserve securities in computing the reserve funds of banks and trust companies within the provisions of sections 2 and 3 of the Act of May 8, 1907, P. L. 189, as amended by the Act of July 11, 1917, P. L. 791.

2. Such mandamuses are not "bonds issued in compliance with law by any city" within the language of the Act of May 8, 1907, P. L. 189, nor as used in section 17 of the Act of May 20, 1889, P. L. 246.

3. The word "bonds" as used in the statute contemplates bonds as that term is used by the investing public.

Department of Justice,
Harrisburg, Pa., June 1, 1927.

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

Sir: You have requested our opinion whether mandamuses of the City of Philadelphia, which are short term obligations issued in compliance with orders of court, are to be regarded as legal reserve securities in computing the reserve funds of banks and trust companies within the provisions of the Act of May 8, 1907, P. L. 189, and the amendments thereto.

Sections 2 and 3 of the Act of May 8, 1907, as amended by the Act of July 11, 1917, P. L. 791, provide for reserve funds of 15% of the aggregate of immediate demand liabilities and of 7½% of the aggregate of time deposits. One-third of both these reserve funds may consist of "bonds of the United States, bonds of the Commonwealth of Pennsylvania, and bonds issued in compliance with law by any city, county, or borough of the Commonwealth of Pennsylvania, and bonds which now are or hereafter may be authorized by law as legal investments for savings banks or savings institutions in Pennsylvania, computed at their par value, and which bonds are the absolute property" of the bank or trust company setting up said reserve funds."

Legal investments for savings banks or savings institutions in Pennsylvania are enumerated in Section 17 of the Act of May 20, 1889, P. L. 246, which is as follows:

> "It shall be lawful for the trustee of any saving bank to invest money deposited therein only as follows:
> "First. In the stocks or bonds of interest bearing notes or the obligations of the United States, or those for which the faith of the United States is pledged to provide for the payment of the interest and the principal.
> "Second. In the stocks or bonds of the Commonwealth of Pennsylvania bearing interest.
> "Third. In the stocks or bonds of any State in the Union that has not within ten years previous to making such investments, by such corporation, defaulted in the payment of any part of either principal or interest of any debt authorized by any legislature of such State to be contracted.
> "Fourth. In the stocks or bonds of any city, county, town or village of any State of the United States, issued pursuant to the authority of any law of the State, or in any interest bearing obligation issued by the city or county in which such bank shall be situated.
> "Fifth. In bonds and mortgages on unincumbered, improved real estate, situate in this State."

The above Section is the only enactment in Pennsylvania relative to legal investments for savings banks which it is necessary to consider in the discussion of the question presented.

Mandamuses are obviously not "bonds issued in compliance with law by any city, county or borough of the Commonwealth of Pennsylvania" within the language of the Act of May 8, 1907, as amended. Whether they are "bonds which now are or hereafter may be authorized by law as legal investment for savings banks or savings institutions in Pennsylvania" within the language of said Act, must be determined by a constitution of the language "stocks and 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 (saving bank) shall be situated," as used in the fourth paragraph of Section 17 of the Act of May 20, 1889.

It will be noted that although savings banks are permitted to invest in *stocks or bonds* of any of the designated municipalities of the United States, or in *interest bearing obligations* of the city or county in which the bank is situated, the investment of the reserve funds referred to above is restricted to *bonds* which are legal investments for savings banks; also that all of the securities enumerated for the investment for such reserve funds are *bonds* which are to be com-

puted at their *par value*. The word "bonds," as used in the statute, contemplates "bonds," as that term is used by the investing public. Further, the nature of the reserve funds established by the Act of May 8, 1907 and the provisions relative to the constitution of such reserve funds indicate quite clearly that such reserve funds are to consist only of quick assets readily convertible into cash at any time.

It is our opinion that mandamuses of the City of Philadelphia are not within the class of investments contemplated by Sections 2 and 3 of the said Act of May 8, 1907, as amended.

Very truly yours,

DEPARTMENT OF JUSTICE,
PAUL C. WAGNER,
Deputy Attorney General.

Trust companies acting as executor—Deposit of funds in own bank.

Funds received by executors in the course of their administration are trust funds within the meaning of the Act of May 9, 1889, P. L. 159, and must be deposited in a bank other than that acting as executor or co-executor of an estate.

Department of Justice,

Harrisburg, Pa., June 30, 1927.

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

Sir: You have requested that you be advised whether the funds received by the executors of an estate in the course of the administration of the estate may be deposited in a trust company which is a co-executor of such estate.

It is provided in Section 1, Clause V, of the Act of May 9, 1889, P. L. 159 that:

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

It has been the opinion of this Departemnt that the phase "trust funds," as used in the Act just referred to, was intended to receive and should be given a liberal interpretation. Accordingly it has been

held that "trust funds" include all funds received or held by trust companies in a fiduciary capacity, whether as executor, administrator, guardian, trustee or other fiduciary. Funds received by executors in the course of the administration of an estate are "trust funds" to the same extent as funds received by trustees in the administration of a trust and subject in all respects to the provisions of the said Act of May 9, 1889.

The question which you have submitted was the subject of an opinion addressed to the Secretary of Banking by Deputy Attorney General William Y. C. Anderson, dated May 26, 1926, in which it was held that funds received by executors in the course of the administration of an estate are "trust funds" within the Act of May 9, 1889, and as such were required to be deposited in a banking institution other than one acting as executor or co-executor of the estate. No reason is apparent why the opinion of Deputy Attorney General Anderson should be modified in any respect.

For a more detailed discussion of the principles involved, you are referred to the opinions of Deputy Attorney General Bernard J. Myers, dated August 16, 1920 (30 D. R. 63), and of Deputy Attorney General Fred Taylor Pusey, dated June 20, 1922 (2 D. & C. 59).

Very truly yours,

DEPARTMENT OF JUSTICE,
PAUL C. WAGNER,
Deputy Attorney General.

Trust funds—Investment—Mortgage collateral certificates—Trust fund mortgages—Acts of 1874, 1889, 1923, 1925 and 1927.

1. A trust company has no authority under section 41 (*a*) of the Fiduciaries Act of June 7, 1917, P. L. 447, as amended June 29, 1923, P. L. 955, to invest trust funds held by it in mortgage collateral certificates issued by it and secured by mortgages on real estate.

2. Such investment is not authorized as a participation in a general trust fund of mortgages under clause v, section 29, of the Act of April 29, 1874, as amended by the Acts of May 9, 1889, P. L. 159, April 6, 1925, P. L. 152, and May 5, 1927 (No. 405).

3. The investment must be in "a general trust fund of mortgages upon real estate securing bonds or notes" of individuals as distinguished from an investment in collateral certificates, and the bonds and mortgages must be in the possession of the trustee, and not of another company. If any of the securities forming a part of the fund should consist of bonds or notes of private corporations or be in the possession of a trust company other than the trustee, the investment is illegal.

Department of Justice,
Harrisburg, Pa., July 27, 1927.

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

Sir: You have requested that you be advised whether the Pittsburgh Trust Company is authorized to invest funds which it holds in trust in a fiduciary capacity in mortgage collateral certificates issued by said Pittsburgh Trust Company, a specimen certificate being submitted with your request.

The mortgage collateral certificate issued by the Pittsburgh Trust Company is one of a series of such certificates of similar form and terms certifying, in effect, that the holder is entitled to an interest, the amount of which is specified in dollars in the certificate, in a "Mortgage Loan Fund" consisting of first mortgages on approved real estate. The principal of each certificate is payable to the holder three years from the date specified therein. Interest is payable thereon at the rate of 5 per centum per annum on March 1st and Sept. 1st of each year upon the presentation of coupons attached to the certificate. Title to the bonds, mortgages, insurance policies, agreements and other papers connected with and pertaining to said mortgage loan fund is in the Pittsburgh Trust Company as a special trust fund, although all of such bonds, mortgages, etc., are deposited with the Terminal Trust Company, of Pittsburgh, Pennsylvania, and held by said Terminal Trust Company, subject to the terms and conditions of the outstanding certificates. The total amount of certificates outstanding is limited to the face value of the first mortgages comprising the fund. The certificates are registered and countersigned by the Terminal Trust Company as registrar. Prompt payment of the principal and interest of the certificates is guaranteed by the Pittsburgh Trust Company.

The first question which arises is, whether an investment of trust funds held by the Pittsburgh Trust Company as a fiduciary in such mortgage collateral certificates, as such is authorized by section 41 *(a)* 1 of the Fiduciaries Act of June 7, 1917, P. L. 447, as amended by the Act of June 29, 1923, P. L. 955, which reads as follows: "Section 41 *(a)*. 1. When a fiduciary shall have in his hands any moneys, the principal or capital whereof is to remain for a time in his possession or under his control, and the interests, profits or income whereof are to be paid away or to accumulate, or when the income of real estate shall be more than sufficient for the purpose of the trust, such fiduciary may invest such moneys in the stock or public debt of the United States, or in the public debt of this Commonwealth, or in bonds or certificates of debt now created or hereafter to be created and issued according to law by any of the counties,

cities, boroughs, townships, school districts or poor districts of this Commonwealth, or 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 mortgage or deed of trust to a trustee for the benefit of all bondholders, or in ground rents in this Commonwealth: Provided, that nothing herein contained shall authorize any fiduciary to make any investment contrary to the directions contained in the will of the decedent in regard to the investment of such money." If so, the investment must come within that portion of the section which reads: "....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 mortgage or deed of trust to a trustee for the benefit of all bondholders,....." This question is substantially the same as that considered in the opinion rendered by this department to the Secretary of Banking dated April 26, 1927. For the reasons set forth in that opinion, I am of the opinion that said mortgage collateral certificates of the Pittsburgh Trust Company, as such, are not legal investments for trust funds in the State of Pennsylvania within the provisions of section 41 *(a)* 1 of the Fiduciaries Act of 1917, referred to above.

The second question is whether the investment of trust funds by the Pittsburgh Trust Company in such certificates, as "participation in a general trust fund of mortgages," is authorized by clause V, section 29, of the Act of April 29, 1874, P. L. 84, as amended by the Acts of May 9, 1889, P. L. 159, April 6, 1925, P. L. 152, and May 5, 1927 (No. 405).

This clause, before its amendment by the Act of April 6, 1925, read as follows: "Clause v. The said companies shall keep all trust funds and investments separate and apart from the assets of the companies, and all investments made by the said companies as fiduciaries shall be so designated as that the trust to which such investment shall belong shall be clearly known...." The said Acts of April 6, 1925, and May 5, 1927, amended the clause by adding the following provisos: "....Provided, that every such company shall have the right to clear receipts and payments of trust money in the regular course of business in the same manner as other funds held by it; and provided, further, that said companies may assign to their various trust estates participation in a general trust fund of mortgages upon real estate securing bonds or notes, in which case it shall be a sufficient compliance with the provisions of this section for the company to designate clearly on its records the bonds or notes and mortgages composing such general trust fund, the names of the trust estates participating therein, and the

amounts of the respective participations; and, in such case, no estate so participating shall be deemed to have individual ownership in any bond or note and mortgage in such fund, and the company shall have the right at any time to repurchase, at market value, but not less than face value, any such bonds or notes and mortgages from such fund, with the right to substitute therefor other bonds or notes and mortgages."

The amendments of 1925 and 1927, which expressly authorized trust companies to assign to their various trust estates "participation in a general trust fund of mortgages upon real estate securing bonds," were intended to authorize a trust company to create a general fund of mortgages which it carries on its trust books in the aggregate, showing the items making up the fund, and to distribute it among its various trust estates as investments to the extent of the participation of the respective estates. This authority enables a trust company to set up a fund consisting of one or more mortgages in which two or more trust estates may participate. The acts do not require the execution of a mortgage or deed of trust setting forth the terms and conditions under which the mortgages are held in the fund or the issuance of any certificates or other evidences of participation in the fund. All that is required is a clear record of the trust books of the trust company acting as trustee showing the mortgages comprising the trust fund, the names of the trust participating and the amounts of the respective participations. There is, of course, no objection to the issuance of certificates of participation if the trustee desires to issue such certificates.

An investment of trust funds in "participation in a general trust fund of mortgages" must be considered to be an investment in the bonds and mortgages constituting the fund, otherwise the investment would be prohibited by the provisions of section 41 (*a*) 1 of the Fiduciaries Act discussed above. The amendments of 1925 and 1927 did not enlarge the character or increase the classes of investments permitted to fiduciaries; such was not its purpose. Clause v, section 29 of the Act of April 29, 1874, and its amendments were intended only to provide for the care, custody and possession of trust funds and investments by trust companies acting as fiduciaries. The nature of the investments permitted to all fiduciaries, whether individual or corporate, is determined by section 41 *(a)* 1 of the Fiduciaries Act.

Investment by the Pittsburgh Trust Company in its mortgage collateral certificates of trust funds held by it, when considered as an investment in the bonds and mortgages constituting its mortgage loan fund, is subject to three objections:

First. The certificates bear interest at the rate of 5 per centum per annum. It appears, after investigation, that all mortgages constituting

the fund bear interest at the rate of 6 per centum, with the exception of one large mortgage, upon which the rate is 5½ per centum. The Pittsburgh Trust Company, the trustee of the trust funds being invested, is, therefore, securing for itself a profit of from one-half to 1 per centum of the trust funds invested in such certificates. This is contrary to all legal principles governing the conduct of trustees, and is in itself sufficient to constitute the practice of the investment of trust funds in such certificates an illegal one. The trustee not only receives compensation for handling the income actually received by the trust estate, but also profits in the investment of the principal of the trust estate.

Second. Two of the mortgages comprising the fund are mortgages of private corporations securing the bonds of such corporations. It is only the bonds of individuals which are authorized as legal investments for fiduciaries, and the inclusion of such corporate mortgages in the fund makes the investment of trust funds therein illegal for the reasons set forth in the opinion rendered by this department to the Secretary of Banking dated April 26, 1927, referred to above.

Third. The securities comprising the mortgage loan fund are not in the possession of the trustee, but of another trust company. The amendments of 1925 and 1927, referred to above, were designed to provide a more elastic method of handling mortgages as an investment for trust funds. It is the evident intent of the acts that the possession of the mortgages comprising the "general trust fund," provided for therein, shall remain in the trustee to the same extent and in the same manner in which other securities and evidences of indebtedness comprising investments of trust funds remains in the possession of the trustee.

I am, therefore, further, of the opinion that the Pittsburgh Trust Company is not authorized to invest trust funds held by it in a fiduciary capacity in its mortgage collateral certificates, described above, as evidencing an interest or participation in its mortgage loan fund.

Very truly yours,

DEPARTMENT OF JUSTICE,
PAUL C. WAGNER,
Deputy Attorney General.

Trust companies—Trust funds—Acts of 1917, P. L. 447; 1923, P. L. 23; 1923, P. L. 955.

Investment by a trust company of trust funds held by it in participation in a general trust fund of mortgages, is not authorized when such fund includes a mortgage securing the bond or note of a private corporation.

Department of Justice,
Harrisburg, Pa., August 10, 1927.

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

Sir: You have requested that you be advised whether a trust company is authorized to invest trust funds which it holds in a fiduciary capacity

(a) In a single bond, executed by a private corporation, secured by mortage on real estate in this Commonwealth, or

(b) In participation in a general trust fund of mortgages upon real estate securing bonds or notes, in which fund is included a mortgage securing the bond or note of a private corporation.

The investments which constitute legal investments for trust funds in Pennsylvania are prescribed by Section 41, (a) 1, of the Fiduciaries Act of 1917 (June 7, 1917, P. L. 447), as amended by the Acts of May 19, 1923, P. L. 23 and June 29, 1923, P. L. 955, which reads as follows:

> "When a fiduciary shall have in his hands any moneys, the principal or capital whereof is to remain for a time in his possession or under his control, and the interest, profits, or income whereof are to be paid away or to accumulate, or when the income of real estate shall be more than sufficient for the purpose of the trust, such fiduciary may invest such moneys in the stock or public debt of the United States, or in the public debt of this Commonwealth, or in bonds or certificates of debt now created or hereafter to be created and issued according to law by any of the counties, cities, boroughs, townships, school districts, or poor districts of this Commonwealth, or 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 mortgages or deed of trust to a trustee for the benefit of all bond-holders, or in ground rents in this Commonwealth: Provided, That nothing herein contained shall authorize any fiduciary to make any investment contrary to the directions contained in the will of the decedent in regard to the investment of such money."

The above section expressly limits the investment of trust funds in bonds secured by mortgage on real estate to "bonds of one or more

individuals." We are, therefore, of the opinion that the investment by a trust company of trust funds which it holds in a fiduciary capacity in the single bond of a private corporation secured by mortgage on real estate is unauthorized.

It has been argued, however, that investment of trust funds in "participation in a general trust fund of mortgages," of which one is a mortgage securing the bond of a private corporation, is authorized, in the case of a corporate trustee, by Clause V, Section 29, of the Act of April 29, 1874, as amended by the Acts of May 9, 1889, P. L. 159, April 6, 1925, P. L. 152 and May 5, 1927 (No. 405.)

This Clause, before its amendment by the Act of April 6, 1925, read as follows:

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

The said Acts of April 6, 1925 and May 5, 1927 amended the Clause by adding the following provisos:

> "Provided, That every such company shall have the right to clear receipts and payments of trust money in the regular course of business in the same manner as other funds held by it: And provided further, That said companies may assign to their various trust estates participation in a general trust fund of mortgages upon real estate securing bonds or notes, in which case it shall be a sufficient compliance with the provisions of this section for the company to designate clearly on its records the bonds or notes and mortgages composing such general trust fund, the names of the trust estates participating therein and the amounts of the respective participations; and in such case no estate so participating shall be deemed to have individual ownership in any bond or note and mortgage in such fund, and the company shall have the right at any time to repurchase at market value but not less than face value any such bonds or notes and mortgages from such fund, with the right to substitute therefor other bonds or notes and mortgages."

An investment of trust funds in "participation in a general trust fund of mortgages" must be considered to be an investment in the bonds and mortgages constituting the fund and such bonds must be within the provisions of Section 41, (a) 1, of the Fiduciaries Act referred to above. Clause V. Section 29 of the Act of April 29, 1874 and its amendments were intended only to provide for the care, custody and possession of trust funds and investments by trust com-

panies acting as fiduciaries; the amendments of 1925 and 1927 to this Clause did not enlarge the character, or increase the classes, of investments legal for fiduciaries. The nature of the investments permitted to all fiduciaries, whether individual or corporate, is determined by the Fiduciaries Act.

We are, therefore, further of the opinion that investment by a trust company of trust funds held by it in participation in a general trust fund of mortgages is not authorized when such fund includes a mortgage securing the bond or note of a private corporation.

Yours very truly,

DEPARTMENT OF JUSTICE,
PAUL C. WAGNER,
Deputy Attorney General.

Corporations—Corporate trustees—Guaranteeing mortgages—Compensation—Acts of June 7, 1917, and May 2, 1919.

1. A corporate trustee is not authorized, under the Acts of June 7, 1917, P. L. 447, and May 2, 1919, P. L. 114, to pay to itself a percentage per annum upon the principal of a mortgage or other security, constituting an investment of a trust estate, as compensation for a guaranty by it of the payment of the principal and interest of such mortgage or security.

2. Such acts apply only to companies other than the corporate trustee acting for the particular estate.

Department of Justice,

Harrisburg, Pa., September 22, 1927.

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

Sir: You have requested that you be advised whether a corporate trustee is authorized by the provisions of Section 41 (b) of the Fiduciaries Act of 1917 (June 7, 1917, P. L. 447), as amended by the Act of May 2, 1919, P. L. 114, to pay to itself not exceeding one half of one per cent per annum upon the principal of any mortgage or other security, constituting an investment of a trust estate of which it is trustee, as compensation for the guaranty by it of the payment of the principal and interest of such mortgage or other security.

The Section referred to above reads as follows:

> "Any fiduciary required by law, by order of any orphans' court, or by the provisions of any last will and testament under or by authority of which such fiduciary

is acting, to invest funds within his control in mortgages or other securities, may include, as a part of the lawful expense of executing his trust, a reasonable sum paid to the company, authorizing under the laws of this State so to do, for guaranteeing the payment of the principal and interest of such mortgage or other securities, not exceeding one-half of one per centum per annum upon the principal of such mortgage or other securities."

It is our opinion that the purpose of the above Section was to authorize the guaranty of the payment of the principal and interest of mortgages and other securities constituting investments of trust estates only by companies other than the corporate trustee acting for the particular estate. To permit a corporate trustee to make such a guaranty and to receive compensation therefor would empower it to profit in excess of the compensation paid to it for the administration of the trust, and would result, in all probability, in much unnecessary guaranteeing of the investments of trust funds. It was not the purpose or intent of the Legislature to legalize such a practice.

Very truly yours,

DEPARTMENT OF JUSTICE,
PAUL C. WAGNER,
Deputy Attorney General.

Banks and banking—Trust companies—Authority to issue mortgage participation certificates—Acts of May 13, 1876, and July 17, 1919.

1. A bank chartered under the Act of May 13, 1876, P. L. 161, and which has accepted the Act of July 17, 1919, P. L. 1032, is authorized to issue mortgage participation certificates and act as trustee thereunder for the holders of certificates.

2. A bank which has not accepted the provisions of the Act of 1919 may not act as trustee under mortgage participation certificates, though it may assign certain designated portions of a mortgage or group of mortgages or issue certificates of participation therein, provided it does not assume any fiduciary powers or duties thereunder.

3. No bank chartered under the Act of 1876, regardless of whether it has accepted the Act of 1919, is authorized to guarantee mortgage participation certificates.

Department of Justice,

Harrisburg Pa., March 22, 1928.

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

Sir: We beg to acknowledge receipt of your request for our opinion

relative to the authority of a bank chartered under the Act of May 13, 1876, P. L. 161, to issue mortgage participation certificates, either with or without guarantee.

We understand that it has been the practice for banks so chartered to issue and sell certificates evidencing participation of a designated amount in a mortgage fund established by the bank, the mortgages constituting which are held by the bank as security for the certificates outstanding. In certain cases the payment of the principal and interest of such mortgage participation certificates has been guaranteed by the bank. In some instances the mortgage participation certificates are issued under an agreement or deed of trust specifying the terms and conditions under which the mortgage participation certificates are issued, the rights of the holders thereof and the duties and liabilities of the bank as trustee for the holders of the mortgage participation certificates with relation to the mortgages constituting the fund securing the certificates. In other cases the mortgage participation certificates are in effect merely assignments of a designated interest in certain mortgage or group of mortgages, the assignment not being recorded and the bank acting as the agent of the assignee in the collection of the interest and principal when due.

Considering first the authority of a bank chartered under the above Act of 1876 to issue such mortgage participation certificates without guarantee, it is necessary to distinguish between a bank which has accepted the provisions of the Act of July 17, 1919, P. L. 1032, which grants to banks so chartered the right to act in the same fiduciary capacities in which trust companies organized under the laws of this Commonwealth are permitted to act, and a bank which has not accepted the said Act of 1919.

The issuance by a bank of mortgage participation certificates under an agreement or deed of trust under which the bank assumes to perform fiduciary powers and to act as trustee for the certificate holders, is, in our opinion, authorized by the said Act of July 17, 1919, and a bank which has accepted this act is therefore authorized to issue such certificates and exercise the fiduciary powers required by the agreement under which the certificates are issued.

A bank which has accepted the provisions of the above Act of 1919 is, however, not authorized to exercise such fiduciary powers and therefore has, in our opinion, no authority to issue mortgage participation certificates under any agreement or instrument which requires the issuing bank to exercise any trust or fiduciary powers. There is no prohibition, however, against the assignment by such bank of a designated portion or amount of a single mortgage or group of mortgages or the issuance of certificates of participation therein, provided the assigning or issuing bank does not assume any fiduciary

or trust powers either under the assignment or the certificates and the agreement or instrument under which such certificates are issued. It will be necessary to determine in each particular case whether or not the bank has assumed the performance of any fiduciary or trust powers.

Considering next the authority of a bank chartered under the above Act of 1876 to issue mortgage participation certificates with guarantee, we are of the opinion that such bank is not authorized to guarantee mortgage participation certificates, whether or not it has accepted the provisions of the Act of June 17, 1919, referred to above. The reasons for this opinion are the same as those set forth in the opinion of the Deputy Attorney General William Y. C. Anderson to the Secretary of Banking, dated December 3, 1926, relative to the guarantee by a bank chartered under the said Act of 1876 of the payment of the principal and interest of bonds secured by mortgages on real estate sold by the bank to its customers.

Accordingly, we beg to advise that in our opinion a bank chartered under the Act of 1876 is authorized to issue mortgage participation certificates without guarantee in connection with which it is required to exercise fiduciary or trust powers provided it has accepted the said Act of June 17, 1919; that it is authorized to issue mortgage participation certificates without guarantee in connection with which it is not required to exercise any fiduciary or trust powers without accepting the provisions of the said Act of 1919; but that no bank chartered under the Act of 1876 is authorized, under any circumstances, to issue mortgage participation certificates with guarantee.

Very truly yours,

DEPARTMENT OF JUSTICE,
PAUL C. WAGNER,
Deputy Attorney General.

OPINIONS TO THE SECRETARY OF THE COMMONWEALTH

OPINIONS TO THE SECRETARY OF THE COMMONWEALTH

Townships—First Class—Division Into Wards—Commissioners—Quarter Sessions Court—Appointment—Even or Odd Numbered—Election of Successors—Township Code of 1917 With Its Amendments.

Where a township of the first class has been divided into wards, commissioners appointed by the Court of Quarter Sessions hold office for the unexpired part of a four-year term, the next municipal election at which their successors are to be elected depending whether the wards are numbered even or odd. The Township Code of 1917, with its amendments, provides for four-year terms only for commissioners, those for even-numbered terms being elected every four years from 1921, and those for odd-numbered wards dating from 1923.

Department of Justice,
Harrisburg, Pa., August 8, 1927.

Honorable Charles Johnson, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether township commissioners for the even-numbered wards of townships of the first class are to be elected at the 1927 Municipal election, under the following circumstances:

We understand that the Court of Quarter Sessions of Delaware County has, since the municipal election of 1925, created certain new wards in Upper Darby Township, and has appointed commissioners to represent these wards. Certain of the wards thus created bear even numbers. You desire to be advised whether commissioners for these wards should be nominated and elected at this year's primary and election, or whether the commissioners appointed by the Court will serve until 1929.

The power of Courts of Quarter Sessions to create new wards in townships of the first class is conferred by Section 33 of the Township Code of 1917 (P. L. 840), which was added to the Code by the Act of April 20, 1921, P. L. 186. That section makes no provision for the appointment of commissioners to represent the wards thus created.

Accordingly when a new ward is created in a township of the first class, a vacancy in the office of commissioner for that ward automatically exists.

Authority to fill such vacancies is conferred upon the Courts of Quarter Sessions by Section 130 of the Township Code, which provides that "the person so appointed shall hold office for the unexpired term * * * ."

Section 110 of the Township Code as last amended by the Act of April 30, 1925, P. L. 399, provided that township commissioners for the even-numbered wards of townships of the first class should be elected for four-year terms in 1921 and every four years thereafter; and commissioners for the odd-numbered wards in 1923 and every four years thereafter. The section provides further, that, "All commissioners hereafter elected shall hold office for the term of four years." To this provision the only exception is that added by the amendatory Act of April 30, 1925, P. L. 399 which applies only, "In any township of the first class which has not been divided into wards and where five township commissioners were heretofore elected at large at the same election for terms of four years each."

There is, therefore, no provision in the law, applicable to the case covered by your inquiry, which permits the election of township commissioners for less than full four-year terms.

Accordingly we advise you that the commissioners appointed by the Court, for even-numbered wards in townships of the first class created since the Municipal election of 1925, will hold office until the Municipal election of 1929.

Very truly your,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

Incorporation for Purchasing, Holding and Selling Other Securities—Stocks—Single Purpose—Lawful Business—Lawful Purpose.

A corporation may properly be incorporated under the laws of Pennsylvania for the purpose of purchasing, holding and selling the stocks of other corporations, either separately or in conjunction with other characters of securities and investments provided, of course, that such corporation is created to transact but one single character of business.

Department of Justice,

Harrisburg, Pa., December 15, 1927.

Honorable Charles Johnson, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your letter of December 12th, in which you ask to be advised whether a corporation may properly be organized under the laws of Pennsylvania for the purpose of purchasing, holding and selling the stocks of other corporations, either separately or in conjunction with other characters of securities and

investments, provided, of course, that the corporation is created to transact but a single character of business. Or, in the specific case before you, whether the inclusion of the word "stocks" is proper in the following statement of purpose:

> "Said corporation is formed for the purpose of purchasing, acquiring, investing in, holding, selling and dealing in stocks, bonds, debentures, notes, mortgages, leases, obligations, contracts and cognate securities or evidences of indebtedness, and the transaction of all such business as is necessary and incidental thereto."

The Act of July 2, 1901, P. L. 603, provides:

> "That hereafter any corporation, organized for profit, created by general or special laws, may purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of, the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created by any other corporation or corporations of this or any other State, and while the owner of said stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

There is, under the terms of the act, no limitation whatever upon this power; it is possessed by any corporation organized for profit; it need not be any particular type of profit corporation; the stocks purchased and held need not be those of any special character of corporation and there is no upward limitation in the amount of stocks that any corporation for profit may hold. However, it does not necessarily follow that because a corporation for profit may, as an incident to its main purpose, possess the power to hold stocks of other corporations, it may be incorporated for this particular purpose. We must look for legislation to authorize incorporation for such a purpose and we find it in the "Any Lawful Business" Act of July 9th, 1901, P. L. 624, and the "Any Lawful Purpose" Act of May 11th, 1909, P. L. 515. The Act of 1901 provides that corporations may be organized.

> "For the transaction of any lawful business not otherwise specifically provided for by Act of Assembly."

The 1909 Act provides that a corporation may be organized.

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

In this State we find no decision of the Courts, or opinion of this Department, directly involving the question before us. Exactly the same question, however, was raised and passed upon in the case of *Dittman vs. Distilling Company of America,* 64 N. J. Eq. 537, 54 Atl. 570. There it was held that a corporation, created for the pur-

pose of holding stock and controlling the operations of other corporations, was organized for a "lawful purpose" within the meaning of the New Jersey Corporation Act authorizing incorporation for "any lawful business or purpose whatever." Vice Chancellor Emery said:

> "The only theory upon which the formation of corporations for the purpose of holding stock of other corporations can be held not to be a 'lawful purpose,' within the meaning of the act, is that an authority to own the stock and control the management of other corporations must be given expressly and in terms in the section authorizing the formation of companies, in order to be lawful. This *power* to own and control stock of other corporations is expressly given by a subsequent section *to all corporations* when organized, and to the same extent as individuals. *Such ownership of stock is therefore a lawful act.* * * * * * * It would seem that the ownership of stock in other corporations, either alone or in connection with other objects, as the purpose of the corporation, is a purpose of incorporation authorized by the act."

This New Jersey case does not stand alone. With ample citation of authorities from many states, we find the following statement in Cook on Corporations, 8th Ed., page 1071:

> "Where the statutes of a state authorizes incorporation for any legal purpose, incorporation may be had for buying and selling shares of stock in other corporations." And to the same effect see: Fletcher Cyclopedia Corporations, Section 129.

John F. Whitworth, formerly Chief of the Corporation Bureau in the office of the Secretary of the Commonwealth, in his work, entitled "Opinions, Corporations," at page 26, states that in his opinion a charter should not be granted a Pennsylvania corporation for such a purpose.

We hesitate to disagree with the opinion of a writer whose ability we recognize and respect, but in support of his conclusion Mr. Whitworth cited the cases of *People vs. Chicago Gas Trust Company,* 130 Ill. 268, 22 N. E. 798, decided in 1889, and *Northern Securities Company vs. United States,* 193 U. S. 197, decided in 1904. He placed great reliance upon that part of the opinion in the Illinois case which is purely dictum and which has since been repudiated. In *Robotham vs. Prudential Insurance Company of America,* 64 N. J. Eq. 673, 53 Atl. 842, Vice Chancellor Stevenson in an exhaustive and convincing opinion said, inter alia:

> "As soon as our general corporation act was amended so as to permit the organization of corporations under it

> for 'any lawful business whatever' (Laws, 1865, P. 913; Rev. Corp. Act, 1875, Section 10), it seems plain that corporations could be created for the express purpose of acquiring, holding, and dealing in stocks to the extent that such business may be lawful. To construe the word 'lawful' in such a statute as this in the sense of 'authorized' (i. e., not ultra vires), in accordance with a dictum in the case of *People v. Chicago Gas Trust Co.*, 130 Ill., 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798, converts the statutory definition of the lawful objects of corporations into a meaningless circle." See also Cook on Corporations, supra, page 1068.

In the Northern Securities Company case a majority of the stock of the Great Northern Railway Company and the Northern Pacific Railway Company was acquired in 1901, and when the United States Government questioned and attacked the power of the Company to do this, the Court held that the Anti-trust Act of Congress of 1890 it was illegal for a corporation to hold a majority of the stock of two competing interstate railway corporations. In section 317 in his work on Corporations, Cook discusses this decision and directs attention to the fact that while under the laws of many states, corporations may legally *be organized* to purchase and hold the stocks of other corporations, nevertheless having been thus legally organized, they may *later* conduct their business in such manner as to conflict with the Federal Anti-trust laws, which of course, is an entirely different matter. As summarized by the learned author, at page 1091:

> "A holding company is legal and unobjectionable, where it is free from the taint of suppressing competition, and where the charter or the statutes of the state authorize the corporation to own stock in other corporations."

I am, therefore, of the opinion that a corporation may properly be incorporated under the laws of Pennsylvania for the purpose of purchasing, holding and selling the stocks of other corporations, either separately or in conjunction with other characters of securities and investments provided, of course, that such corporation is created to transact but a single character of business.

Very truly yours,

DEPARTMENT OF JUSTICE,
THOS. J. BALDRIGE,
Attorney General.

OPINIONS TO THE EXECUTIVE DEPARTMENT

OPINIONS TO THE EXECUTIVE DEPARTMENT

Governor—Certificate—Election Returns filed with Secretary of the Commonwealth—Act of July 24, 1913, P. L. 995.

The mandate of Section 2 of the Act of July 24, 1913, P. L. 995, to the Governor to issue a certificate of the election of a United States Senator, directed to the President of the United States Senate, is conditioned upon and limited by the election returns filed with the Secretary of the Commonwealth. The mandate of the act is fully satisfied when the Governor issues a certificate which correctly sets forth what the face of the returns appear to show.

Department of Justice,

Harrisburg, Pa., January 8, 1927.

Honorable Gifford Pinchot, Governor of Pennsylvania, Harrisburg, Pa.

Sir: You have submitted to me, and I have examined carefully, the certificate which you propose to deliver to Honorable William S. Vare concerning the question as to what returns of the election of November 2, 1926, filed in the office of the Secretary of the Commonwealth show with regard to the choice of the voters of Pennsylvania for a Senator to represent the State for the senatorial term beginning March 4, 1927. The certificate you propose to issue reads as follows:

> "To the President of the Senate of the United States:
> "This is to certify that on the face of the returns filed in the Office of the Secretary of the Commonwealth of the election held on the second day of November, 1926, William S. Vare appears to have been chosen by the qualified electors of the State of Pennsylvania a senator from said State to represent said State in the Senate of the United States for the term of six years beginning on the fourth day of March, 1927."

The provision of law which requires you to issue such a certificate, is Section 2 of the Pennsylvania Act of July 24, 1913, P. L. 995, and it reads as follows:

> "The vote for candidates for the office of United States Senator shall be counted, certified, computed and returned, as is now or may hereafter be provided by law with respect to other officers filled by a vote of the electors of the State at large: Provided, however, That the returns of the election of United States Senator shall be made to the Secretary of the Commonwealth,

> who shall immediately tabulate and compute the same, and, upon the conclusion of said count, certify the result thereof to the Governor, who shall immediately issue a certificate of election, under the seal of the Commonwealth, duly signed by himself, and attested by the Secretary of the Commonwealth, and deliver the same to the candidate receiving the highest number of votes. He shall also transmit the returns of said election to the President of the United States Senate."

It is entirely clear from the foregoing that the mandate to issue a certificate of election is conditioned upon and limited by the election returns filed with the Secretary of the Commonwealth and by him certified to the Governor. It is equally clear that it cannot be a mandate to the Governor to certify to what he believes to be untrue.

If then a Governor believes that, because of election frauds or for other reasons conclusive to him, the returns do not represent the true results of an election, the law cannot and does not oblige him to violate his conscience by certifying that they do. There is therefore no escape from the conclusion that a Governor who is convinced that the returns misrepresent the actual vote is not required to certify that the candidate appearing from the returns to be at the head of the list, has been "duly chosen by the qualified electors," but that in such case the mandate of the Act is fully satisfied when the Governor issues a certificate which correctly sets forth what the face of the returns appears to show.

You are convinced that, on account of wrongful action at the polls and egregious use of funds in connection with the securing of votes, the returns in question do not represent the result of the election with an reasonable degree of accuracy; and therefore it is my opinion that the proposed certificate, which sets forth correctly what the returns appear to show, is a full compliance with the duty imposed on you by Section 2 of the Act of July 24, 1913, quoted above.

Very truly yours,

DEPARTMENT OF JUSTICE,
GEORGE W. WOODRUFF,
Attorney General.

Governor—Trustees of State Institutions—Departmental Administrative Boards or Commissions—Advisory Boards or Commissions—Members of General Assembly—Administrative Code—Article II, Section 6, of the Pennsylvania Constitution.

Article II, Section 6, of the Pennsylvania Constitution forbids the appoint-

ment of members of the General Assembly to membership on departmental administrative boards or commissions or advisory boards or commissions of the State Government. As boards of trustees of State institutions are departmental administrative boards, members of the General Assembly cannot validly be appointed to membership on them.

Department of Justice,

Harrisburg Pa., June 7, 1927.

Honorable John S. Fisher, Governor of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the Constitution permits you to appoint members of the Legislature as members of departmental administrative boards or commissions or advisory boards or commissions of the State government, and particularly whether you may appoint members of the Legislature to membership on boards of trustees of State institutions.

Article II, section 6 of the Constitution provides that, "No senator or representative shall during the time for which he shall have been elected be appointed to any civil office under this Commonwealth * * *"

Obviously the only question involved in your inquiry is whether the members of departmental administrative boards and commissions and of advisory boards and commissions of the State government are civil officers within the meaning of the provision of the Constitution just quoted.

The Administrative Code of 1923 (Act of June 7, 1923, P. L. 498) as amended by the Act of April 13, 1927, (Act No. 164) is the statute under which the Governor is authorized to appoint the members of all departmental administrative boards and commissions and advisory boards and commissions of the State government. Boards of trustees of State institutions are departmental administrative boards and it will, therefore, not be necessary in this opinion to make separate mention of them.

Section 206 of the Administrative Code provides for the appointment by the Governor, with the advice and consent of two-thirds of all the members of the Senate, of the members of all departmental administrative boards and commissions and of all advisory boards and commissions "except as in this act otherwise provided." An examination of the remaining sections of the Act discloses the fact that all of the exceptions are cases in which persons become members of boards and commissions ex officio or are appointed by authorities other than the Governor. It appears, therefore, that Section 206 of the Code covers every case of an appointment by the Governor of a member of a departmental administrative board or commission or of an advisory board or commission.

All of the Governor's appointees to membership on the boards and commissions under discussion are appointed for definite terms. Their terms are fixed either by Section 207 of the Administrative Code or by the sections of Article IV which deal with the organization of the several boards and commissions respectively.

The powers and duties of members of all of these boards and commissions are definitely prescribed in the Administrative Code. It will not be necessary to consider these powers and duties in detail, but in view of the fact that your inquiry particularly mentions the boards of trustees of State institutions we call attention to the fact that the powers and duties of members of these boards of trustees are prescribed by Sections 1311 and 2019 of the Administrative Code. Both sections give to the boards of trustees of State institutions the "general direction and control of the property and management" of the institutions over which they respectively have jurisdiction; and specifically the power to elect superintendents, to appoint all officers and employes who may be necessary for the work of the respective institutions, and to fix the compensation of such officers and employes in conformity with the standards established by the Executive Board.

Members of certain departmental administrative boards and commissions are compensated for the time which they devote to their public duties. Members of other such boards and commissions serve without compensation but are entitled to the expenses which they incur in performing the duties imposed upon them by law.

All members of these boards and commissions are obliged, before entering upon the performance of their duties, to take and subscribe the constitutional oath of office which must be filed in the office of the Secretary of the Commonwealth. Section 218 of the Administrative Code, which imposes this requirement uses the expression, "All persons appointed by the Governor under the provisions of this act * * * shall before entering upon the duties of *their offices* take and subscribe the constitutional oath of office. * * *."

It appears therefore that members of all departmental administrative boards and commissions and of all advisory boards and commissions appointed by the Governor are appointed for definite terms with or without compensation, receive the expenses incurred by them in the performance of their duties, have their powers and duties specifically conferred and imposed upon them by statutory law and are referred to as persons holding "offices" who must take and subscribe the constitutional oath of office.

The Administrative Code as a whole deals with the conduct of the executive and administrative work of the Commonwealth. Clearly the members of the several boards and commissions to which your inquiry refers exercise a part of the sovereignty of the Commonwealth

of Pennsylvania in the executive field of the Commonwealth's activities.

Were there no authority to guide us we would have no difficulty in reaching the conclusion that members of departmental administrative boards and commissions and of advisory boards and commissions appointed under the provisions of the Administrative Code as amended hold "civil offices under this Commonwealth;" and this conclusion is amply justified by all of the precedents afforded both by the decisions of our Courts and the opinions of former Attorneys General.

Attorney General Carson on July 31, 1903, rendered an opinion in which he discussed the proper definition of a "civil office under this Commonwealth." He referred to a number of definitions of "public officer" and reached the conclusion that "public office" involves the idea of tenure, duration, fees, emoluments and powers as well as that of duty and "implies an authority to exercise some portion of the sovereign power of the State either in making or in executing the laws." *Factory Inspector's Lawyer,* 28 Pa. C. C. Rep. 369.

In *Commonwealth ex rel. Murphy, 25 Pa. C. C. Rep. 637,* Judge Weand of the Court of Common Pleas of Montgomery County quoted, among others, the following definition from Tiedman on Municipal Corporations:

> "The word 'office' embraces a more or less permanent delegation of a portion of governmental power coupled with legally defined duties and privileges, continuous in their nature, and which upon the death, resignation or removal of the incumbent devolve on his successor."

Continuing Judge Weand said:

> "The thought running through every definition of an officer is that he shall perform some service of or some duty to the government, State or municipal corporation, and not merely to those who appoint or elect him. His tenure must be defined, fixed and certain, and not arise out of mere contract and employment."

In 46 Pa. C. C. Rep. 530 appears an opinion of the Attorney General holding that a fish warden is a civil officer under the Commonwealth and that, therefore, a member of the Legislature cannot be appointed as such. See also opinion of Deputy Attorney General Brown in *Common Pleas Judgeship, 4 D. and C. Rep. 408.*

While there are no decisions of the appellate courts of this Commonwealth dealing expressly with the meaning of "civil office under this Commonwealth" as used in Article II, Section 6 of the Constitution, there are a number of relevant definitions of "public officer" to which we shall refer briefly.

In *Commonwealth vs. Moffitt,* Mr. Justice Mestrezat in holding that a poor director is a public officer said, at page 263;

> "He is selected by the people to perform certain imposed duties and exercise certain prescribed powers in the government of the State or the municipal division thereof for which he is chosen. His office is administered for the benefit of the public, and to the extent of the powers conferred by law he exercises the functions of government."

In *Tucker's Appeal, 271 Pa. 462,* Mr. Justice Kephart quoted with approval the language used in *Commonwealth vs. Moffitt* and held that county commissioners when acting as overseers and directors of the poor under an Act of Assembly are "public officers."

See also *Commonwealth vs. Moore, 266 Pa. 100, Dewey vs. Luzerne County, 74 Pa. Superior Ct. 300,* and *Commonwealth vs. Moore, 71 Pa. Superior Ct. 365.*

Every essential element necessary to constitute one a public officer is present in the case of members of departmental administrative boards and commissions and of advisory boards and commissions appointed under the provisions of the Administrative Code except that in certain instances the members while entitled to receive their expenses are not compensated for the services which they render. It is our opinion that the presence or absence of this element is inconsequential in cases in which appointees serve for definite terms, perform only those duties and exercise only those powers prescribed and conferred by statutory law, and are compelled before beginning their terms of service to take, subscribe and file the constitutional oath of office.

Accordingly you are advised that the Constitution of this Commonwealth forbids the appointment of members of the General Assembly to membership on departmental administrative boards or commissions or advisory boards or commissions of the State Government. As boards of trustees of State institutions are departmental administrative boards, members of the General Assembly cannot validly be appointed to membership on them.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

Constitutional law—Temporary commissions created by general assembly—Appointment of members of general assembly.

1. Members of the general assembly are eligible and may be appointed to membership on the several temporary commissions created by the action of the 1927 session of the general assembly.

2. The members of such commissions do not hold "civil offices under this Commonwealth" within the meaning of article II, section 6, of the Constitution.

Department of Justice,

Harrisburg, Pa., June 16, 1927.

Honorable John S. Fisher, Governor of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request to be advised regarding the eligibility of members of the General Assembly for appointment to membership on the several temporary commissions created by action of the 1927 session of the General Assembly. We understand that your inquiry is prompted by our recent opinion advising you that you cannot appoint members of the General Assembly to membership upon the departmental administrative boards and commissions or advisory boards and commissions which form parts of the executive branch of the State Government.

The 1927 session of the Legislature authorized the appointment of the following temporary commissions:

Pennsylvania Delaware River Bridge Commission Number Two. Created by the Act of April 11, 1927 (Act No. 152).

Commission to Investigate the Necessity of a Bridge Across the Susquehanna River at Bainbridge, Lancaster County. Authorized by the Act of April 22, 1927 (Act No. 217).

Commission to Study the Bituminous Coal Fields. Created by Joint Resolution of May 4, 1927 (Act No. 393).

Penal Law Commission. Authorized by Joint Resolution of May 4, 1927 (Act No. 394).

Election Law Commission. Authorized by Joint Resolution of May 4, 1927 (Act No. 395).

Commission to Study the Laws Relating to the Healing Art. Created by Joint Resolution of May 4, 1927 (Act No. 396).

Commission to Study the Distribution of State Subsidies to School Districts. Authorized by the Act of May 4, 1927 (Act No. 397).

Commission to Study Salaries Paid to Public Officials and Employes of the Commonwealth and Its Political Sub-divisions. Created by the Act of May 6, 1927 (Act No. 429).

Commission on Penal Institutions. Authorized by the Act of May 10, 1927 (Act No. 449).

All of the commissions mentioned are required by the acts or joint resolutions creating them to investigate specific subjects, prepare recommendations as the result of their investigations, and report to the General Assembly.

In addition to these commissions the Legislature created the following:

Old Portage Railroad Celebration Commission. Authorized by the Act of May 6, 1927 (Act No. 427). The Commission is directed to expend not more than $10,000 of the Commonwealth's money in the preparation and construction of a model of the winding engines and inclined plane of the Old Portage Railroad, and to provide a place for its preservation convenient for the public. When this shall have been done, the Commission will automatically cease to exist.

Commission to Erect a Memorial to the Colored Soldiers who Served in Any War to which the United States was a Party. Created by the Act of May 4, 1927 (Act No. 48A). The Commission is directed to arrange for the erection and dedication at the expense of the Commonwealth, of a statue. After the dedication of the statue, the Commission will have no further duties to perform.

The members of the commissions above described will not be appointed for definite terms, will not be required to take the constitutional oath of office, and will receive no compensation for their services. The consent of the Senate is not necessary to validate the appointment of those members whom the Governor is authorized to name.

Except for the two commissions which are directed to erect monuments, all of the commissions are investigating bodies created for the purpose of making recommendations to the General Assembly for future action by it. These commissions will not, clearly, exercise any part of the sovereignty of the Commonwealth.

Under these circumstances we have no hesitancy in advising you that the members of these temporary legislative investigating commissions will not hold "civil offices under this Commonwealth" within the meaning of Article II, Section 6, of the Constitution.

The status of members of the two commissions charged with the duty of erecting monuments is not entirely free from doubt, but it is our opinion that they also will not hold "civil offices under this Commonwealth" in the sense in which the Constitution uses that expression.

As already indicated, these commissioners will serve, not for definite terms, but only until the specific pieces of work which they are directed to do, shall have been completed. The power of each commission is limited to the expenditure of a definite amount of money for a particular object. The performance of the one duty imposed upon it, can scarcely be said to vest in either commission the power to exercise a part of the Commonwealth's sovereignty.

Accordingly, you are advised that members of the General Assembly may be appointed to membership on any of the temporary commissions authorized by action of the General Assembly at its 1927 session.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

Investments—Funds of State departments, boards and commissions.

1. Under section 6 of the Act of July 18, 1917, P. L. 1043, the funds of the Public School Employees' Retirement Board may be invested only in such securities as are legal investments for savings banks, subject to the further restrictions imposed by clause 6 of that section, and subject, also, to the restriction that, under article III, section 22, of the Constitution, prohibiting the investment of trust funds in the stock or bonds of a private corporation, farm loan bonds issued by Federal land banks or joint-stock land banks are not a proper investment of funds in the hands of the Employees' Retirement Board, notwithstanding such bonds were made a proper investment for savings banks by the Act of April 5, 1917, P. L. 47, as amended June 28, 1923, P. L. 884.

2. Under section 6, clauses 1 and 6, of the Act of June 27, 1923, P. L. 858, investments by the State Employees' Retirement Board are limited to those in which fiduciaries are permitted to invest trust funds.

3. Investments of State Sinking Funds are limited by article ix, section 12, of the Constitution to State and Federal bonds.

4. Under section 12 of the Act of June 2, 1915, P. L. 762, funds of the Workmen's Insurance Board may be invested only in such securities as are authorized for savings banks.

5. Investment of the State Insurance Fund is governed by section 2 of the Act of May 14, 1915, P. L. 524, providing for investment in Federal, State and municipal securities.

6. Under section 2703 of the School Code of May 18, 1911, P. L. 309, the State School Fund may be invested in bonds of a school district or municipal bonds in which savings banks are permitted to invest their deposits.

7. The Agricultural College Land Script Fund in the hands of the sinking fund commissioners may be invested only in securities of the State of Pennsylvania or of the United States, under the Act of April 1, 1863, P. L. 213.

8. Where there are funds for investment as to which there is no specific statute, they should be invested only in such securities as can be lawfully purchased by fiduciaries when investing trust funds.

9. In considering investments in mortgages, the fact that they are "guaranteed" does not relieve the department or board from the duty of making investigation and exercising care in the selection of the mortgage.

Department of Justice,

Harrisburg, Pa., July 13, 1927.

Honorable Arthur F. Townsend, Budget Secretary, Harrisburg, Pennsylvania.

Sir: We have your request to be advised (1) in what classes of securi-

ties the moneys in certain specified funds administered by departments, boards or commissions of the State government may legally be invested, (2) whether in bidding for bond issues, State departments, boards and commissions have the right to submit bids for all or for only a part of any particular issue and (3) by what departments, boards or commissions funds may be invested in guaranteed first mortgages on real estate.

We understand that these inquiries are prompted by the fact that the Governor has requested the Budget Secretary to make such investigations for and recommendations to him as will enable him to perform the duty imposed upon him by Section 701 of The Administrative Code of 1923 as amended by the Act of April 13, 1927, namely, "To approve or disapprove all investments by departments, boards or commissions of funds administered by such departments, boards or commissions."

We shall first discuss the classes of securities in which the several departments, boards and commissions may lawfully invest funds administered by them.

I.

A. Public School Employes' Retirement Board.

The investment of the funds administered by this Board is governed by Section 6 of the Act of July 18, 1907, P. L. 1043, clauses 1 and 6. Section 6, clause 1, provides that in making investments the members of the Board shall be subject 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."

Accordingly the Retirement Board can lawfully invest the funds under its control only in such investments as are legal for savings banks in Pennsylvania. We shall list these investments hereinafter.

The other restrictions imposed upon the Retirement Board in the making of investments are as follows (Section 6, clause 6 of the Act of 1917):

1. No member or person connected with the Board shall have any interest, direct or indirect, in the gains or profits of any investment made by the Board;

2. No member or person connected with the Board may, directly or indirectly, for himself or herself, or as an agent or partner of others, borrow any of the Board's funds or deposits or in any manner use the same except to make such current and necessary payments as are authorized by the Retirement Board;

3. No member or person connected with the Board shall become an endorser or surety or in any manner an obligor for moneys loaned by or borrowed of the Board.

B. State Employes' Retirement Board.

The power of the State Employes' Retirement Board to make investments is governed by Section 6, clauses 1 and 6, of the Act of June 27, 1923, P. L. 858.

The investments which may be made are those in which fiduciaries in Pennsylvania may lawfully invest trust funds.

The other restrictions upon the members of the Retirement Board in investing funds under their control are the same as those hereinabove outlined as applicable to members of the Public School Employes' Retirement Board.

We shall subsequently list the investments which may legally be made by fiduciaries in Pennsylvania.

C. Board of Finance and Revenue—(Investing the State Sinking Fund and the State Bond Road Sinking Fund.)

The Constitution, in Article IX, Section 12, prescribes the securities in which moneys in the State Sinking Fund may be invested. These securities are either bonds of this Commonwealth or bonds of the United States.

The Constitution (Article IX, Section 11), contemplates but one Sinking Fund for all the indebtedness of the Commonwealth. While there is no serious objection to the separation of the Sinking Fund, for accounting purposes, into constituent parts representing the several bond issues, nevertheless, strictly speaking, there can be but one Sinking Fund; and the constitutional limitation regarding the investment of moneys in the Sinking Fund is applicable to every dollar in the Sinking Fund or any constituent part thereof.

D. State Workmen's Insurance Board.

The investment of the funds administered by this Board is governed by section 12 of the Act of June 2, 1915, P. L. 762 which provides that the State Workmen's Insurance Board "may invest any of the surplus or reserve belonging to the Fund in such securities and investments as are authorized for investment by savings banks."

E. State Treasurer—(Investing the State Insurance Fund.)

The investment of moneys in the State Insurance Fund is governed by Section 2 of the Act of May 14, 1915, P. L. 524.

The types of investment which may be made are specified in the act and are as follows:

> "* * * lawfully issued interest bearing securities of the United States of America, the Commonwealth of Pennsylvania or any other of the United States, or any county, city, borough or school district of this Commonwealth or any obligations of municipalities of any of the other

States, but, preferably, in such securities issued by municipalities within this Commonwealth."

Investments of money in this fund must be made by the State Treasurer "under the supervision and direction of" the Board of Finance and Revenue, as the successor of the Sinking Fund Commissioners (Section 2 of the Act of May 14, 1915, P. L. 524 and Section 1102(a) of The Administrative Code, Act of June 7, 1923, P. L. 498, as amended by the Act of April 13, 1927.)

F. State Council of Education—(Investing the State School Fund.)

The investment of moneys in the State School Fund is governed by Section 2703 of the School Code of 1911 (Act of May 18, 1911, P. L. 309.)

Investments are restricted to bonds properly issued by a school district in this Commonwealth or municipal bonds in which savings banks of Pennsylvania are authorized by law to invest their deposits.

All investments of this Fund must be approved by the Auditor General as well as by the Governor.

G. *Board of Finance and Revenue—(Investing Agricultural College Land Script Fund.)*

There is, at the present time, no specific authority vested in the Board of Finance and Revenue, as successor to the Sinking Fund Commissioners, to invest the Agricultural College Land Script Fund. By the Act of April 3, 1872, P. L. 39, the surveyor general was directed to sell all bonds in this Fund and pay the proceeds of the sale to the State Treasurer for the use of the Sinking Fund Commissioners. The same Act directed the Governor, the Auditor General and the State Treasurer to issue a registered bond of this Commonwealth for the sum of five hundred thousand dollars, payable to the Agricultural College Land Script Fund of Pennsylvania, after fifty years from February 1, 1872, the bond to be delivered to the State Treasurer "for the uses and purposes declared by law."

There has been no subsequent legislation on this subject; and upon the maturity of the above mentioned bond, the principal thereof was paid and the proceeds thereof turned over to the Sinking Fund Commissioners to be invested by them.

The original Act which created this Fund,—the Act of April 1, 1863, P. L. 213,—provided that the moneys therein should not be invested "in any other stocks than those of the United States or those of this Commonwealth."

Accordingly, investment of the moneys in this Fund must be confined to securities of this Commonwealth or of the United States.

H. *Departments, Boards and Commissions having Funds for Investment, in the absence of specific Statutory Instructions.*

We understand that there are certain funds invested from time to time by certain departments, boards and commissions, for the investment of which the statutes do not specifically give directions.

The only safe course which such departments, boards and commissions can pursue in investigating such funds is to confine themselves to the purchase of such securities as can lawfully be purchased by fiduciaries when investing trust funds.

Having covered your inquiries with respect to particular departments, boards and commissions, we shall list, for your convenience, the investments which may lawfully be made by savings banks and fiduciaries:

Savings Banks.

Under the Act of May 20, 1889, P. L. 246, Section 17, deposits in savings banks may lawfully be invested in the following securities:

1. "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;"

2. Stocks or bonds of this Commonwealth bearing interest;

3. Stocks or bonds of any State in the Union which has not within ten years previous to the date of the purchase of such securities by any particular savings bank defaulted in the payment of any part of either principal or interest of any debt authorized by the Legislature of such State to be contracted;

4. The stocks or bonds of any city, county, town or village of any State of the United States, lawfully issued, or interest bearing obligations issued by the city or county in which the bank is situated; or

5. In bonds and loans on unencumbered improved real estate situate in Pennsylvania.

To this list of legal investments the Act of April 8, 1917, P. L. 47, as amended by the Act of June 28, 1923, P. L. 884, added farm loan bonds issued by Federal Land Banks or Joint Stock Land Banks under the provisions of the Act of Congress approved July 17, 1916, its amendments and supplements. However, we are of the opinion that notwithstanding the provisions of the Act of 1917, as amended, the Public School Employes' Retirement Board cannot lawfully invest the funds administered by it in bonds issued either by Federal Land Banks or Joint Stock Land Banks.

In the management of the several Funds committed to their care the members of the Public School Employes' Retirement Board are specifically designated as "trustees" by Section 6 of the Act of July

18, 1917, P. L. 1043; and under the opinion of Deputy Attorney General Brown addressed to Honorable Peter G. Cameron, Secretary of Banking, under date of August 29, 1923, 4 D. and C. 55, trustees cannot lawfully invest trust funds in farm loan bonds issued by Federal Land Banks notwithstanding the provisions of the Act of April 5, 1917, P. L. 46. Deputy Attorney General Brown very properly held that these bonds are bonds of private corporations and, therefore, come within the prohibition of Article III, Section 22 of the Constitution of this Commonwealth which 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."

In an opinion addressed to Honorable John W. Morrison, First Deputy Secretary of Banking, on September 5, 1923, (4 D. and C. 54) Deputy Attorney General Brown ruled that the constitutional prohibition does not apply to savings banks notwithstanding the fact that the directors of savings banks are spoken of in the statutes as "trustees," his reason being that the relationship between a savings bank and a depositor therein is that of debtor and creditor and not that of trustee and *cestui que trust*.

We are of the opinion that the relationship between the public school employes who pay their money into the Public School Employes' Retirement Fund and the Public School Employes' Retirement Board is that of *cestui que trust* and trustees, and not merely that of creditor and debtor.

Accordingly, while the Legislature could and did in the Public School Employes' Retirement Act authorize these particular trustees to make certain investments of the funds administered by them, which would not be lawful investments if made by trustees generally, nevertheless the Legislature could not under the Constitution permit these trustees to invest the funds managed by them contrary to the provisions of Article III, Section 22 of the Constitution.

Fiduciaries.

Legal Investments for fiduciaries are defined in Section 41 (a) 1 of the Act of June 7, 1917, P. L. 447, as amended by the Act of March 19, 1923, P. L. 23, and the Act of June 29, 1925, P. L. 955. They are:

1. The stock or public debt of the United States;
2. The public debt of this Commonwealth;
3. Bonds or certificates of debt lawfully issued by any county, city, borough, township, school district or poor district of this Commonwealth.
4. Ground rents in Pennsylvania or bonds of one or more indi-

viduals secured by mortgage on real estate in this Commonwealth which may be either a single bond secured by a mortgage or one or more bonds of an issue of bonds secured by mortgage or deed of trust to a trustee for the benefit of all bond holders.

It is important to note that bonds secured by mortgages on real estate must be bonds of an individual or individuals and cannot be corporate bonds. See opinion of Deputy Attorney General Anderson to Honorable Peter G. Cameron, Secretary of Banking, May 10, 1926, 8 D. and C. 202.

To summarize we shall list, by funds, the investments which the several departments, boards and commissions may lawfully make:

Public School Employes' Retirement Fund:

1. Obligations of the United States;
2. Obligations of this Commonwealth;
3. Obligations of any other State of the Union which has not within ten years defaulted in the payment of principal or interest on any obligation;
4. Obligations of any city, county, town or village in the United States; and
5. Individual, but not corporate, bonds and loans on unencumbered improved Pennsylvania real estate.

State Workmen's Insurance Fund:

1. Obligations of the United States;
2. Obligations of this Commonwealth;
3. Obligations of any other State of the Union which has not within ten years defaulted in the payment of principal or interest on any obligation;
4. Obligations of any city, county, town or village in the United States; and
5. Bonds and loans on unencumbered improved Pennsylvania real estate; and
6. Farm loan bonds issued by a Federal Land Bank or a Joint Stock Land Bank.

State School Fund:

1. Bonds of any school district in Pennsylvania; and
2. Bonds of any city, county, town or village in the United States.

State Sinking Fund—(Including State Bond Road Sinking Fund): Agricultural College Land Script Fund.

1. Bonds of the United States; and
2. Bonds of Pennsylvania.

State Insurance Fund:

1. Securities of the United States;

2. Securities of any State in the Union;
3. Securities of any county, city, borough or school district of any State in the Union, but preferably of Pennsylvania.

State Employes' Retirement Fund:
Any Fund to be invested by any Department, Board or Commission without specific statutory instructions:
1. The stock or public debt of the United States;
2. The public debt of Pennsylvania;
3. Bonds or certificates of debt of any county, city, borough, township, school district or poor district of Pennsylvania;
4. Ground rents on Pennsylvania real estate; or
5. Mortgages or bonds secured by mortgages on Pennsylvania real estate, the bonds to be individual and not corporate bonds.

II.

In bidding for bond issues in which they may lawfully make investments departments, boards and commissions may submit bids for an entire issue or for only a part thereof. There is nothing in any of the statutes regulating investments by these State agencies which restricts their discretion in determining how large or how small a part of any particular issue to purchase.

III.

Departments, boards and commissions may invest the funds administered by them in guaranteed first mortgages on real estate in any case in which they may lawfully invest funds in first mortgages on real estate not guaranteed.

The fact that a mortgage is guaranteed does not relieve a department, board or commission of any responsibility for the exercise of that care which the law requires in making investments in mortgages. The mortgage itself must be a lawful investment; and if an investment is made either by a trustee or by an agency which is given the same power to make investments as may be exercised by a trustee, the bond secured by mortgage must be the bond of an individual or individuals. A guaranty executed by a corporation does not invalidate the investment if the mortgage itself would be a legal investment without the guaranty; but, as already pointed out, the fact that a guaranteed mortgage is purchased does not relieve the purchasing agency from any responsibility for the soundness of the mortgage itself.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

State department, boards and commissions—Audits—Appropriations, Incidental expenses. Acts of 1923, P. L. 498, as amended by Act of 1927, No. 164.

The several departments, boards and commissions, may employ persons to audit their condition. Expense may be paid out of any appropriation which includes among the objects for which it can be expended, "the payment of incidental expenses."

Department of Justice,

Harrisburg, Pa., August 19, 1927.

Honorable Arthur P. Townsend, Budget Secretary, Harrisburg, Pa.

Sir: We have your request to be advised whether the several administrative departments, boards and commissions of the State government may lawfully employ auditors to make audits of the affairs of such departments, boards and commissions and pay the expense of such audits out of their current appropriations.

With respect to the latter part of your question it is impossible for us to generalize. Whether any department, board or commission may pay the expense of an audit out of its current appropriation depends entirely upon the language of that appropriation.

We can, however, advise you generally with respect to the right of departments, boards and commissions to employ persons to audit their affairs.

Before doing so we shall briefly state the circumstances under which your inquiry arises.

Under the Administrative Code of 1923 (Act of June 7, 1923, P. L. 498) as amended by the Act of April 13, 1927, (Act No. 164) the Governor is given the power to supervise generally the fiscal affairs of the executive branch of the State government, excepting only the Department of the Auditor General and the Treasury Department. He has the authority and it is his duty to call upon the several departments, boards and commissions for estimates in advance of expenditures and to approve or disapprove the budgetary proposals submitted to him.

Charged with the direct responsibility for the fiscal condition of the State it is quite natural that the Governor should desire for his information detailed data with regard to the affairs of the several departments, boards and commissions, and particularly as of the beginning of the first biennium of his administration, with this in mind Governor Fisher requested from practically all departments, boards and commissions that they obtain and submit to him thorough audits of their condition as of May 31, 1927. In response to the Governor's request a number of departments, boards and commissions have employed certified public accountants to make the audits requested by the Governor.

The question you raise is whether in ordering such audits these departments, boards and commissions acted within or beyond their authority.

If there be any legal obstacle which prevents the several executive agencies of the Commonwealth from ordering audits of their affairs it is that the Constitution created the office of Auditor General and that under our statutory law the Auditor General is the only executive officer who has the right to order or make an audit.

While the Auditor General is a constitutional officer the Supreme Court has held in *Commonwealth vs. Powell, 249 Pa. 144* that his duties are purely statutory. Unless, therefore, there is anything in the statutes which gives to the Auditor General the exclusive right to obtain information with regard to the financial details of the State government, the mere fact that the Auditor General is a constitutional officer does not prevent department heads and boards and commissions from independently auditing their own condition or causing it to be audited.

The authority of the Auditor General in the premises is conferred by the Act of March 30, 1811, 5 Smith's Laws 228. Section 1 of that Act undoubtedly authorizes the Auditor General to "examine and adjust" all accounts between the Commonwealth and any persons having public money in their possession. It is undoubtedly the function of the Auditor General to ascertain whether the various administrative departments, boards and commissions have paid into the State Treasury all moneys coming into their hands which should be paid into the Treasury, and whether there have been any irregularities in the handling or use of public funds by such departments, boards and commissions. However, there are many details in connection with the administration of the State's business through its various agencies in which those agencies may be interested, but in which the Auditor General would have no interest. Departments, boards and commissions cannot dictate to the Auditor General with what detail his examination shall be made, nor can they demand or properly request that in making an examination of their affairs special attention be paid to particular features of their work.

In view of the growth of the State government and the extent to which its activities have expanded we cannot conceive anything more important than that, periodically, the several departments, boards and commissions should have for their own information and that of the Governor expert examinations into the conduct of their affairs; and we can find nothing in any statute which renders such an examination unlawful or inconsistent with the functions of the Auditor General.

Accordingly we advise you that it is entirely proper for the several departments, boards and commissions, if and when necessary for the intelligent management of their own affairs and to enable them to give to the Governor such information as he may desire, to employ persons thoroughly to audit their condition.

We advise you further that in our judgment such an audit is an incidental expense of administration and that it is proper to pay the expense thereof out of any appropriation which includes among the objects for which it can be expended, "the payment of incidental expenses."

In addition, we call your attention to the fact that many of the appropriations to departments, boards and commissions expressly authorize the payment of the compensation of "auditors." In all such cases there can be no doubt about the propriety of employing persons to make audits of the kind we have been discussing.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

State Officers—Employes—Removal from one city to another—Payment of expenses.

The Governor may approve payment by the State of the expenses of moving a State employe's household goods from one place in Pennsylvania to another, provided the employe has been in the service of the department, board or commission for more than one year and has been required by the head of the Department, board or commission of which he or she is an employe, to move his or her residence from one place to another. Act of April 13, 1927, No. 164.

Department of Justice,

Harrisburg, Pa., September 28, 1927.

Honorable John S. Fisher, Governor of Pennsylvania, Harrisburg, Pa.

Sir: We have your letter asking to be advised whether the law authorizes you "to approve requisitions for the payment of expenses incurred by State employes in moving from one city to another where the moving has been necessitated by the work of the Department."

Section 216 of the Administrative Code of 1923, as amended by the Act of April 13, 1927 (Act No. 164) contains the following provision:

> "Whenever an employe of any department, board or commission, who shall have been in the employment of the same department, board or commission for more than one year, shall be required, by the head of the department or by the board or commission by which he or she is employed, to change his or her residence from one place in Pennsylvania to another such place, such employe may, with the approval of the Governor in writing, receive the expenses of moving his or her household goods to his or her new residence."

This provision is self-explanatory. It permits you to approve the payment by the State of the expenses of moving a State employe's household goods from one place in Pennsylvania to another such place if and only if:

(1) The employe has been in the service of the same department, board or commission for more than one year; and

(2) The employe has been required by the head of the department or by the board or commission of which he or she is an employe, to move his or her residence from one place to another.

Accordingly, whenever you are requested to approve a requisition for moving expenses under the authority thus conferred upon you, the proper department head or board or commission should certify to you the jurisdictional facts just mentioned.

Yours very truly,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

State Officers and employes—Premium on Bonds. Property and Supplies.

Premium on bonds to be paid from appropriation to the Department of Property and Supplies "for the payment of the cost of procuring bonds required to be given to the Commonwealth by department heads and other State officers and employes." Act of May 11, 1927, Appropriation Acts, page 213.

Department of Justice,

Harrisburg, Pa., March 6, 1928.

Honorable Arthur P. Townsend, Budget Secretary, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the premiums of surety companies for executing fidelity bonds for officers and employes of certain departments, boards and commissions can be paid out of the funds appropriated to those departments, boards and commissions, or whether all fidelity bonds for State officers and employes must be paid for out of the appropriation made by the Legislature to the Department of Property and Supplies for "the payment of the cost of procuring bonds required to be given to the Commonwealth by Department heads and other officers and employes" (Act of May 11, 1927, Appropriation Acts, page 194 at page 213).

You mention specifically as the subject of your inquiry fidelity bonds covering employes of the Department of Highways, the Board of Game Commissioners, the Board of Fish Commissioners, the State Employes' Retirement Board, the Public School Employes' Retire-

ment Board, the Department of Banking, the Pennsylvania Securities Commission, the State Workmen's Insurance Board, and the Department of Property and Supplies, as far as concerns its work in constructing the Soldiers and Sailors Memorial Bridge and in administering the State Insurance Fund.

Section 219 of the Administrative Code (Act of June 7, 1923, P. L. 498, as amended by the Act of April 13, 1927, P. L. 207), provides that fidelity bonds must be given by the following: All department heads, the Secretary of the Board of Game Commissioners, the Commissioner of Fisheries, the members of the Public Service Commission, and the members of the Pennsylvania State Board of Censors.

It provides that bonds may be required, with the approval of the Governor, of the following:

First—Such deputies, directors, bureau or division chiefs and other officers or employes of departments as the heads of the respective departments shall deem necessary;

Second—Such members of departmental administrative boards and commissions as the heads of the departments with which they are connected shall deem necessary;

Third—Such officers and employes of independent administrative boards and commissions as the respective boards and commissions shall deem necessary.

The amounts of all bonds given under this section must be fixed by the Governor, whose discretion is limited only to the extent that the bonds of department heads and of the other officers and board members specifically mentioned in the section may not be less than $20,000. The security on all bonds given under this section must be approved by the Attorney General and all of the bonds must be filed with the State Treasurer.

It is to be noted that this section of the Code makes no provision for the bonding of employes of departmental administrative boards and commissions. Only the members of such boards and commissions are embraced within the provisions of Section 219; but in many cases the employes assigned to departmental administrative boards and commissions are employes of the departments with which such boards or commissions are connected. All such employes come within the provisions of Section 219. However, in the cases of the boards of trustees listed in Section 435 of the Code, whose employes are appointed under Sections 1311 and 2019 of the Code, the employes thus appointed are not employes of the Departments of Public Instruction or of Welfare, as the case may be, and the bonding of such employes is not covered by Section 219.

In our opinion the appropriation to which you have referred was intended to be the exclusive fund available for the payment of pre-

miums on bonds furnished under the provisions of Section 219 of the Administrative Code.

Practically every department, board and commission of the State Government has appropriations either out of the General Fund or out of special funds which are so phrased as to enable them to be used for the payment of premiums on fidelity bonds covering the officers and employes of such departments, boards and commissions. It would be impossible to differentiate between any departments, boards and commissions and to say that premiums on bonds required by Section 219 of the Code covering the officers and employes of some of them should be paid out of the appropriation to the Department of Property and Supplies while the premiums on bonds required by the same section covering officers and employes of other departments, boards and commissions should not be paid for out of that appropriation but out of funds directly appropriated to the departments, boards and commissions involved.

Accordingly, you are advised that it is not possible to pay premiums on bonds covering officers and employes of the departments, boards and commissions mentioned in your inquiry out of any funds other than the appropriation to the Department of Property and Supplies "for the payment of the cost of procuring bonds required to be given to the Commonwealth by department heads and other State officers and employes."

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

Department of Property and Supplies—Bureau of Construction—Functions of Bureau of Construction.

Department of Justice,

Harrisburg, Pa., May 17, 1928.

Honorable Arthur P. Townsend, Budget Secretary, Harrisburg, Pennsylvania.

Sir: We have your request to be advised what functions the newly created Bureau of Construction in the Department of Property and Supplies should perform. We understand that the Department of Property and Supplies in creating this Bureau, intended to concentrate in it the duties of that Department relating to the repair, alteration, improvement, and construction of State buildings.

In the first place this Bureau should have full control and supervision over all construction work done on the Capitol grounds. This power should be exercised to the exclusion of all other State agencies

as that was the evident purpose of the Legislature as expressed in Section 2102 (a) of The Administrative Code.

Over all repairs, alterations and improvements to buildings not on the Capitol grounds the same section of the Code gives to the Department of Property and Supplies general supervision. This does not mean that the Department of Property and Supplies is to be in direct charge of such work but that it is to be kept informed of what is being done along these lines, so that it may make suggestions and endeavor to work out a uniform policy relating to the maintenance and construction of all State buildings wherever they may be situated.

This function of the Department of Property and Supplies can be exercised only if the departments, boards, and commissions, having jurisdiction over the buildings cooperate with the Department of Property and Supplies by consulting it and submitting to it for suggestion and recommendation proposed plans and specifications for work of this kind.

It must be noted, however, that the general supervisory power given to the Department of Property and Supplies is not universally applicable. It applies only "except as in this act otherwise provided." Specific exceptions contained in the act are as follows:

1. Welfare institutions; and
2. State armories.

With respect to welfare institutions, Section 2014 of the Code gives to the Department of Welfare power to approve or disapprove all plans for the erection or substantial alteration of any State institution and Section 2015 provides that the Department of Welfare may make rules and regulations for the making of contracts for repairs, alterations, improvements, equipment and construction of all buildings belonging to State institutions and that no contract for repairs, alterations and construction of such buildings shall be valid without the approval of the Department of Welfare as evidenced by the signature of the Secretary of Welfare. These provisions in our opinion, give to the Department of Welfare, general supervision over repairs, alterations, and improvements to buildings of welfare institutions and render it unnecessary for the Department of Property and Supplies to exercise general supervision over this class of buildings.

With respect to armories, Section 1409 of the Code specifically confers upon the Armory Board, power to erect, maintain, manage, and regulate armories; and this provision in our opinion renders it unnecessary for the Department of Property and Supplies to exercise general supervision over buildings of this class.

The Department of Property and Supplies is also directed by Section 2102 (e) of The Administrative Code to employ, and with the approval of the Governor, fix the compensation of such superintendent

or superintendents of construction as may be necessary properly to supervise the expenditure of all funds appropriated by the Legislature for building, repairing, altering, adding to or improving State buildings. These superintendents are directed to see that the plan and specifications of the architect shall be faithfully carried out by the contractors for the work, and it is provided that they shall define, determine, and decide all questions of the proper interpretation of the plans and specifications which may arise during the progress of the work, this power to be subject to appeal to and final decision by the Secretary of Property and Supplies.

In our opinion, this section contemplated the appointment of such number of superintendents of construction as could by personal inspection and supervision see to it that the plans and specifications for erecting, repairing, altering, adding to or improving State buildings are faithfully carried out. This provision is universally applicable. There are no exceptions. It is, therefore, the duty of the Department of Property and Supplies, through superintendents of construction to see that all State buildings are erected, repaired, altered, or improved according to the approved plans and specifications. This includes welfare institutions and State armories.

Superintendents of construction have no duties whatever to perform with regard to requisitions for payments to contractors. The department, board, or commission which is erecting, repairing, altering, adding to or improving a State building should decline to issue or approve any requisition for payment of a contractor doing work of this character until the superintendent of construction on the job has certified to the department, board or commission that the work covered by the requisition has been done according to the plans and specifications; and the issuance of such certificates is the extent to which superintendents of construction have a right to go with respect to the payment of contractors.

If any question arises about any requisition, while that requisition is being examined by the fiscal officers of the Commonwealth, the fiscal officers should conduct their own investigation, or if they have any inquiries which they desire to make, such inquiries should be addressed to the department, board, or commission from which the requisition came. That department, board, or commission, can, if it deems it advisable, consult the superintendent of construction respecting the inquiries of the fiscal officers, but the Department of Property and Supplies should not assume to audit requisitions for construction work or to assist in any way in such auditing.

Where an institution within the Department of Welfare undertakes to make repairs or alterations to buildings through its own employees and without contracting for the making of such repairs or alterations, the Department of Property and Supplies has no responsibility nor

does it have any power to exercise supervision over the work. The making of such repairs, or alterations is under the exclusive supervision of the board of trustees of the institution, which, however, must have the approval of the Department of Welfare for the expenditure of the moneys necessary to make the repairs or alterations.

The Department of Property and Supplies under Section 2103 of The Administrative Code has the power to establish standard specifications for all articles, materials, and supplies used by State institutions with whatever department connected; and these institutions must conform to such standard specifications or explain to the Department of Property and Supplies why other specifications were adopted. See Section 507 (b) of The Administrative Code. Any purchase of materials made contrary to the last mentioned section is illegal and would subject the purchasing officials to personal liability for the materials purchased.

Beyond the adoption of standard specifications, the Department of Property and Supplies does not have any function to perform in connection with the purchase of materials for a State institution unless the institution has requested the Department to act as its purchasing agent under Section 2103 (f) of the Code.

The adoption of specifications for the purchase of materials and supplies is not of course, a function of the Bureau of Construction of the Department of Property and Supplies, as the Department has already assigned this work to another bureau.

The Department of Property and Supplies has nothing whatever to do with the fixing or payment of architects' fees except in cases in which the architect has been employed by that Department in connection with work done on the Capitol grounds, or if elsewhere, by the use of money appropriated to it.

From what we have said the following propositions become apparent:

1. With the exception of boards of trustees of State institutions within the Department of Welfare and with the exception of the State Armory Board, all department, boards or commissions, which are about to make substantial alterations to existing buildings or to erect new buildings, should submit their proposed plans and specifications to the Department of Property and Supplies for its criticism and suggestion;

2. Proposed plans and specifications for welfare institutions or for State armories need not be submitted to the Department of Property and Supplies until they have been adopted and approved and until work under them is about to commence. They should, however, be filed with the Department of Property and Supplies before the commencement of the work so that that department may arrange through a superintendent of construction to supervise the work and see that the plans and specifications are carried out;

3. The Department of Property and Supplies cannot lawfully substitute for "capable superintendents of construction," inspectors who simply make reports to Harrisburg without themselves having the qualifications necessary to enable them to act as superintendents of construction;

4. Departments, boards, and commissions, engaged in the construction, or substantial alteration of buildings should decline to approve any requisitions for the payment of contractors until the superintendent of construction on the job has certified that the work covered by the requisition has been done in accordance with the plans and specifications. A superintendent of construction has no authority to go any further than this in his certificate and cannot be held responsible for the accuracy of any or all of its details.

5. The Department of Property and Supplies has no power or duty to pass upon requisitions for the purchase of materials or equipment for any department, board, or commission, unless the Department under its purchasing function has acted as purchasing agent. In this case, it must of course, approve the requisition before it can be paid; and

6. The Department of Property and Supplies has nothing whatever to do with the employment or payment of architects except for work done on the Capitol grounds, or for work done directly by the Department of Property and Supplies elsewhere than on the Capitol grounds.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

Status of Boards of Trustees of Welfare Institutions. Their relationship to the Department of Welfare.

INDEX

Department of Justice,

Harrisburg, Pa., June 25, 1928.

Honorable Arthur P. Townsend, Budget Secretary, Harrisburg, Pennsylvania.

Sir: We have received a number of separate requests from you for advice regarding the powers and duties of boards of trustees of State institutions within the Department of Welfare.

Your inquiries have been suggested by matters called to the attention of the several boards by auditors employed by them, at the Governor's request, to make comprehensive investigations into their affairs. You have placed before us the audits, in which appear the facts giving rise to your questions. In view of the great number of inquiries submitted to us, we shall refrain in most cases from stating the facts out of which they arise, but shall state and answer them abstractly.

We have reached the conclusion that it will be more helpful to you and to the boards of trustees if we combine in one extensive opinion answers to questions which you embodied in a number of separate requests for opinions; and we shall therefore do so, using appropriate headings to indicate the general subjects to which your questions relate.

I.

STATUS OF BOARDS OF TRUSTEES OF WELFARE INSTITUTIONS. THEIR RELATIONSHIP TO THE DEPARTMENT OF WELFARE

1. You inquire whether the several boards of trustees within the Department of Welfare are corporate bodies, and if so, what corporate powers they possess.

Prior to the passage of The Administrative Code in 1923, (Act of June 7, 1923, P. L. 498) the boards of trustees or managers of most of these institutions, were corporate bodies; but Section 2 of that act abolished the existing boards, and Section 202 created new boards of trustees to function in lieu of the abolished boards. The Code did not constitute the new boards corporate bodies.

Since 1923, several boards of trustees have been created for new State institutions within the Department of Welfare, but by the Act of April 13, 1927, P. L. 207, amending The Administrative Code of 1923, all of these boards were constituted departmental administrative boards within the Department of Welfare and their legal status was made identical with that of the boards of trustees created by The Administrative Code in 1923. There is, therefore, no difference between any of the boards of trustees of State institutions within the Department of Welfare, as far as concerns their legal status, and the question whether they have any corporate powers. The members of all of them are officers of the executive branch of the State Government, charged with the duty of performing a part of the executive or administrative work of the Commonwealth.

Accordingly, all of the boards of trustees of State institutions within the Department of Welfare are now non-corporate bodies without any corporate powers.

This brings us to the question:

2. What is the relationship between the boards of trustees of State welfare institutions and the Department of Welfare?

Speaking generally, the relationship between the Department and these boards is such that the closest cooperation is necessary to enable the Department, on the one hand, and the boards, on the other, to perform properly the duties which the Legislature has imposed upon them, respectively.

The responsibility for initiating action necessary for the management of these institutions rests with the boards; but the Legislature has decreed that in a great many matters, the boards shall procure the approval of the Department before their action shall take effect.

Thus:

(a) While the boards may take action involving the expenditure of money, they must in all cases obtain the approval of the Department to validate their expenditures. This follows from the provision of Section 305 of The Administrative Code that "in all matters involving the expenditure of money, all * * * departmental administrative boards * * * shall be subject and responsible to the departments with which they are respectively connected."

It will be noted that the supervisory power of the Department over expenditures is unlimited, and applies regardless of the course of the money which the boards contemplate spending.

(b) The boards are charged with the responsibility of preparing plans for the erection or substantial alteration of buildings; but before the plans can be carried into effect, they must be approved by the Department. Section 2014 (a) of the Code.

(c) The boards have the authority to appoint such officers and employes as may be necessary for the conduct of their institutions (Section 2019 of the Code); but in so doing they must conform to the rules and regulations of the Department on the subject (Section 2015-d).

(d) The boards may fix salaries, but in so doing they must conform to the standards established by the Executive Board (Section 2019 (e) of the Code); and as the payment of salaries necessarily involves the expenditure of money, the Department must approve them before they can take effect.

(e) The boards may make by-laws, rules, and regulations, but, to make them effective, the Department's approval must have been obtained (Section 2019-d).

(f) The boards may award contracts for repairs, alterations, equipment and construction of buildings, but all such contracts must conform to the rules of and be approved by the Department before they are binding. (Section 2015-d and e).

(g) The boards may purchase supplies, but must observe the rules of the Department on the subject (Section 2015-d). Incidentally, as we shall point out later, the boards, in making such purchases, must also conform to the standard specifications established by the Department of Property and Supplies, unless they follow strictly the procedure outlined in Section 507 (d) of The Administrative Code.

These illustrations will serve to demonstrate the necessity for the fullest cooperation between the boards and the Department of Welfare. That the Legislature intended such cooperation to exist is evident from the fact that the Secretary of Welfare was constituted, ex officio, a member of each of these boards. (Section 435 of The Code).

To summarize, it is apparent that in any matter of importance, the

board of trustees of a State welfare institution should confer with the Department of Welfare before taking definite action, so that there may be a complete accord between the board as the initiating agency and the Department as the approving agency.

The Department of Welfare has other powers and duties in connection with the operation of the institutions whose boards are within it, as follows:

To supervise them (Section 2003 of The Administrative Code).

To make and enforce rules and regulations for their visitation, examination and inspection. (Section 2004-a).

To visit and inspect them at least once in each year (Section 2004-b).

To inquire and examine into their methods with relation to their inmates or patients, the official conduct of the trustees and other officers charged with their management, and every matter and thing relating to their usefulness, administration and management or the welfare of their patients or inmates (Section 2004-b).

Whenever it finds any condition to exist which, in its opinion, is unlawful, unhygienic or detrimental to the proper maintenance and discipline of an institution, or to the proper maintenance, custody and welfare of the inmates or patients, to direct the officers in control of the institution to correct the objectionable condition "in the manner and within the time specified by the Department" (Section 2004-c).

To make recommendations to the boards of trustees with regard to standards and methods which will be helpful in the government and administration of the institutions and which will tend towards the betterment of the inmates therein (Section 2007).

To determine the capacity of the institutions (Section 2016-a).

To determine and designate the types of persons to be received by the institutions, the proportion of each type to be received therein and the districts from which persons shall be received (Section 2016-b).

To establish rules and regulations, not inconsistent with law, for determining the number of free days of care and treatment rendered to indigent persons (Section 2017-c).

In addition, the Department has further powers and responsibilities with reference to the inmates of particular classes of institutions. See Sections 2008-2013, inclusive, of The Administrative Code.

Therefore, as we have previously stated, the proper exercise of all of these powers and responsibilities of the Department, necessitates complete co-operation by the boards of trustees. Unless they give it, they are not discharging their public duty in the way in which the Legislature clearly intended that it should be discharged.

II

INSTITUTIONAL FUNDS

A. *In General*

You ask to be advised:

> 1. Whether all funds coming into the possession of the boards of trustees of these institutions as the result of their management of the institutions, are State funds, and
> 2. Whether it is lawful for the boards of trustees of State-owned mental hospitals and penal and correctional institutions to aggregate moneys received from the counties to pay for the maintenance of patients or inmates, and call them "County Funds"?

Certain boards of trustees of State institutions receive for safekeeping, money belonging to the inmates, patients or wards of their respective institutions. Those moneys are not State funds.

With this exception, all moneys coming into the possession of these boards of trustees as the result of their management of their respective institutions are State funds. This includes money received from pay patients, money received from counties or other political sub-divisions for maintenance or keeping of inmates or prisoners, and money received from any other source whatsoever for services rendered by these institutions. The institutions themselves are State-owned, and the boards of trustees, as previously stated, are agencies of the Commonwealth. In the management of the institutions there is no partnership or other community of interest between the Commonwealth and any county, city or other political sub-division. Accordingly, all funds coming into the possession of the boards of trustees by virtue of their management of their several institutions, are in the possession and become the property of the Commonwealth. This includes moneys paid by counties or other political sub-divisions.

While we are not prepared to say that it is unlawful to aggregate these moneys under the title "County Funds" or "County Accounts," such designation, if intended to describe the ownership of the moneys, is a misnomer.

B. *Bank Deposits*

With respect to the bank deposits of these institutions you ask a number of specific questions, as follows:

> "1. Under what style of title should the funds of these institutions be deposited?"
> "2. Are depositories of the funds in the possession of these institutions required to pay interest thereon?"

"3. Are depositories of such funds required to give surety bonds covering the deposits?"

"4. Do the surety bonds given by State depositories to the State Treasurer covering moneys deposited by him therein, also cover deposits made by State institutions in such State depositories?"

"5. Do active deposits of moneys advanced to these institutions by the State Treasurer out of their appropriations earn interest at the rate of 2% or 3%, if deposited in non-active State depositories?"

"6. Do active deposits of other moneys deposited by these institutions in non-active State depositories earn interest at the rate of 2% or 3%?"

"7. Does the interest earned on balances other than those arising from advanced requisitions have to be paid into the State Treasury?"

"8. If all receipts are deposited in the name of the Commonwealth, must advance requisitions be deposited in a separate account?"

All bank accounts carried by those institutions should be in the name, "Commonwealth of Pennsylvania, Board of Trustees of (name of institution)."

Under the Act of June 2, 1915, P. L. 726, the Auditor General may, under certain circumstances, draw his warrant upon the State Treasurer calling upon the State Treasurer to advance to any department, board or commission of the State government, a part of the appropriation to such department, board or commission.

Under the Act of 1915, such advances:

(a) Must be deposited in State depositories selected by the Board of Finance and Revenue;

(b) Bear interest at the rate of two per centum (2%) per annum, unless the account is inactive in which case the interest rate is three per centum (3%) per annum; this interest is payable into the State Treasury; and

(c) Should be kept in accounts separate and distinct from the account or accounts in which the other moneys of the institution are deposited.

In the case of all other deposits made by boards of trustees of state institutions:

(a) While the law does not compel the boards to confine their deposits to banks designated as "State depositories" by the Board of Finance and Revenue, nevertheless money should not be deposited in any bank or banking institution which has not been so designated;

(b) If this rule be adhered to, no special form of bond will be necessary to protect deposits, as all State depositories must have on file with the State Treasurer, bonds covering not only moneys deposited by the State Treasurer, but also by all State departments, boards or commissions. It will, however, be necessary for the boards

of trustees to ascertain from the State Treasurer whether their banks have filed with him bonds sufficient in amount to cover any moneys which the State Treasurer may have deposited with such banks and in addition thereto the institutions' deposits. If the bond of any bank is insufficient to cover this total, the interested board of trustees should require it to file additional security with the State Treasurer;

(c) If any board of trustees does deposit money in a bank which is not a State depository, it should unquestionably require such bank to furnish a bond with satisfactory corporate surety, to indemnify the Commonwealth against loss of the deposit. This bond should be substantially in the form which State depositories are required to file with the State Treasurer. Failure to require such bond might very well, in our opinion, render the members of the board individually liable if any moneys deposited should be lost; and

(d) The depositories should be required to pay interest at the rate of three per centum (3%) per annum on daily balances in accounts which are inactive; and two per centum (2%) on accounts which are active. This interest need not be paid into the State Treasury, but may be added to the funds on deposit.

We have advised you thus with regard to deposits of funds not received upon advance requisition, because in our opinion these boards of trustees should exercise no less care in selecting depositories and should require no less favorable interest payments on deposits, than the State Treasurer is compelled by law to exercise and require in depositing the funds of the State Treasury of which he is custodian.

C. Special Funds

Your questions under this heading and the preliminary statement which introduces them, are as follows:

> "These institutions receive and set aside in special funds receipts from donations given to the institution for special purposes; moneys received from a commissary or retail store maintained in the institution; and moneys received from industries carried on by patients or inmates of the institutions.
>
> "These receipts are spent without being included on the general books of the institutions.
>
> "In some cases the money is spent for items which ordinarily are considered part of the cost of maintaining the institution and therefore the true cost of maintenance of these institutions is not shown on the general books.
>
> "In other instances the moneys are spent for entertainment, amusement and similar purposes not provided for in the appropriation for maintenance of the institution.
>
> "There is no check up or control of these special funds

by anyone outside of the institution (or in the institution).''

''1. What is the legal status of these special funds?''

''2. Is it lawful for these receipts to be deposited with other receipts of the institution and 'earmarked' so that they can be expended for the special purpose for which they were given and be properly controlled and accounted for?''

''3. What supervision must the Department of Welfare exercise over these funds? What are the responsibilities of this Department in regard to these funds?''

''4. What are the duties of the Department of the Auditor General in regard to these funds? Is it the duty of this department to audit the receipts and disbursements and see that they are all accounted for and proper?''

Prior to the passage of The Administrative Code, many of the boards of trustees of the State institutions now within the Department of Welfare were corporate bodies. As such, the Legislature had specifically conferred upon them the power to accept gifts and donations of property, both real and personal, to be held by them for the benefit of their respective institutions. When, in 1923, these corporate bodies were abolished and the present boards of trustees were substituted for them, the Legislature did not endow the present boards with the right to accept gifts for the benefit of their institutions. However, in a number of cases the abolished boards of trustees had in their possession and turned over to their successors, property which had been lawfully accepted by them to be used for particular purposes specified by the donors.

Having now come into the possession of the Commonwealth, all of this property is State property; but it can be used only for the purposes for which the donors originally gave it to the corporate bodies which had the right to receive it.

Accordingly, all such property must now continue to be used for the purposes for which it was originally contributed. In cases where such property is in the shape of money, it should be segregated from the other funds of the institution by depositing it in special bank accounts, the character of which should be clearly defined on the minutes of the respective boards of trustees. As these funds are the property of the Commonwealth they are subject to audit by the Auditor General even though they be held for use for particular purposes, and even though they have been deposited in special bank accounts.

If an institution receives money as the result of the maintenance of a commissary or retail store conducted for the convenience of its

inmates, any profit earned by such commissary or store should be paid into the institution's maintenance fund.

Moneys received from industries carried on by institutions, patients or inmates of institutions must be disposed of as provided in the acts authorizing the establishment of such industries. However, in cases in which no such provision has been made, any moneys accruing from industries in which inmates are employed should be used for maintenance purposes.

To summarize, we answer your specific questions as follows:

1. All of the special funds mentioned in your inquiry are property of the Commonwealth. They are moneys received by the several institutions and as we have previously stated all moneys received by any of these institutions as the result of the services which they render or as an incident thereof are State property.

2. There is no occasion to "ear-mark" any moneys received from the sources under discussion, except moneys donated to institutions for special purposes. These moneys should be deposited in separate accounts and appropriate minutes should be made by the boards, authorizing and identifying these special bank accounts.

3. The Department of Welfare has the same responsibility for the expenditure of moneys received by institutions from outside sources as it has for the expenditure of moneys appropriated by the Legislature. Under Section 503 of The Administrative Code, all expenditures of money by these institutions are subject to the approval of the Department of Welfare.

4. It is the duty of the Auditor General to examine and audit all accounts between the Commonwealth and its officers. It follows that the Auditor General should audit all accounts of every kind and description in which moneys belonging to the Commonwealth are kept. This is just as true of a special account in which State property used for a special purpose is deposited as it is of a maintenance account or an advance requisition account carried by the institution.

D. *Patients' or Inmates' Funds*

In a number of the institutions inmates are required when they enter to turn over to the officers of the institution any money which they have in their possession. Money subsequently received from relatives or other persons must also be turned over to the institution. The officers hold these moneys in trust for the inmates to be used from time to time as directed by the inmates, subject, of course, to proper supervision by the officers of the institution.

It seems to be customary for the institutions to carry a single deposit account in which all inmates' money is deposited. The proportionate

interest of the several inmates in this fund is determinable only from the books of the institution.

You ask a number of questions with regard to such deposit accounts which we shall answer as we state them.

> "1. Have the officials of such institutions the right to use such deposits for purposes of maintenance of the institution or any other purpose except as directed by the inmate?"

The answer to this question is that all moneys in these deposit accounts are the property of the individuals from whom they are received. It would, therefore, not be proper to use any part of the moneys in these accounts for maintenance purposes or for any other purposes except as directed by the individuals to whom the money belongs.

> "2. In whom does his share of these deposits vest upon the death of an inmate without any known heirs"

In the absence of a will or other testamentary direction, the money of an inmate, who does not have any known heirs, would escheat to the Commonwealth. The procedure to be followed in such cases is the same as the procedure applicable to any other case in which moneys are escheatable to the Commonwealth.

It is, of course, entirely permissible for an inmate of an institution, if mentally competent to do so, by proper writing to direct that upon his death any funds standing to his credit shall revert to the institution to be used for general maintenance purposes or for any other proper purpose.

> "3. What disposition is to be made of interest earned upon the aggregate sum of all such deposits of a particular institution which are deposited as a whole, where an individual's deposits are so small as to make it impracticable to distribute the interest earned?"
>
> "4. Is it permissible for the institution to enter into an agreement with each inmate to pay interest only on deposits of a fixed sum, and that all other interest earned shall be spent for the welfare of the patients as the board of trustees thinks best?"

In the absence of an agreement by an inmate or a patient that the institution shall not be required to pay to him interest earned upon his proportion of the special deposit account in which inmates' funds are kept, the interest must be distributed among the inmates whose moneys were in the account during the interest period. These funds are not State property and the State is not entitled to the interest earned by them.

It is, however, entirely permissible and proper for the officers of an

institution to request inmates, except those mentally incompetent, to agree that they will be entitled to receive interest only on deposits of a fixed sum and that all other interest shall be payable into the general maintenance account of the institutions. It is proper that the officers of the institution make such request for the reason that there is substantial bookkeeping involved in the handling of these funds and accounts, and it is doubtful whether the interest earned by the special deposit account would in any event cover the cost to the institution of handling the money and keeping the accounts.

> "5. What disposition is to be made of interest which has accumulated on these deposits of the inmates over a period of years and has never been distributed?"

As there is no possible way of distributing this interest to the persons to whom it belongs, its disposition should be determined by legislative enactment. It cannot properly be turned in to the maintenance accounts of the several institutions; but in the future, interest should be currently disposed of so that such funds may not accumulate.

> "6. Who is liable for reimbursement to the patients when such deposits are embezzled by an employe of an institution?"

Neither the State nor the board of trustees of a State institution is responsible to a patient for moneys embezzled by an employe of an institution unless there was gross negligence on the part of the trustees in employing the person guilty of the embezzlement. If ordinary care was exercised in the employment of the person who committed the crime and the trustees had no reason to be on notice of the employe's dishonesty prior to the embezzlement, they could not be held liable for the money embezzled. The only liability would rest upon the person guilty of the offense.

> "7. Unclaimed accounts of inmates of some of these institutions, interest received on bank balances of inmates' cash on deposit, and interest from securities in which inmates' cash has been invested, have been credited to the Prisoner's Aid Fund and used for amusement, etc., of inmates. Is this disposition of such moneys legal?"

As already indicated, unclaimed accounts of inmates or patients of institutions are subject to escheat to the Commonwealth to the same extent and under the same procedure applicable in other cases. It is therefore unlawful for any such unclaimed moneys to be placed to the credit of the "Prisoners' Aid Fund" or any other fund under the control of the board of trustees.

Interest on bank balances and from securities in which inmates' cash is invested can be used for amusements or credited to the Prisoners' Aid Fund only if the inmates owning the cash or securities have agreed to this disposition of the interest. As the money is the property of the inmates and not of the State, it is entirely permissible for inmates, unless mentally incompetent, to agree that interest thereon may be thus used.

> "8. What supervision must the Department of Welfare exercise over these funds and what are its responsibilities in regard thereto?"

The Department of Welfare does not have any direct responsibility for these funds but it is the duty of the Department to exercise supervision over the method of handling them, just as it supervises all other activities of the institutions.

> "9. Is it the duty of the Department of the Auditor General to make an audit of these funds to see that they are properly handled?"

The Auditor General is not under any duty to audit accounts in which inmates' funds are deposited although it is entirely appropriate that the Auditor General be satisfied that any such account contains only money belonging to inmates and does not have mingled with inmates' funds any money belonging to the Commonwealth.

E. *Surplus Funds*

We understand that a number of institutions within the Department of Welfare have in their possession so-called "surplus funds."

These surpluses have accumulated from a number of sources, which it would be impossible, at this date, to trace.

You ask:

> "1. What disposition should be made of these surplus funds?"
> "2. To whom should the surplus funds of the institution revert, the counties or the State?"
> "3. In some cases expenditures have been made and charged to surplus, when these expenditures could not be charged to the State or counties. Who is responsible for such expenditures?"

These surplus funds in the hands of the boards, of trustees are State funds. The boards are not required by law to pay them into the State Treasury nor are they permitted to spend them. It is their duty to hold them intact until the Legislature determines what disposition shall be made of them.

We understand that, at present, the boards of trustees of a number of mental hospitals and of the several penal and correctional institutions are using these funds to finance the maintenance expenses of their respective institutions pending collections from the counties.

As the Legislature has provided no means of financing the maintenance of these institutions pending collections from the counties, we can see no objection to the use of these funds for this purpose. However, as county collections come in, the money borrowed from these surpluses should be restored in full.

To finance expenses for which the State is chargeable, the Auditor General has authority to grant advances against State appropriations. Accordingly, it is unnecessary to use these surplus funds, even temporarily for the payment of State appropriation liabilities.

In our opinion these moneys are subject to audit by the Auditor General to the same extent as other State moneys in the hands of State officers.

While we can see no objection to the use of these funds for temporarily financing the maintenance of the institutions pending collections from the counties, there is, as we have previously stated, no authority for the permanent expenditure of any part of these funds for any purpose. Any such expenditure would be illegal; and it would be particularly unlawful to use any of this money for expenditures unauthorized by State appropriation acts and not chargeable to the counties for the maintenance of inmates. Any officer of any of these institutions charged with the custody of these funds would be personally liable for any illegal disbursement thereof.

There are doubtless instances in which, in the past, boards of trustees have ordered parts of these surplus funds to be expended, in good faith, for the benefit of the respective institutions, believing that the disposition of these funds was wholly within the discretion of the boards; and treasurers have disbursed them as ordered. It is not the disposition of this department to seek to surcharge any officer for any such expenditure until the Legislature shall have had an opportunity to consider the entire subject of these surpluses. In the future, however, treasurers of these boards should be held strictly accountable for any unlawful expenditure of these surplus moneys.

F. *Unclaimed Wages*

You inquire:

> "What is the proper disposition of unclaimed wages, where they have been unclaimed for a considerable period of time?"

If an employe's wages have been set apart on or in a special bank account and have been and are being held for him, the fund thus created would be subject to the escheat law; and it would be neces-

sary to follow the usual procedure for the escheat of moneys in order to have these funds lawfully paid into the State Treasury.

If, on the other hand, the amount of an employes' unpaid wages has merely been set up on the books, without any setting apart of cash, and the wages have been unclaimed for such a period as to render it unlikely that a demand will ever be made for their payment, the institution may by a proper bookkeeping entry cancel the item.

III

LIMITATIONS ON AUTHORITY TO SPEND MONEY

We have already pointed out that all expenditures of boards of trustees of State institutions within the Department of Welfare must be approved in advance by the Department of Welfare. Without this approval they are not lawful expenditures, regardless of the source from which the money was received.

In addition to this requirement, there are other limitations of authority which must be observed. We shall discuss them under appropriate subheadings.

A. *Purchase of Materials and Supplies*

Section 2015 (d) of The Administrative Code provides that the Department of Welfare shall have the power and its duty shall be:

> "To make and enforce rules and regulations, not inconsistent with this act, for the making of contracts, the purchase of supplies, and the employment of persons by State institutions under the supervision of the department, * * *"

Section 2103 (a) of The Administrative Code gives to the Department of Property and Supplies the power:

> "To formulate and establish standard specifications for all articles, materials and supplies, used by the administrative departments, boards, and commissions, and by State institutions: * * *"

subject to a proviso that no specification shall be fixed as standard until it shall have been approved by a majority of the heads of the departments, boards, or commissions or of the State institutions using the article, material or supply described in the specification.

Section 507 (d) of The Administrative Code, while it permits boards of trustees of State institutions to make their own purchases independently of the Department of Property and Supplies, provides:

> "* * * That after the Department of Property and Supplies shall have established a standard specification for any article required by any such institution, it shall

> be unlawful for any such institution to purchase such article under any other specification unless such institution shall forward to the Department of Property and Supplies, at the time the purchase was made, the modified specification, the price paid thereunder, and the reason for the modification, and, whenever practicable, forward to the department for analysis a sample of the article purchased under the modified specification."

These provisions of The Administrative Code are self-explanatory. Under them the Department of Property and Supplies is directed to adopt standard specifications for articles needed by State institutions, and after such specifications have been adopted by the Department every State institution is obliged to make purchases in accordance with the standard specifications unless, in each case in which it departs from the standard specifications, it notifies the Department of Property and Supplies of such departure as provided in Section 507 (d), above quoted. In addition, boards of trustees in making purchases must conform to the rules and regulations of the Department of Welfare on the subject. These rules and regulations cannot, under any circumstances, authorize a departure from the requirements of Section 507 (d) of the Code.

If the board of trustees or the officers of a State institution make purchases of articles according to specifications other than those established by the Department of Property and Supplies and without notice to the Department of Property and Supplies as required by Section 507 (d) of the Administrative Code, the purchases are illegal and cannot be paid for out of State moneys whether such moneys be appropriated by the Legislature or collected by the institution from patients, from counties, or otherwise. For any purchases made contrary to the statutory provisions we have quoted, the person or persons who signed the purchase orders might very well be held individually liable; but as the Commonwealth would not be a party to any controversy between sellers named in illegal purchase orders and the officers or trustees executing or authorizing such purchases, we shall refrain from expressing any definite opinion on this point. We repeat that the funds administered by the boards of trustees could not be used to make payment in such cases; and if they should be thus used, the person or persons who disbursed the money, would be subject to surcharge therefor.

B. *The Erection, Alteration, Repair or Improvement of Buildings*

In a number of opinions heretofore rendered, this Department has pointed out:

1. That before any new State building can lawfully be erected, the location and exterior design thereof must be approved by the State Art Commission; and that before any substantial alteration

can lawfully be made to an existing State building, the exterior design of the alteration must be approved by the Art Commission. This is required by Section 2108 (b) of The Administrative Code; and

2. That all plans for the erection or substantial alteration and all contracts for repairs, alterations, equipment and construction of any State institution within the Department of Welfare must be approved by that department. Section 2014 (a) and (e) of the Code.

C. *The Purchase or Leasing of Land or Buildings*

You have asked several specific questions which we shall answer under this subheading, as follows:

> "1. Does a board of trustees or a superintendent have the right to acquire by purchase or lease, property for the institution, unless specific authority is given by the appropriation act?"
>
> "2. If a board of trustees or a superintendent should enter into any contracts, or receive any leases or deeds, for property acquired without specific authority, what is the legal status of these contracts, leases and deeds?"
>
> "3. Does a board of trustees have the legal right to enter into leases for a period beyond the appropriation biennium?"
>
> "4. Does a board of trustees have the legal right to enter into leases or contracts for a period beyond the designated termination of the term of office of the respective members?"

1. Boards of trustees or their superintendents do not have the right to acquire real estate for their institutions, either by lease or purchase, unless the Legislature has specifically authorized such acquisition.. See Opinion of Deputy Attorney General Emerson Collins in Official Opinions of the Attorney General, 1921-1922, p. 540, which cites Opinion of Attorney General Hensel in 15 C. C. Reports 83.

2. If a board of trustees or a superintendent of a State institution assumes, without legislative authority, to contract for, or lease, or purchase, real estate, the transaction if not wholly void, would at least be voidable and could be set aside at the instance of the Attorney General. Even a gift of real estate would be ineffective unless some officer of the Commonwealth had been authorized by law to accept a deed therefor.

Every acquisition of real estate by the Commonwealth involves responsibility for the maintenance of the property acquired; and this responsibility cannot be fastened upon the Commonwealth unless the Legislature has taken action authorizing the acquisition or acceptance of the property.

3. Assuming that a board of trustees has received an appropriation for the leasing of real estate. The authority to enter into leases only for a term coextensive with the appropriation period.

4. The terms of office of the members of a board of trustees have no bearing upon the board's right to make contracts or enter into leases. The board is a continuing body; and the board's powers are the same, whether the respective members of the board, or any of them, have just been appointed for full terms of four years, or whether the terms of the members, or of any of them, are about to expire.

D. *Appointing and Fixing the Compensation of Employes*

While the boards of trustees of State institutions within the Department of Welfare are authorized to appoint and fix the compensation of their superintendents or wardens and other employes, their authority is subject to the following limitations:

1. All such appointments must be made according to the rules and regulations of the Department of Welfare covering "the employment of persons by State institutions," (Section 2015 (d) of The Administrative Code);

2. The compensation of employes must conform to the classification adopted by the Executive Board (Section 2019-c of the Code); and

3. Under The Administrative Code, boards of trustees do not have the right to contract with superintendents, wardens or other employes for their services for terms of years. All employes are appointed without term and to serve at the pleasure of their respective boards of trustees.

IV

THE DUTIES AND RESPONSIBILITIES OF BOARDS OF TRUSTEES IN MANAGING THEIR INSTITUTIONS

You have asked a number of questions which we shall answer under the above heading, with appropriate subheadings.

A. *Fidelity Bonds*

You ask:

> "1. Is there any basis fixed by law governing the amount of fidelity bonds which these institutions should carry on their officers and employes?"
>
> "2. Are the premiums for all fidelity bonds, which are either required by statute or which may be required for the protection of the funds of the Commonwealth and the institutions, payable out of the appropriation for fidelity bonds made to the Department of Property and Supplies?"
>
> "3. If not, is it lawful for the premiums on fidelity bonds to be paid out of receipts of, or appropriations to, these institutions?"
>
> "4. With whom should fidelity bonds be deposited?"

1 and 2. In an opinion rendered to you on March 6, 1928, we answered your first two questions in part. We pointed out that

Section 219 of The Administrative Code (Act of June 7, 1923, P. L. 498, as amended by the Act of April 13, 1927, P. L. 207) makes provision for the bonding of such members of departmental administrative boards and commissions "as the heads of the various departments shall, subject to the approval of the Governor, prescribe;" that Section 219 does not make provision for the bonding of employes of boards of trustees of State institutions within the Department of Welfare; and that the premiums on all bonds which State officers and employes are required by law to give, must be paid for out of the appropriation for fidelity bonds, made to the Department of Property and Supplies by the General Appropriation Act.

Section 219 of The Administrative Code applies only to bonds "conditioned for the faithful performance of their (the State officers and employes to whom Section 219 applies) duties." There is, however, another Act, still in force, which applies to certain State officers and employes who may not be bonded under the provisions of Section 219 of The Administrative Code. The Act to which we refer is the Act of May 28, 1915, P. L. 626. It provides:

> "* * * That from and after the passage of this act, every such State official and employe, and every state official and employe who may hereafter be appointed, who shall receive and disburse public moneys, shall be required to give a good and sufficient corporate bond to the Commonwealth of Pennsylvania, conditioned that he will well and truly account for and pay out, according to law, all moneys received by him in the performance of his official duties; and the amount, when not otherwise provided by law, and character, of each bond, and the sufficiency of the surety, shall in all cases be approved by the Attorney General. * * *"

This Act requires the treasurers of State institutions to be bonded; and the premiums on these bonds are payable out of the appropriation to the Department of Property and Supplies. See Opinion of Attorney General Brown to the Superintendent of Public Grounds and Buildings, under date of June 20, 1916 (Official Opinions of the Attorney General, 1915-1916, p. 461.)

If the treasurer of an institution is a member of the board of trustees, he may be bonded under Section 219 of The Administrative Code; and if he is so bonded, his bond should be phrased so as to comply both with the requirements of Section 219 and with the Act of May 28, 1915. The bond should be conditioned both for the faithful performance of the treasurer's duties and that the treasurer "will well and truly account for and pay out, according to law, all moneys received by him in the performance of his official duties."

If the treasurer of an institution is not a member of the board of trustees (and under Section 435 of The Administrative Code he need

not be a member), or if, although he is a member, the Department of Welfare and the Governor have not required him to be bonded under Section 219 of The Administrative Code, he must give bond under the Act of May 28, 1913. In such case, the amount of his bond must be determined and the surety approved by the Attorney General.

No other bonds covering employes of State institutions can be paid for out of the appropriation to the Department of Property and Supplies, and there is no law fixing the amounts of bonds of such employes nor providing what employes, if any, shall be bonded. This is a matter entirely within the discretion of the several boards of trustees, subject to the approval of the Department of Welfare under Section 503 of The Administrative Code.

3. Premiums upon any such bonds may be paid out of the maintenance appropriations made by the Legislature to the several institutions, or out of funds available for maintenance received from any other source. See Opinion of Deputy Attorney General Kun to the Norristown State Hospital, July 6, 1916 (Official Opinions of the Attorney General, 1915-1916, p. 601).

4. All fidelity or disbursement bonds executed either under the provisions of Section 219 of the Administrative Code or of the Act of May 28, 1915, must be filed with the State Treasurer. All bonds required of employes by action of boards of trustees should be filed with such officers of the respective boards as such boards shall by resolution determine.

B. *Delegation of Duties*

You inquire:

> "Is the treasurer of a board of trustees permitted to delegate all of his duties with respect to cash to someone else? If so, is he responsible under his bond in case of a shortage of money?"

The treasurer of a board of trustees cannot properly delegate all of his duties with respect to cash to other persons. Unless he is willing to perform the duties of the office, he should not hold it. If he does permit other persons to perform his duties, he is unquestionably responsible under his bond if a shortage of money occurs.

In the event that it is not reasonably possible for the treasurer to handle all of the cash received by the institution, any persons who receive and handle money for him should be bonded. While bonding such employes would not relieve the treasurer from legal responsibility for their losses, it would, as a practical matter, enable any loss to be recouped from the bondsman of the employe at fault, thus rendering it unnecessary to call upon the treasurer to pay it.

C. *Vacations of Employes*

Your questions under this heading are:

> "1. Does Section 222 of The Administrative Code apply to these institutions?"
> "2. If not, who has power to grant vacations to employes of these institutions and for what period of time?"
> "3. Can regular employes be paid additional wages in lieu of vacations?"

1. Section 222 of The Administrative Code does not apply to employes of boards of trustees of State institutions within the Department of Welfare. Section 222 applies only to employes of departments and of the three independent administrative boards and commissions. As we have previously advised you, employes of boards of trustees of State institutions are not employes of the Department of Welfare or of any other department. Hence their vacations are not regulated by Section 222 of the Code.

2. The granting of vacations is a matter within the discretion of the respective boards of trustees, subject, however, to the rules and regulations, if any, of the Department of Welfare on the subject. The Department has the power under Section 2013 (d) of the Code to make and enforce rules and regulations for "the employment of persons by State institutions" under its supervision. Under this power, the Department could properly adopt regulations covering the granting of vacations to employes.

In the absence of such regulations, the several boards should in exercising their discretion upon this subject, follow as nearly as possible the policy enunciated by the Legislature in section 222 of The Administrative Code, namely, that fifteen working days with pay should be the normal vacation period.

3. It would not be lawful to pay additional compensation to regular employes in lieu of allowing such employes vacations. Under Section 2019 of The Administrative Code, all compensation of employes of these boards must conform to the classification adopted by the Executive Board; and the classification makes no provision for additional compensation to employes who do not take vacations.

D. *Leasing Property Away*

You inquire whether the board of trustees of an institution can lawfully lease to a tenant farmer a part of the land over which it has control.

An institution cannot lawfully lease any part of the real estate of the institution to a tenant farmer or to any other person. The Department of Property and Supplies is the only agency of the Com-

monwealth which has the right to lease away any State real estate which is under the control of the board of trustees of a State institution. This power was conferred upon it by Section 2102 (i) of The Administrative Code as amended by Section 67 of the Act of April 13, 1927, P. L. 207. The terms of any such lease are for the Secretary of Property and Supplies to prescribe, subject to the approval of the Governor in writing. The maximum term for which such a lease can be executed is one year, and thereafter from year to year.

You also ask the following question:

> "Can money received from royalties on oil taken from wells located on institutional property be used for ordinary maintenance, or must it be refunded directly to the State treasury; and what disposition is to be made of funds received as the result of depletion of forests on lands of these institutions."

In an opinion dated January 29, 1919 (Official Opinions of the Attorney General, 1919-1920, p. 185) Deputy Attorney General Bernard J. Myers advised the Superintendent of Public Instruction that:

> "* * * as there has been no Act of Assembly passed giving the trustees of State-owned normal schools the right to engage in the business of mining and selling coal, or any Act giving the Commonwealth of Pennsylvania, through any agency whatever, the right to engage in the mining and selling of coal, the trustees of the (Slippery Rock) Normal School have no such power."

This position is unquestionably sound, and there is no difference, in principle, between selling coal taken from State property, and selling oil or timber. Hence, an institution cannot lawfully permit anyone to drill an oil well on State property, or permit forest trees to be cut without express authority of the Legislature. We do not, of course, mean that a tree cannot be cut down if it is necessary for the benefit of other trees, or if it has died; but the wholesale cutting of timber would be unlawful unless authorized by Act of Assembly.

Any moneys accruing from unauthorized dispositions of oil or timber should be held pending Legislative action. It would be improper to expend the moneys for any purpose. The moneys should not be received by the State Treasurer because of the fact that its source was in illegal transaction.

E. *The Titling of Automobiles*

You ask:

> "Should automobiles owned by the various institutions be titled in the name of the Commonwealth of Pennsylvania, Department of Welfare?"

They should not be thus titled. They should be titled in the name, "Commonwealth of Pennsylvania, Board of Trustees of (name of the institution)."

F. *Workmen's Compensation.*

Your questions under this heading are:

> "1. Can employes or dependents of employes of these institutions be compensated from the appropriations made to the Department of Labor and Industry each biennium for the payment of statutory allowances for compensation; and medical, hospital and surgical expenses to injured state employes or the payment of statutory allowances for burial expenses and compensation to dependents of deceased state employes?"
>
> "2. If employes or dependents of employes of these institutions cannot be compensated from this appropriation, what is the institution's liability and should it carry compensation insurance?"

1. Whether employes or dependents of employes of State institutions can receive workmen's compensation out of the biennial appropriation to the Department of Labor and Industry for the payment of workmen's compensation to State employes, depends upon the language of the particular appropriation act. There is nothing to prevent the Legislature from including institutional employes within the purview of this appropriation if it sees fit to do so.

The language of the 1927 appropriation (Act of May 11, 1927, Appropriation Acts, p. 206) is as follows:

> "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-seven and ending May thirty-first, one thousand nine hundred and twenty-nine, to injured employes and dependents of deceased employes of the various departments of the Government of this Commonwealth, * * *"

In our opinion the Legislature did not intend any part of this appropriation to be used for the payment of workmen's compensation to employes or dependents of employes of boards of trustees of State institutions. These employes are not employes of the Department of Welfare or of any other administrative department. This view is in accordance with an opinion rendered by this Department to the Secretary of Labor and Industry on January 28, 1924, interpreting an identical provision in the General Appropriation Act of 1923.

2. Your second inquiry was definitely answered in an opinion ren-

dered by Judge William H. Keller, then First Deputy Attorney General, on December 9, 1915, and reported in Official Opinions of the Attorney General for 1915-1916, at page 194. Judge Keller advised that State institutions "are bound to insure their own employes and to pay for the same from their ordinary receipts or out of the funds appropriated for their maintenance." There has been no legislation since 1915 which in any way modifies the situation as it existed then, and you are, therefore, advised that it is the duty of all boards of trustees of State institutions within the Department of Welfare to carry workmen's compensation insurance covering their employes.

G. *Liability for Damages and Duty to Carry Insurance*

You ask:

> "1. What is the liability of these institutions for damages to individuals or non-State property occasioned by the institutions' automobiles, boilers, elevators or other property?"
>
> "2. If public liability insurance is carried in order to indemnify the institutions' employes against damages caused by their negligence in operating State property, is it to be considered as a part of the compensation of such employes?"

In an opinion dated January 13, 1921, addressed to the Secretary of the Scranton State Hospital (Official Opinions of the Attorney General, 1921-1922, p. 455), Deputy Attorney General Hull answered your first question. He held that neither the Commonwealth (citing *Collins* vs *Commonwealth, 262 page 572)* nor the board of trustees of a State institution as a body corporate could be held liable for the negligence of an employe of the institution, and that the individual members of the board could be held liable only if they personally contributed to the negligence of the employe.

When the Administrative Code (Act of June 7, 1923, P. L. 498) became effective on June 15, 1923, the boards of trustees of these institutions ceased to be bodies corporate. Since that date their members have been acting as State officers and all persons employed by them, while not employes of the Department of Welfare, are nevertheless State employes. For the negligence of such employes the trustees cannot, in our opinion, be held personally liable, unless, as Deputy Attorney General Hull stated, they personally contributed to the employes' negligence.

2. On the other hand, the individual employes of the institutions may be held liable for their negligence in operating State property. Without express legislative authority, we are of the opinion that insurance cannot be carried, at the expense of an institution, to protect

its employes from individual liability for their negligence in operating State property.

H. *Extent to Which Insurance May and Should be Carried to Protect State Property*

Your questions under this subheading are as follows:

"1. Can these institutions be reimbursed from the State Insurance Fund for:

(a) Losses by fire,
(b) Losses by tornado,
(c) Losses resulting from elevator accidents,
(d) Losses resulting from boiler explosions,
(e) Losses resulting from accidents in connection with new construction,
(f) Losses resulting from automobile accidents,
(g) Losses of automobiles by fire or theft,
(h) Losses by payroll theft or burglary."

"2. If not, is it necessary for these institutions to purchase protection of any kind and for which class of the above losses should it purchase protection?"

"3. Some of these institutions segregate their receipts and designate them as 'State' and 'County.' Is it proper for these institutions to pay out of so-called 'County Funds' premiums for fire, public liability, property damage, and theft insurance?"

Most of the above questions have been definitely answered in previous opinions of this Department, some of which we shall cite.

The State Insurance Fund was created by the Act of May 14, 1915, P. L. 524. Its administration is now vested in the Department of Property and Supplies under Section 2102 (1) of The Administrative Code.

In no case can an institution be reimbursed out of the Insurance Fund for losses, but in certain of the cases which you have specified, the Department of Property and Supplies, with the approval of the Governor, may authorize the rebuilding, restoration or replacement of the property damaged or destroyed, and the expense of such rebuilding, restoration or replacement will be paid out of the Insurance Fund.

It is unlawful for a State institution to carry insurance against any loss or damage of property which may be rebuilt, restored or replaced at the expense of the State Insurance Fund. Opinion of Deputy Attorney General Hull, January 13, 1921, above cited, in which prior opinions of this Department are reviewed. In all other cases, the boards of trustees may, in their discretion, purchase insurance.

We shall now take up the specific cases you mention:

(a) *Losses by fire*: These losses are covered by the State Insurance Fund. The purchase of fire insurance would be unlawful. Deputy Attorney General Hull's opinion, above cited.

(b) *Losses by tornado*: Such losses are losses by "casualty" and are covered by the State Insurance Fund. The purchase of tornado insurance would be unlawful.

(c) *Losses from elevator accidents*: Such losses are also "by casualty," and elevator insurance cannot lawfully be carried.

(d) *Losses resulting from boiler explosions*: Losses occuring as the result of boiler explosions would be "by casualty," and while losses to State property would be covered by the State Insurance Fund, the Legislature has by the Act of May 21, 1921, P. L. 549, expressly authorized the purchase of boiler insurance. Boards of trustees may, therefore, carry such insurance if they deem it advisable to do so.

(e) *Losses resulting from accidents in connection with new construction*: Such losses, would be "by casualty," and the situation is identical with those mentioned under (b) and (c).

(f) *Losses resulting from automobile accidents and*(g) *Losses of automobiles by fire or theft*: Damage to or destruction of automobiles by fire, or as the result of accidental collision, is covered by the State Insurance Fund, and cannot lawfully be covered by insurance. Losses by theft are not covered by the State Insurance Fund, and insurance against such losses may be carried. Opinion of Deputy Attorney General Keller, dated October 4, 1916. (Official Opinions of the Attorney General 1915, 1916, p. 268.)

(h) *Losses by payroll theft or burglary*: These losses are not covered by the State Insurance Fund and insurance against them may be carried.

2. Whether they should purchase boiler insurance or insurance to cover the theft of automobiles or losses by payroll theft or burglary rests in the discretion of the several boards of trustees. They should act with the same care which prudent business men would exercise in the protection of their own property. Conditions in the various parts of the Commonwealth and at the several institutions vary, and it would not be possible to lay down a rule which would be applicable to all such boards of trustees throughout the State, except this, that boards of trustees will never be subject either to criticism or surcharge in exercising the greatest possible degree of care in safe-guarding the Commonwealth's property which is placed in their custody.

3. Insofar as concerns expenditures for insurance there is no possible distinction between the legality of expenditures made from State

appropriations and from funds received from other sources for services rendered by the institutions. It would be absolutely unlawful to use the latter money to pay for an unlawful purchase. Notwithstanding the fact that such money is denominated "County Funds" or by another designation, it is, as we have previously advised you, State property as soon as received by the board of trustees.

I. *Collections of Moneys Due to Institutions*

You ask to be advised upon the following questions:

> "1. Can these institutions employ local attorneys to collect their bills after obtaining permission of the Department of Welfare and the approval of the Department of Justice?"
>
> "2. If so, what should be the basis of compensation to the attorneys for collecting these accounts?"
>
> "3. If they cannot employ their own attorneys, will the Department of Justice make these collections for them?"
>
> "4. If the Department of Justice makes collections, should the money collected be deposited in the general fund of the Commonwealth or be turned over to the institution to be used by it?"

Section 509 of the Administrative Code (Act of June 7, 1923, P. L. 498) provides that whenever any taxes or other accounts of any kind whatever due the Commonwealth shall remain overdue and unpaid for a period of six months, it shall be the duty of the department, board, or commission to which the money should have been paid to refer the account to the Department of Justice for collection; and it is the duty of this Department in any such case to endeavor to make the collection.

Accordingly, all State institutions should, at least once every month, notify this Department of any account which has become delinquent during the preceding month. This Department will in all such cases appoint special attorneys in localities where collections are to be made for the purpose of taking such steps as may be necessary to compel payment of the accounts due. The detailed procedure for handling these collections has been communicated to the Department of Welfare which in turn no doubt has outlined the procedure to the institutions within that Department.

There is no statutory rule fixing the amount of compensation to be paid to the special attorneys undertaking these collections. The Legislature did by the Act of April 12, 1923, P. L. 63, fix the fees of attorneys employed by the Auditor General to collect delinquent State taxes. This Department will in all cases fix the fees of local attorneys to whom collections are referred and will adhere as nearly

as possible to the schedule established by the Act of April 12, 1923, P. L. 63, although in view of the small accounts involved in some of these collections it will not be possible for us to adhere strictly to the schedule mentioned.

In all cases the compensation of special attorneys to whom these collections are referred will be deducted from the amounts collected. The balance after deducting the expenses of collection will be turned over to the institution to which the money was owing to be paid into the account into which the money would have been paid if the institution had made the collection without the assistance of this Department.

J. *Disposition of Unserviceable Property*

You inquire whether the boards of trustees of State institutions may dispose of unserviceable State property independently of the Department of Property and Supplies, and if not, what is embraced within the meaning of the word "unserviceable" as used in this connection.

Section 508 of the Administrative Code renders it the duty of every department, board or commision having possession of "any furnishings or other personal property of this Commonwealth" which are "no longer of service" to the Commonwealth "to put such property into the custody of the Department of Property and Supplies;" and it is the duty of that department, under Section 2103 (i) of the Administrative Code, to issue a receipt for such property, make record thereof, and as soon as convenient, sell it at public or private sale in the City of Harrisburg, or elsewhere, as may seem advisable. A proviso to this clause of The Administrative Code authorizes the Department of Property and Supplies to exchange on account of the purchase price of new property, any unserviceable property turned over to it, if the department, board or commission in whose possession it was, at the time of turning it over to the Department of Property and Supplies, shall requisition that Department to furnish new property of a similar character or shall request that department as purchasing agent to purchase new property of a similar character.

Accordingly, the disposition of unserviceable property of the Commonwealth in the possession of the board of trustees of a State institution is a matter exclusively for the Department of Property and Supplies.

Regarding the second part of your question, we are of the opinion that Sections 508 and 2103 (i) of The Administrative Code relate only to such personal property as was part of the equipment of an institution, and that they do not cover the disposition of produce, crops or animals raised by the institution or articles manufactured by its inmates.

Section 508 speaks of property which "shall no longer be of service" to the Commonwealth. This language clearly imports that the property shall previously have been "of service," that it shall have been in use and shall have become unfit for further use. The same expression appears in Section 2103 (i).

Accordingly, we advise you that State institutions are not required to turn over to the Department of Property and Supplies surplus products of their farms or gardens or surplus young live-stock or surplus articles manufactured by their inmates.

There is, however, no general law permitting boards of trustees of State institutions to dispose of such property except in the case of institutions "for the care and treatment of the insane, feeble-minded and epileptic persons," which may, under the Act of April 27, 1925, P. L. 307, sell or exchange, in a limited market, "supplies, manufactured articles, goods, and products * * * made, manufactured or produced" by their inmates. The market is limited to the Commonwealth, any political sub-division thereof or any State-aided institution.

Without statutory authority, State property of any description cannot be sold by any State agency having possession thereof. The inability of State institutions lawfully to sell or exchange in the open market surplus farm, garden or animal products raised by them on land owned by the Commonwealth for the purpose of raising such products, should be called to the attention of the Legislature at its next session.

V

PAYING AND FINANCING EXPENSES

You ask a number of questions which we shall discuss under this general heading.

Before answering them, we call your attention in a preliminary way, to the fact that there is no uniformity of method in providing for the payment of the expenses of operating the many institutions within the Department of Welfare.

All of them receive appropriations from the Legislature for the payment of certain extraordinary expenses; but their maintenance expenses must be met in a variety of ways. Thus the State medical and surgical hospitals pay their running expenses in part out of moneys appropriated by the State, and in part out of receipts from patients; the penitentiaries pay the salaries of their officers out of State appropriations, and the cost of keeping prisoners, exclusive of this item, must be collected from the several counties from which the prisoners were committed; and the mental hospitals pay their maintenance expenses in part out of moneys appropriated by the State

and in part out of the collections from the counties or poor districts.

In the cases of medical and surgical hospitals it is almost impossible to foretell at the beginning of the biennium whether the amounts appropriated by the Legislature will suffice for the payment of the biennium's maintenance expenses, for the reason that the collections from the patients are uncertain and vary widely from period to period.

No provision whatever has been made by the Legislature for financing the expenses of penitentiaries pending the collection of their quarterly bills from the several counties, nor has any provision been made for financing any of the other welfare institutions which must depend in part upon collections from political subdivisions of the State during the periods intervening between payments.

This state of affairs should be corrected by the Legislature, particularly in view of the answers which we shall be obliged to give in the following pages to certain of your questions.

A. *Requisitions*

Your first question under this heading is as follows:

> "1. In regard to requisitions drawn by these institutions on the Auditor General is there any law governing the basis of payment of moneys to these institutions, and if not, can the Auditor General use his discretion in this matter?"

Before answering this question we desire to call attention to the fact that all requisitions for State institutions within the Department of Welfare should be drawn by the Department of Welfare rather than by the institutions themselves.

Section 223 of The Administrative Code 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 requisitions of the head of the department with which such departmental administrative boards or commisisons * * * are connected."

This provision is applicable whether appropriations against which requisitions are issued were made to the Department of Welfare or to the boards of trustees of the institutions. *Piccirilli Brothers vs. Lewis, 282 Pa. 328, at pages 333 to 335.*

We realize that this practice is not being followed at the present time. Instead of requiring requisitions to be issued by the Department of Welfare, the fiscal officers of the State are permitting the requisitions to be drawn directly by boards of trustees to which the appropriations were made. However, before the requisitions are

honored, the approval of the Department of Welfare is required. While it would be better to comply with the explicit directions contained in Section 223 of the Administrative Code, the present practice is a substantial compliance with that requirement; but it would be entirely unlawful for requisitions for any of these boards to be honored in the absence of the approving signature of the Secretary of Welfare or her deputy.

Coming now to your question, you desire to know whether there is any law governing the basis of paying moneys out of appropriations made to the welfare institutions, and if not, whether the Auditor General may, in his discretion, determine from time to time how much of the several appropriations should be paid for expenses incurred by these institutions.

The Act of March 15, 1899, P. L. 8., which is still in force provides:

> "That all appropriations hereafter made to educational, penal, reformatory, charitable, benevolent, or eleemosynary institutions shall be paid on the warrant of the Auditor General on a settlement made by him and the State Treasurer, but no warrant shall be drawn on settlement made until the directors or managers of such institutions shall have made, under oath to the Auditor General, a report accompanied by the vouchers, containing a specifically itemized statement of the receipts from all sources and the expenses of the institution during the previous quarter, together with the cash balance on hand, and the same is approved by him and the State Treasurer, nor until the Treasurer shall have sufficient money in the treasury, not otherwise appropriated, to pay the quarterly instalments due the institution; and unexpended balances of sums appropriated for specific purposes shall not be used for other purposes, whether specific or general, and shall revert to the State Treasury at the close of the two fiscal years for which it was made."

Obviously this Act applies only to appropriations for maintenance and has no bearing whatever upon appropriations for construction, equipment or capital expenditures generally.

Under the Act of 1899 settlements are to be made on a quarterly basis and the institutions cannot be paid more than the difference between their receipts from all sources during the previous quarter and their expenses during the same period.

The only other statutory provisions which have any bearing on your question are Sections 604 and 503 of The Administrative Code.

Under Section 604 the Governor has the right to require all administrative agencies under him to submit, periodically, budget estimates showing the amounts which they propose to spend during the ensuing period prescribed by the Governor. These estimates

having been approved by the Governor, administrative agencies are prohibited from exceeding them without the Governor's approval.

Section 503 of the Code renders all of the financial operations of boards of trustees of State institutions within the Department of Welfare subject to the approval of that department.

Accordingly, the amounts which would be payable to the institutions under the Act of 1899 may be diminished if their budgets do not call for expenditures from appropriated funds of the full amounts to which they would otherwise be entitled under the Act of 1899.

With regard to appropriations for purposes other than maintenance, the only statutory provisions having any bearing upon the amounts to be expended from time to time during the appropriation period are Sections 604 and 503 of The Administrative Code to which reference has already been made. The Auditor General does not have any discretion with regard to the expenditure of these appropriations, but must be governed by the requisitions presented by or with the approval of the Department of Welfare, which requisitions must be in accordance with the budget estimates approved by the Governor.

Your next question is as follows:

> "2. If an institution's appropriation has been over-requisitioned, due to the fact that the institution has withheld the recording of cash received and has failed to report the withholding of cash on its last quarterly report for the biennium so that the amount received from the State for the biennium was more than it should have been if all cash received had been recorded and reported, should the amount over-requisitioned for the biennium be returned to the State Treasurer?"

The answer to this question is perfectly clear. In the event that an institution by failing to record and report cash received during the last quarter of the biennium has obtained more money from the State Treasury than it was entitled to receive under the provisions of the Act of March 15, 1899, P. L. 8, the excess must be refunded to the State Treasurer as soon as the error is discovered.

We understand that it has been the practice of the Auditor General to require these refunds to be made in cases covered by the above question and answer.

> "3. Have these institutions the right to expend any moneys unless approved by the Department of Welfare and the Auditor General?"

As you have already been advised, under Section 503 of The Administrative Code boards of trustees of State institutions within the Department of Welfare are "subject and responsible to" that de-

partment "in all matters involving the expenditure of money." Accordingly, the Department of Welfare's approval must be obtained for all expenditures, including those made from funds other than State appropriations. This approval need not be obtained for every item of expenditure, but may be obtained upon the basis of a classified budget, approved prior to the making of the expenditure.

The Auditor General's approval is not a pre-requisite to the expenditure of moneys not in the State Treasury; but the Auditor General, in auditing the accounts of the institution should call to the attention of the Department of Welfare and the institution any expenditures which he believes to have been illegal. If the Auditor General's view is questioned, he should request the Department of Justice to pass upon the legal question involved; and if the expenditures be held to have been illegal, the officer who made them would be liable in the amount thereof.

The responsibility of the treasurer of a State institution for the expenditure of moneys received by the institution and which are not payable into the State Treasury is exactly the same as the responsibility of the State Treasurer for disbursing moneys in the State Treasury. The expenditures must in either case be lawful.

Treasurers of State institutions have the same opportunity to protect themselves from liability as is available to the State Treasurer. If a treasurer is doubtful concerning the legality of a proposed expenditure, he should consult the Department of Justice and follow its advice. Section 509 of The Administrative Code provides that "when any officer shall follow the advice given him by the Department of Justice, he shall not be in any way liable for so doing, upon his official bond or otherwise." This provision was construed and sustained by the Supreme Court in *Commonwealth vs. Lewis*, 282 Pa. 306 (1925).

> "4. Does the Department of Welfare have the power and is it the duty of the Department to make examinations of the books, records and acts of the institutions before approving the requisitions drawn by the State institutions on the Auditor General? What are the responsibilities of the Department in this matter?"

As we have already pointed out, it is the duty of the Department of Welfare, under Section 223 of The Administrative Code, to draw all requisitions for these institutions. The present practice, however, is to permit the institutions to draw the requisitions, subject to the approval of the Department of Welfare.

Whether the Department draws or merely approved the requisitions it shares the responsibility for the expenditures covered by them (Section 503 of The Administrative Code). It follows as a necessary conclusion, that the Department has the power and the duty to make such examinations of the books, records and accounts of the institu-

tions as it may deem necessary to satisfy itself respecting the legality and propriety of all payments requested by the respective boards of trustees.

B. *Advance Requisitions*

Under certain circumstances, institutions are entitled to advancements against appropriations made by the Legislature for the payment of their expenses.

You inquire whether the institutions are limited by law as to the amount of such advance requisitions, or whether the Auditor General is given full discretion as to the amount which he should advance to any institution.

Advancements against appropriations are covered exclusively by the provisions of the Act of April 23, 1909, P. L. 146, as amended by the Act of June 2, 1915, P. L. 726

Under this Act it is lawful for the Department of Welfare on behalf of the board of trustees of a State institution (or the board, acting with the approval of the Department) to requisition the Auditor General for an advancement against its appropriation in any amount which the board feels it should have; but the amount to be granted upon such requisition is exclusively within the discretion of the Auditor General. The language of the act is:

> "* * * the Auditor General, after the approval of said requisition by himself and the State Treasurer, shall draw his warrant upon the latter officer for such sum or sums, to be paid out of the appropriation, as in the discretion of the Auditor General may be necessary * * *".

The act further provides that in no case shall the advancement exceed the amount of the bond of the officer or individual having control of disbursements from the funds advanced.

C. *Loans*

> "1. Does the board of trustees have the legal right as a body to borrow money?"

Boards of trustees of State institutions are administrative officers of the executive branch of the State government. As such they do not have the right to borrow money in the name of the Commonwealth; and as all of their acts must be done in the name of the Commonwealth it necessarily follows that they cannot lawfully borrow money, as a body, under any circumstances.

> "2. If the members of a board of trustees, either as a body or individually, borrow money and use it for their institutions, who is legally liable for the money borrowed.

If boards of trustees borrow money and use it for the operation of their institutions they are personally liable for the money borrowed.

If money is borrowed and used to pay bills for materials furnished or services rendered to an institution, the members of the board of trustees should for their own protection take from any persons whose bills are paid assignments of claim in favor of the members of the board, so that if and when appropriated funds become available to cover the purposes for which the loan was made the members of the board can collect the amounts due on the assigned claims and use the money thus obtained to repay the loans made.

> "3. If money is borrowed by a board of trustees, is the interest on the money borrowed, properly payable out of the receipts of or appropriations to the respective institutions?"

As boards of trustees do not have the power to borrow money on behalf of the Commonwealth, interest on loans made by such boards is not a proper charge against the receipts of or appropriations to their institutions.

> "4. Can accounts receivable from counties be hypothecated by the board of trustees of a State institution? Who is liable upon notes for which such accounts have been assigned as security?

Accounts receivable from counties cannot be assigned to a bank. These accounts are the property of the Commonwealth and there is no legislation authorizing any board of trustees to hypothecate them for any purpose.

Members of a board of trustees making such loans are individually liable thereon just as in any other case of unauthorized borrowing by boards of trustees.

> "5. Where an institution has purchased equipment and the notes of the institution have been given therefor, is it lawful to liquidate these notes from a deficiency appropriation granted subsequent to the giving of the notes?"

As previously stated, boards of trustees cannot borrow money in the name of the Commonwealth or in the name of such boards. Loans, if made, are the individual obligations of the trustees. Accordingly, in the case stated by you a deficiency appropriation could not properly be used to pay the notes. The boards of trustees ought to have taken from the persons who furnished equipment, assignments of their claims. Out of the deficiency appropriation these assigned claims could be paid. The money would be received by the trustees who are personally liable on the notes, and could be used by them to liquidate their indebtedness.

D. *Deficiencies*

"1. When a board of trustees creates a deficiency who is liable?"

Boards of trustees do not have any authority to incur liabilities in excess of the amounts appropriated by the Legislature plus the reasonably anticipated receipts from other sources. If liabilities are incurred in excess of this total, boards of trustees would be personally liable therefore unless the Legislature passed a deficiency appropriation to enable the excess liabilities to be paid.

"2. When a deficiency is created in one biennium and exists at the end of the biennium, can it be liquidated from the appropriation made for the succeeding biennium, or should it remain as a liability on the books until the General Assembly specifically appropriates funds to liquidate this liability?"

The answer to this question depends upon the phraseology of the particular appropriation act made for the current biennium. If that appropriation is for the period beginning June first of the first year of the biennium and ending May thirty-first of the second year thereof any deficiency from a previous biennium could not be paid out of the current appropriation. Deficiencies can be paid out of the appropriations for the current biennium only if such appropriations are made to pay bills incurred and unpaid at the beginning of the current biennium, as well as bills incurred during the current biennium.

The General Appropriation Act is always so phrased as to enable bills previously incurred to be paid out of it, but as a general rule appropriations to State institutions are not thus phrased.

E. *Diversion of Appropriations*

"Where an appropriation is made for equipment and fixed property generally, is it proper to pay out of this appropriation, expenses incurred in connection with the ordinary maintenance of the institution and if this is not lawful who is liable for the moneys so expended?"

Under no circumstances may money appropriated for equipment and fixed property be used to pay maintenance expenses. If appropriated money is diverted from its lawful purpose, the persons who disburse the moneys are subject to surcharge.

F. *Enforcement of Liability for Illegal Expenditures*

"If the Auditor General finds that money has been illegally expended by the disbursing officers of a State institution, what procedure should be followed to compel reimbursement to the institution?"

As previously stated, if the Auditor General believes that money has been illegally disbursed, and his view is questioned, it is his duty to submit the legal question involved to the Department of Justice for determination.

If the Department of Justice holds that the expenditure was lawful, the Auditor General will be guided accordingly; if on the other hand the Department of Justice holds that the expenditure was unlawful, the officer who disbursed the money must refund it to the institution. He can seek reimbursement from the party who received the money, but whether he is thus reimbursed or not, he must make a refund to the institution.

When it has been determined that an officer has illegally disbursed money, he should be notified to this effect by the Auditor General, who should also notify the Department of Welfare and the board of trustees of the institution. If the money is not refunded after such notice, the facts should be laid before the Department of Justice with a request to take such action as may be necessary to compel the person who disbursed the money illegally to reimburse the institution.

We have previously pointed out that the disbursing officers of State institutions can avoid any liability for having made disbursements by seeking the advice of this Department upon the legality of proposed disbursements before the disbursements are made.

VI

REPORTS

You state that some institutions within the Department of Welfare have been very lax in furnishing to the Auditor General and to the Department of Welfare periodical statements of accounts and affairs; you ask to be advised what the law is with regard to such reports, and how it can be enforced.

The only reports or statements which these institutions are required to furnish to the Auditor General are those which must accompany requisitions (whether made by the Department of Welfare or the respective board of trustees) for payments out of appropriations. Without these reports the requisitions cannot be honored.

Each board of trustees is required by Section 504 of The Administrative Code to make a biennial report to the Department of Welfare. This report must be made not later than September first of each even-numbered year. This is the only formal report which any of these institutions is required by law to make.

However, under Section 606 of the Administrative Code it is the duty of each board of trustees to furnish promptly to the Secretary of Welfare such information as may be needed by the Department

of Welfare for furnishing to the Governor periodical estimates of the current expenditures of that department and all boards and commissions attached to it. The only means of enforcing this provision is contained in Section 604 of The Administrative Code. Under it the Governor may notify the Auditor General in writing of the failure or refusal of any department, board or commission to present to him for approval, satisfactory budget estimates for any period, and the Auditor General, upon receipt of any such notice, must withhold the drawing of any warrant in favor of such department, board or commission until the Governor shall have notified him in writing that the delinquent estimate has been furnished and approved.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

Penal Institutions—Counties.

Relationship between State penal and correctional institutions and the counties responsible for the cost of keeping or maintaining inmates.

Department of Justice,

Harrisburg, Pa., June 26, 1928.

Honorable Arthur P. Townsend, Budget Secretary, Harrisburg, Pennsylvania.

Sir: We have your request to be advised on a number of questions regarding the relationship between the several State penal and correctional institutions and the counties responsible for the cost of keeping or maintaining inmates. We shall state and answer your questions under appropriate headings:

I.

RELATIONSHIP BETWEEN STATE PENAL AND CORRECTIONAL INSTITUTIONS AND COUNTIES, IN GENERAL

> "1. What are the relations of the counties to these institutions?"
>
> "2. Is the relationship between the counties and these institutions merely that of debtor and creditor, as far as the financial operations of these institutions are concerned?"

"3. After the counties have paid for the cost of maintenance of patients or inmates, do they have any further jurisdiction over the money which they have paid?"

"4. What rights and powers have the counties to cause an audit or examination of the books, records and accounts of these institutions?"

The following institutions are covered by your inquiry:

Eastern State Penitentiary,
Western State Penitentiary,
Pennsylvania Industrial Reformatory,
State Industrial Home for Women, and
Pennsylvania Training School.

All of these institutions are owned by the Commonwealth and are operated and managed exclusively by boards of trustees appointed by the Governor with the advice and consent of the Senate, as provided in Section 206 (b) of The Administrative Code (Act of June 7, 1923, P. L. 498, as amended by the Act of April 13, 1927, P. L. 207). The counties have no part whatsoever in their management and operation.

The counties must, however, pay the cost of keeping or maintaining the inmates of these institutions under the following Acts of Assembly:

Penitentiaries: The Act of April 23, 1829, P. L. 341, Section 9, as amended by the Act of February 27, 1833, P. L. 55, Section 5, and the Act of April 27, 1925, P. L. 354.

The Act of 1829, as amended, provided that:

"The expenses of keeping the convicts in the said eastern and western penitentiaries, shall be borne by the respective counties in which they shall be convicted, and the said expense shall be paid to the said inspectors by orders to be drawn by them on the treasurers of the said counties, who shall accept and pay the same: Provided, * * * That the said inspectors shall annually * * * transmit by the public mail, to the commissioners of such of the counties as may have become indebted for convicts confined in said penitentiaries, an account of the expense of keeping said convicts, which account shall be signed by the said inspectors, and be sworn or affirmed to by them and attested by the clerk; and it shall be the duty of the said commissioners, immediately on receipt of said accounts, to give notice to the treasurers of their respective counties of the amount of said accounts, with instructions to collect and retain moneys for the payment of said orders when presented. And all salaries of the officers of the said penitentiaries shall be paid by the State; * * * "

The Act of 1925 provides:

> " * * * That the boards of trustees of the eastern and western penitentiaries shall quarterly, as soon as may be after the first Mondays of March, June, September, and December, transmit to the county commissioners of the several counties as may be indebted for convicts confined in said penitentiaries an account of the expenses of keeping said convicts and with such accounts the said trustees shall forward their order drawn on the county treasurer of such county, who shall accept and pay the same."

Pennsylvania Industrial Reformatory: Section 17 of the Act of April 28, 1887, P. L. 63. This section provides that:

> "The managers shall cause to be kept, by the clerk, an account of the cost of the support and maintenance of each convict with the county from which he is sent to the reformatory, which said account shall annually be approved by the said managers, and, if the same be true and correct, shall be sworn to by at least three of said managers, and sent to the commissioners of the proper county, first deducting from the said cost the amount received from the labor of the said convict, if any, and for the balance the said managers shall, sixty days thereafter, draw their draft on the proper officers of the counties, respectively, for the amount so found to be due, which draft it shall be the duty of the said county officers to pay."

State Industrial Home for Women: Section 25 of the Act of July 25, 1913, P. L. 1311, which provides that:

> "The board of managers shall cause to be kept an account of the expense of the support and maintenance of each person committed to the Industrial Home with the county from which she was sent, and bills for the same shall be forwarded periodically to the commissioners of the proper county, deducting first from said bills any amount which has been received from the labor of the prisoner referred to; and it shall be the duty of the county officers to pay the balance due on said account within thirty days from the receipt of this statement."

Pennsylvania Training School: Section 19 of the Act of April 22, 1850, P. L. 538, as supplemented by the Acts of January 31, 1855, P. L. 6 and April 16, 1857, P. L. 219. This section provides that:

> " * * * the children received by said managers under the conviction of any court * * * shall be clothed, maintained and instructed by the said managers at the public expense of the proper county from which they came; and the accounts of said children shall be kept by the said managers in the same manner that the accounts of convicts in the penitentiaries are now directed to be kept by the inspectors thereof."

In all of the legislation quoted, it is quite clear that the only relationship which the Legislature intended to establish between the State and the counties was that of creditor and debtor. Accordingly, the counties have no jurisdiction whatever over the money which they transmit to the several boards of trustees in payment of the bills rendered by the boards. As soon as the boards receive the money it becomes property of the State, for which the boards are accountable to the State and to no other agency whatever.

It is also quite clear that the Legislature did not intend to give to the counties the right to question the bills rendered by the several boards of trustees, or to cause the books, records and accounts of the institutions to be audited and examined by representatives of the counties. It would be unthinkable to permit every county from which prisoners are sentenced to the Eastern State Penitentiary to make an independent audit of the records of the penitentiary; and it is clear that if one county were to have such a right, fairness would require a similar right to be accorded to all.

The Legislature has provided that the accounts submitted by these several institutions *shall* be paid by the counties. In all cases but one (that of the State Industrial Home for Women) the accounts must be sworn to by some, or all, of the trustees upon whom the Legislature has imposed the full responsibility for the accuracy of the accounts.

Accordingly we advise you:

1. That the only relationship between the State penal and correctional institutions and the counties whose inmates are confined in them, is that of creditor and debtor;

2. That the counties have no jurisdiction whatever over money paid to a State institution for the cost of keeping or maintaining inmates; and

3. That the counties do not have a right to audit or examine the books, records and accounts of State penal or correctional institutions.

II.

EXTENT OF THE STATE'S LIABILITY FOR MAINTAINING THESE INSTITUTIONS

You ask to be advised to what extent the Commonwealth assumed the liability for the cost of maintaining the institutions to which this opinion applies when these institutions were established.

An examination of the acts establishing the five institutions under discussion indicates that only in the case of the eastern and western state penitentiaries did the Commonwealth assume any part of the cost of maintaining inmates.

In the Act of April 23, 1829, P. L. 341 the Legislature provided that "all salaries of officers of the said penitentiaries shall be paid by

the State." Similar provisions were not contained in the legislation establishing either the Pennsylvania Industrial Reformatory, the State Industrial Home for Women or the Pennsylvania Training School. When the three institutions last named were established it was evidently the Legislature's intention that the counties should pay *in toto* the cost of maintaining inmates therein. This cost necessarily includes the entire overhead expense of operating the institutions.

With reference to the penitentiaries the Act of 1829, amended by the Act of February 27, 1833, P. L. 55, was superseded by the Act of April 17, 1843, P. L. 324, which provided:

> "That the salaries of the officers in the eastern and western penitentiaries shall hereafter be paid out of the funds of the respective institutions."

On September 29th of the same year the Governor approved another Act (Section 1, Clause 13, Act of September 29, 1843, P. L. 6) in which the Legislature specifically provided that in the future "in estimating the expenses of maintaining and keeping convicts," in the penitentiaries, "it shall be the duty of the inspectors to include * * * the salaries of the wardens, keepers and officers, and all other expenses necessarily incurred in the management of their respective institutions." This last provision was repealed by the Act of May 31, 1844, P. L. 582, Section 1, clause 24; but the Act of April 17, 1843, P. L. 324 was never expressly repealed and was revived by the express repeal of the Act of September 29, 1843, P. L. 6, which had repealed it by implication.

There are, however, no "funds of the respective institutions" out of which the salaries of the officers of the penitentiaries could be paid; and the Legislature notwithstanding the Act of 1843, has made appropriations at every session since 1844 for the payment of these salaries. Except for the brief period between the approval of the Act of September 29, 1843, and its repeal on May 31, 1844, there has never been any legislative declaration that the counties should be called upon to pay the salaries of officers of the penitentiaries. This may, therefore, very properly be regarded as an obligation which the State has assumed and which the counties have a right to expect it to meet, unless the Legislature shall expressly declare a change of policy in this respect.

The Legislature has also during recent years appropriated to the boards of trustees of the penitentiaries sums in excess of the amounts needed to pay the salaries of officers of the penitentiaries. It has appropriated these excess sums for purposes which are clearly maintenance purposes.

With respect to the other institutions to which this opinion applies the Legislature has also for a number of sessions made appropriations to pay in part the cost of maintaining inmates. These appropriations

have been clearly gratuitous. The counties could not legitimately have made any complaint if the State had not appropriated anything towards the maintenance expenses of these institutions, as it did not when it established the institutions undertake to do more than provide the ground and buildings necessary for their establishment.

III.

WHAT ARE MAINTENANCE CHARGES?

Generally speaking, the cost of the maintenance of the inmates of an institution includes every item of expense necessary for the physical, mental and spiritual welfare of such inmates. It necessarily includes the expense of operating the institutions and watching over and supervising the inmates in all of their activities. It includes among other items, the cost of fuel, light, food, clothing, instruction, transporation, sanitary supplies, recreation and medical care. It includes ordinary repairs to buildings of the institution and replacements of equipment which has been worn out by use. It does not, however, include a charge for depreciation of buildings and equipment.

For all of these institutions, the State has furnished the ground and buildings; and it has always been the policy of the State to pay for additions to buildings and for new buildings.

What are generally described as "extraordinary repairs" are also customarily paid for by the State, although as we shall point out later, a number of opinions have been rendered by former Attorneys General holding that the cost of new heating or plumbing systems or the substitution of an electric light system for a gas light system may be regarded as "maintenance" charges. In our opinion such items should not ordinarily be included as parts of the cost of maintenance. They represent the cost of extraordinary repairs, and should be paid for by the owner of the buildings, which in all of the cases under discussion, is the State.

We shall briefly refer to opinions heretofore rendered by this Department in support of our definition of maintenance as heretofore given.

With respect to the penitentiaries the obligation of the counties as contained in Section 9 of the Act of April 23, 1829, P. L. 341 as amended by the Act of February 27, 1833, P. L. 55 was to pay "the expenses of keeping the convicts." This language was construed by Deputy Attorney General Wolf in an opinion rendered to the warden of the Western State Penitentiary on October 15, 1913, and reported in 42 County Court Rep. at page 193. Deputy Attorney General Wolf said:

> "There is no reasonable distinction between keeping and maintaining, and the word 'maintenance' has been

> construed by this department, in at least four cases as sufficiently broad to include the cost of repairing buildings, roads, sidewalks, and machinery."

Opinions of former Attorneys General Hensel, McCormick, Carson and Elkin were reviewed by Mr. Wolf. In one of these, Attorney General Hensel said:

> "A fair and liberal construction of an appropriation for maintenance would be to supply dilapidation, to arrest, prevent or remedy decay, to maintain or restore, to erect where destruction has taken place; for example; To paint buildings from time to time; to restore worn out furniture; to erect a fence where one has fallen down; to replace insecure or dilapidated walks, ceiling, or foundations, etc."

In another of the opinions cited, it was held that the installation of a new heating or plumbing apparatus would be a proper maintenance charge; in another that the substitution of an electric lighting system for a gas system would be such a charge; and in another the installation of a proper sewage system.

The appropriation to the Western Penitentiary, made by the 1913 Legislature, designated "extraordinary repairs" as one of the purposes for which the money might be expended. Deputy Attorney General Wolf concluded, therefore, that "ordinary repairs" should be included in computing the cost of "keeping" prisoners.

In an opinion to Western Penitentiary, dated April 28, 1916, Judge (then Deputy Attorney General) Hargest held that books, stationery and postage for prisoners are proper maintenance charges (Official Opinions of the Attorney General, 1915-1916, p. 529).

IV

SPECIFIC QUESTIONS RELATING TO "MAINTENANCE" CHARGES

"1. Who are the 'officers' of the penitentiaries?"

As the State has always, except for a very brief period, assumed the payment of the salaries of the officers of the penitentiaries, and as the compensation of all other employes is clearly chargeable to the counties, your question is very pertinent to a correct understanding of the relationship between the State and the counties in paying the expenses of these institutions.

We are of the opinion and advise you that all persons are "officers" who hold, in the penitentiaries, positions of authority over the inmates, or who, without having any authority over the inmates, have been designated as "officers" by the respective boards of trustees.

The only prior ruling upon this question was contained in an opinion by Deputy Attorney General Collins to the warden of the Western Penitentiary, dated September 7, 1921 (Official Opinions of the Attorney General, 1921-1922, p. 442). It was held that the "prisoners' storekeeper" and the institution's chauffeurs are not "officers" and that their compensation is, therefore, chargeable to the counties. Deputy Attorney General Collins in reaching this conclusion, stressed the fact that chauffeurs "perform no service as guards, their entire time being taken in operating * * * automobiles."

> "2. Is it proper for these institutions to charge a portion of an employe's salary to the State and a portion to the counties? Is it proper to charge any salaries to the counties when the State provides an appropriation therefor?"
>
> "3. What salaries and wages can be charged to the State appropriation; to county maintenance?"

In the case of the penitentiaries, the counties cannot under any circumstances be asked to pay any part of the salaries of the "officers" thereof. These salaries could not, therefore, be paid in part out of the State appropriation, and in part out of moneys collected from the counties.

The compensation of all other employes of the penitentiaries, whose services are necessary for "keeping the convicts," and the compensation of all the employes of the other three correctional institutions, whose services are rendered in connection with the maintenance of inmates, are maintenance charges payable by the counties. If, however, the Legislature has provided funds which can be used for the purpose, and the Governor and the Department of Walfare have approved budgets permitting it, there can be no objection to a division of salaries between the State and the counties.

In the case of any of these institutions, the State must pay in full the compensation of employes engaged in parole work or any other activities foreign to the maintenance of inmates within the institutions.

Parenthetically, we call attention to the fact that all salaries must be fixed in accordance with the Executive Board's classification, regardless of the question whether they are paid out of State appropriations or money collected from the counties.

> "4. Can an institution pay for the cost of a superintendent's trip to Europe to attend an association meeting?"

Such an expense could not possibly be charged to "maintenance" and collected from the counties. On the other hand, if the board

of trustees, with the approval of the Department of Welfare, believe that the superintendent's presence at an association meeting abroad is necessary "for the proper conduct of the work of the board," his expenses may be paid out of a State appropriation which permits expenditures for "any other expense necessary for the conduct of the proper work of the board."

It would not be proper to pay such an item from any State money which happens to be in the board's possession, merely because the Legislature has never determined what disposition shall be made of it.

> "5. Can an institution charge an expenditure to county maintenance if no appropriation from the State provides for the same?"

If the expenditure is a proper charge against maintenance, it may be charged to the counties in the discretion of the board of trustees even if there is a State appropriation from which it could be paid; and if there is no such appropriation, it is the board's duty to charge it to the counties. If the expenditure is not a proper charge against maintenance, the counties cannot be asked to pay it, merely because there is no State appropriation from which it can be paid.

> "6. If the Auditor General refuses payment of certain expenditures out of a State appropriation, do these institutions have authority to charge these expenditures to the counties or to their surplus accounts?"

The answer to this question would depend entirely upon the Auditor General's reason for refusing payment out of the State appropriation. If the refusal is solely upon the ground that the items refused are not within the language of the appropriation act, they may nevertheless be proper charges against maintenance and collectible from the counties.

If this is not the case, and the expenditures were neither maintenance expenditures nor authorized by an appropriation act, it would be improper to pay them out of "surplus;" for as we have recently advised you these surplus funds are State property which the boards may not dissipate without legislative authority.

> "7. A number of the officers of a State penal institution worked over-time and were given additional compensation therefor. This additional compensation was charged to counties. Should these officers have been employed over-time and should the board of trustees have paid additional compensation for this over-time work?"

As the State undertakes to pay the salaries of officers of these institutions, it is not proper to charge to the counties as a part of the cost of maintenance of prisoners, extra pay to officers of the in-

stitution for over-time work. If these officers are entitled to extra pay for over-time work, such pay must come out of the the State appropriation, and it can be paid out of State appropriation only if approved by the Department of Welfare.

Whether officers should be employed and paid for over-time is a matter to be determined by the board of trustees, subject to the rules of the Department of Welfare governing the employment of persons by these institutions.

V.

BILLINGS TO COUNTIES

> "1. The practice in these institutions has been to bill the counties at the end of each quarter. For this reason the institutions are short of funds towards the end of the quarter. Is it lawful for the institutions to bill the counties in advance on an estimateed cost, the same as the institutions draw advance requisitions against State appropriations?"

Under the legislation quoted under the first heading of this opinion, it is obligatory upon the penitentiaries and the Pennsylvania Training School to send their bills to the counties quarterly; the Pennsylvania Industrial Reformatory must send its bills annually; and the State Industrial Home for Women is authorized to forward its bills "periodically."

In the latter case, the periods may be as determined by the board of trustees of the Home. Bills may be sent on a monthly, quarterly, or annual basis.

In none of these cases would it be lawful for the boards of trustees to bill the counties in advance, on an estimated basis.

The situation to which your question refers is very unbusinesslike and should be remedied by appropriate legislation; but it cannot be remedied in any other way.

> "2. Some of these institutions' expenses have been contracted and not charged to counties. Is it proper for the institution to defer to future periods any part of the maintenance charges for the current period?"

It is not proper for any of the insituttions to which this opinion applies to defer to future periods actual expenses of maintenance for the period for which an account is rendered. The reason for this is obvious;

The population of these institutions is rarely, if ever, exactly the same during two successive periods; and the relative number of inmates from the several counties is not likely to be the same. To defer a charge from one period to another involves, therefore, a pos-

sible, and an almost inevitable, undercharge to certain counties for the current period, and an overcharge to other counties for the future period.

The insitutions may, however, bill the counties upon a consumption basis rather than upon an expenditure basis, and to do so would be a much more exact method of computing costs. For example, if in the month of April, an institution purchases and pays for the coal which will be consumed during the next winter, it would be grossly unfair to charge the amount paid out for coal in April as a part of the maintenance cost for that month. The cost of the number of tons of coal actually used in November should be included in the cost of maintenance for November at the price per ton paid in April.

> "3. Should the Eastern State Penitentiary bill the Pennsylvania Industrial Reformatory for the maintenance of inmates transferred by it, or should it bill the county from which the inmate was originally committed to the reformatory? (See Act of July 11, 1923, P. L. 1044.)"

We regard it as extremely doubtful whether, under the Act of July 11, 1923, P. L. 1044, prisoners can be transferred from the Pennsylvania Industrial Reformatory to a State penitentiary. The Act of 1923 applied only to transfers from institutions for "adult prisoners." The Reformatory, under the Act of June 8, 1881, P. L. 63, Section 9, is an institution for "male criminals, between the ages of fifteen and twenty-five." Boys between the ages of fifteen and twenty-one are not adults; and the Reformatory is, therefore, not, distinctively, an institution for "adult prisoners."

If, however, the Act of 1923 does permit inmates of the Reformatory to be transferred under its provisions to a penitentiary, the board of trustees is obliged to bill the county from which the prisoner was originally convicted, and not the Reformatory, for the maintenance of such prisoner. This is clearly the meaning of Section 4 of the Act of July 11, 1923.

In the case of inmates of the Reformatory who are sentenced by the Courts of Huntingdon County, to a penitentiary, Section 3 of the Act of June 3, 1893, P. L. 280, expressly provides that the penitentiary shall bill the county,—not the Reformatory,—for the maintenance of such prisoners.

> "4. Can a board of trustees cancel charges of a particular kind to one county without giving the same consideration to other counties? In one instance a board of trustees reduced the bill of Philadelphia County in the amount of the cost of certain repairs which Philadelphia County refused to pay."

As previously pointed out, ordinary repairs are to be included in the calculation of the cost of "maintenance." If an item for such repairs is included in one county's bill for a given period, a similar item must be included in the bills of all counties for the same period.

If, on the other hand, an item for extraordinary repairs was improperly included in computing the maintenance costs for a period, and the bill of one county is reduced by eliminating this item, the bills of all counties must be likewise reduced for the same period.

> "5. Do these institutions have the right to charge counties a maintenance cost per day in excess of the actual cost? In some cases the amount charged the counties is just a few cents above the actual cost but this amount spread over a period of years has permitted these institutions to create quite a surplus fund."

None of these institutions has a right to charge counties a maintenance cost per day in excess of the actual figures shown by the books and records of the institution. No matter how small the per diem excess charge may be, it is improper and unlawful. The records of these institutions should be so kept that the actual maintenance cost for every period can be determined with precise exactness.

> "6. The Pennsylvania Industrial Reformatory under the law must keep records on a fiscal year basis ending May 31. The institution bills counties for maintenance on a calendar year basis. Can it render its bills on any basis other than the calendar year?"

Section 17 of the Act of April 28, 1887, P. L. 63, provides that the clerk of the Reformatory shall keep "an account of the cost of the support and maintenance of each convict with the county from which he is sent to the Reformatory, which said account shall annually be approved" by the managers and forwarded to the counties for payment.

While Section 607 of The Administrative Code definitely established a fiscal year ending May thirty-first for all departments, boards and commisisons, it did not make provisions for readjustment of the accounting between the Reformatory and the counties. Accordingly, any county might object to the receipt during any one twelve months' period, of more than one bill from the Reformatory for the same inmate. However, for all new inmates, bills could lawfully be sent to the counties for the first fiscal year period, so that in the course of time, a gradual readjustment to the fiscal year basis would be accomplished.

A better plan would be to ask the Legislature to correct this situation by an amendatory Act.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

State hospitals—Physician employed by—Right to charge patient—Refund of fees collected—Physician on pay-roll of corporation.

1. Physicians employed by State hospitals on a salary basis may not charge and retain fees for services, but all fees collected must be turned over to the institution.

2. Neither the board of trustees nor the executive board has power to authorize salaries with the additional right to retain such fees.

3. Fees collected in the past and retained by physicians should be refunded to the State Treasury.

4. A physician who is a part-time employee of the State may legally be retained on the pay-roll of a corporation for services rendered outside the hospital.

State hospitals—Free and pay service—Rules and regulations—Amount chargeable to employees under Workmen's Compensation Act of 1919.

5. The extent of free service in the various State hospitals depends on the statutes under which they were created. In the Ashland, Blossburg, Connellsville, Philipsburg and Scranton State Hospitals, indigent patients must be treated free, while those able to pay should be compelled to do so. In Hazleton and Shamokin hospitals injured laboring men must be treated without charge, subject to the duty of their employers to pay hospital charges under the Workmen's Compensation Acts, while all others who are able to do so should be required to pay. At Nanticoke and Coaldale, the question of charge is in the discretion of the boards of trustees.

6. In computing charges to employers for the first thirty days of disability, under section 306 of the Workmen's Compensation Act of June 26, 1919, P. L. 642, the amount is unlimited and may include the same charges for services, medicines and supplies as are usually charged paying ward patients for similar services.

7. After the expiration of the thirty-day period, the patient may be charged for treatment unless he is within the class entitled to free treatment.

Department of Justice,

Harrisburg, Pa., June 26, 1928.

Honorable Arthur P. Townsend, Budget Secretary, Harrisburg, Pennsylvania.

Sir: We have your request to be advised with regard to certain questions which the recent audits of State hospitals for the sick and injured have suggested.

We shall state and answer your questions, in their order:

I

PHYSICIANS AND SURGEONS COLLECTING FEES FOR THEIR OWN BENEFIT

> "1. Where physicians and surgeons are employed on a salary basis, can these physicians and surgeons charge and collect fees for their own benefit?"

In our opinion it is unlawful for any physician or surgeon employed by a State hospital on a salary basis, to charge and collect fees for his own benefit, for services rendered in the institution.

Any fees or charges collected for such services should be turned over to the institution. These hospitals are State institutions, conducted in State-owned property and operated by State employes. In all cases in which the circumstances justify a charge for the use of the hospital's facilities, or for services rendered by employes of the hospitals, the amounts collected belong to the State and should be used to defray, pro tanto, the hospitals' expenses.

What we have said applies to all physicians and surgeons employed by these hospitals on a salary basis, whether for part time service or full time service.

> "2. Has the Executive Board the right to authorize salaries with permission to also collect fees?"
>
> "3. Have the Boards of Trustees power to permit by resolution, physicians and surgeons to collect not only salaries but also fees, without record being made in the hospital books?"

The Executive Board does not have the power to permit salaried physicians or surgeons to collect and keep fees for services performed by them in State hospitals.

Section 709 of The Administrative Code authorizes the Executive Board:

> "To standardize the qualifications for employment and all titles, salaries, and wages of persons employed by the administrative departments, boards, and commissions * * *"

To permit salaried employes of the State to collect and retain for their own use fees for services rendered by them on State property and directly or indirectly incidental to their State employment, would clearly not be standardizing their compensation.

The Executive Board has not yet established a standard salary for superintendents of State institutions. Accordingly there is as yet no standard for these positions to which the boards of trustees can con-

form. However, pending the adoption of such a standard, the boards must "fix" the compensation of their superintendents. To let a superintendent receive fees from patients is not fixing his salary, and any arrangement contemplating the receipt of fees from patients as all or a part of his compensation, would clearly be illegal.

What we have just said has been true only since the passage of The Adminstrative Code. Prior to that time the several hospitals were managed by corporate boards of trustees, whose actions in contracting with their respective employes, including superintendents, was not restricted as it is under the Code.

Accordingly, we advise you that neither the Executive Board nor the boards of trustees of State hospitals could lawfully permit salaried employes to retain as part of their compensation, fees received from patients.

> 4. "Is it lawful for a physician or surgeon on the payroll of these institutions to be on the payroll of a corporation?"

If the physician or surgeon is a full-time employe of the institution he could not lawfully also be on the payroll of an individual, a partnership or a corporation.

If the physician or surgeon is only a part-time employe of the State, he may lawfully be on the payroll of a corporation for services rendered by him *outside of the institution.*

As previously stated, no State employe can lawfully retain for his own use fees or compensation for services rendered by him in the institution. These institutions were not established and cannot be used for private gain. Any emoluments for services rendered in them by any physician or surgeon on the State's payroll, should be paid to the respective institutions.

> 5. "If the collection of fees by physicians and surgeons is illegal should these fees collected in the past be refunded to the State Treasury?"

Fees which have been illegally retained by physicians and surgeons employed by a State hospital, should be refunded. If such fees had been paid to the institution when they were collected, they would have reduced the State's appropriation liability to the hospital; and any moneys refunded by physicians or surgeons should be paid into the State Treasury.

II.

FREE SERVICE

> "Do the board of trustees either as a body or individually, the surgeon-in-chief or any other persons have the

legal power to authorize free treatment to patients financially able to pay?"

There are ten State hospitals for sick and injured persons. With the exception of three of them which were created by the same Act of Assembly each hospital was established or acquired as a State institution by a separate Act. The three hospitals which were created by the same Act are the Blossburg, Connellsville and Philipsburg State Hospitals. The Acts differ in a number of particulars so that a general rule cannot be stated, governing the extent to which free service shall be rendered in all State hospitals for the sick and injured.

On November 15, 1923, Deputy Attorney General J. W. Brown rendered an Opinion to Honorable C. W. Hunt, Deputy Secretary of Welfare, in which he covered in detail the extent to which free service must be rendered by the hospitals in question. See Official Opinions of the Attorney General, 1923-1924, page 369. For your convenience we shall restate Deputy Attorney General Brown's conclusions, as follows:

1. In the Ashland, Blossburg, Connellsville, Philipsburg and Scranton State Hospitals, indigent injured patients must be treated without charge. Injured patients who are not indigent should be made to pay the hospitals' established charges for the services rendered.

If any patients other than injured patients are admitted, the same distinction prevails,—indigent patients should be treated without charge, and all others should be required to pay.

2. In the Hazleton and Shamokin State Hospitals, persons injured in mines or workshops and on railroads and injured laboring men generally must be treated without charge, subject to the duty of their employers to pay for medical and hospital services under the workmen's compensation laws to which we shall refer later.

All other patients, unless indigent, should be required to pay the hospitals' established charges for the services rendered.

3. There are no statutory provisions specifying what classes of patients shall be admitted to the Nanticoke and Coaldale State Hospitals, or what classes of patients shall pay. Their boards of trustees, with the approval of the Department of Welfare, must, therefore, deal with these matters in the rules and regulations governing the operation of their respective institutions.

Subsequent to the date of Deputy Attorney General Brown's Opinion there has been no change in the law which requires any modification of the views expressed by him.

Clearly the matter of payment for services rendered should be definitely covered by the rules and regulations of the several hospitals; and if the rules and regulations require all persons to pay who are financially able to do so (and this may be done except at Hazel-

ton and Shamokin, where persons injured in the mines or workshops, or on the railroads, and injured laboring men must be treated free to the extent to which their employers are not liable under the Workmen's Compensation Act), neither the board of trustees nor any member thereof nor the superintendent nor the surgeon-in-chief nor any other officer or employe, may make any exception in favor of any individual patient. All patients, unless they are indigent, must pay; and this rule must be administered uniformly and without exception.

All free cases should, of course, be ward cases. A person not wholly indigent but unable to pay in full for ward treatment should be required to pay as much as he can.

III

INSTITUTIONS COLLECTING FEES FOR THEIR OWN BENEFIT

1. "In addition to the board and general hospital service, is it lawful for these institutions to charge, collect and retain for their own use, fees from all classes of patients for medical and surgical services rendered by their salaried staff?"
2. "Should the ward rate charged patients be less than the per diem cost?"
3. "Can the hospital collect full ward rate plus physicians, surgeons, operating-room and X-ray fees in compensation cases?"
4. "In compensation cases where the injured employe remains in the hospital beyond the statutory thirty day period, is the employe personally responsible for services rendered by the hospital after the end of the statutory period and have these institutions the right to collect medical and surgical fees as well as hospital charges from the patient for services rendered beyond the thirty day period?"

1. Your first question under this heading has already been answered. It is not lawful for these institutions to collect fees from all classes of patients, for medical and surgical services rendered by their salaried staff, as certain classes must be treated free of charge, as stated under the preceding heading. It is lawful for these institutions to charge, collect and use for maintenance, fees received for medical and surgical services rendered by their salaried staff to any and all patients other than those who must be treated without charge.

The ward rate charged to patients should be, as nearly as practicable, the actual cost of the service rendered.

2. In compensation cases these institutions are entitled to collect from employers the cost of surgical, medical and hospital services and medicines and supplies furnished to injured employes, notwithstand-

ing the fact that the injured employes would be entitled to free service, if their cases did not come within the provisions of the Workmen's Compensation laws. This point was expressly decided by the Supreme Court of Pennsylvania in *Trustees of State Hospital* vs. *Lehigh Valley Coal Co.*, 267 Pa. 474 (1920).

With regard to the amounts collectible by the hospitals, the situation is as follows:

Section 306 (e) of the Workmen's Compensation Act of 1915, as amended by the Act of June 26, 1919, P. L. 642, provides that:

> "During the first thirty days after disability begins, the employer shall furnish reasonable surgical and medical services, medicines, and supplies, as and when needed, * * * The cost of such services, medicines, and supplies shall not exceed one hundred dollars. * * * In addition to the above services, medicines, and supplies, hospital treatment, services and supplies shall be furnished by the employer for the said period of thirty days. The cost for such hospital treatment, service, and supplies shall not in any case exceed the prevailing charge in the hospital for like services to other individuals. * * * "

The Superior Court, in *Denne* vs. *Plymouth Coal Mining Company*, 91 Pa. Sup. Ct. 429 (1927), held that under this Section the amount of the employer's liability for "hospital treatment, services and supplies" furnished during the first thirty days after disability begins is unlimited; and that a ruling by the Workmen's Compensation Board attempting to limit such liability to one hundred dollars was void.

Accordingly in computing the amounts of these charges, the hospitals should include all items which they would charge to paying ward patients for similar services. These items would include the full ward rate plus charges for services of physicians or surgeons on the hospital staff, fees for the use of the operating room and of X-ray apparatus, if such charges are customarily made as a part of the cost of treating paying ward patients. The employer cannot, however, be required to pay any item which would not be charged against the patient if he were in the hospital as a paying ward patient.

3. Your last question was answered by Attorney General Francis Shunk Brown in an Opinion dated February 17, 1916, (Official Opinions for 1915-1916, page 575). He held that if the hospital is required to furnish care and services beyond the period during which the employer is required to furnish such services, the hospital may charge the injured person with the cost of treatment unless the injured person is within the classes of persons who are entitled to free service, in

which case a charge could not properly be made under any circumstances.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

Hospitals.

Relationship between State mental hospitals and the several counties.

Department of Justice,

Harrisburg, Pa., June 26, 1928.

Honorable Arthur P. Townsend, Budget Secretary, Harrisburg, Pennsylvania.

Sir: In this opinion we shall reply to a number of questions which you have asked regarding the relations between State mental hospitals and the several counties. Your questions are as follows:

I

"What are the relations of the counties to these institutions?"

II

"Are the relations between the counties and these institutions merely those of debtor and creditor, as far as the financial operations of these institutions are concerned?"

III

"After the counties have paid for the cost of maintenance of patients or inmates, do they have any further jurisdiction over these funds?"

IV

"What rights and powers have the counties to cause an audit or examination of the books, records and accounts of these institutions?"

V

"If a county desires additional information as to the records of the patient from that county, can it hold up the payment of its bill until the institution furnishes the information?"

VI

"The practice in these institutions has been to bill the counties at the end of each quarter. For this reason the institutions are short of funds towards the end of the quarter. Is it unlawful for the institutions to bill the counties in advance on an estimated cost the same as the institutions draw advance requisitions against State appropriations?"

A—HOSPITALS FOR THE INDIGENT INSANE

The care and treatment of mental patients in institutions of all classes is the subject of the Act of July 11, 1923, P. L. 998. Section 503 of that Act deals with the payment of the cost of care and maintenance, including clothing of indigent persons committed to or confined in State mental hospitals. It provides that as far as possible the expense of maintaining such patients shall be paid out of their property or by their relatives, if any, who are liable for their support. In the case of indigent persons, who have no relatives liable to pay for their maintenance, the Act provides that the cost of care and maintenance or the proportion thereof which cannot be collected from the patient or the person liable for his support "shall be paid by the county or the poor district or municipality which is liable for his support and by the Commonwealth in the proportion which is now or shall hereafter be fixed by law."

The Act of April 7, 1927, P. L. 157, provides:

> "That the expense of the care and treatment of the indigent insane, whether chronic or otherwise, in the State * * * hospitals for the insane, is hereby fixed at the uniform rate of three dollars per week for each person, including clothing chargeable to the respective county or poor district from which such insane person shall come, and the excess over said three dollars per week shall be paid by the State; but in no case shall said excess exceed three dollars per week for each indigent insane person."

The State institutions for mental patients are all administered by boards of trustees created by Section 202 of The Administrative Code (Act of June 7, 1923, P. L. 498, as amended by the Act of April 13, 1927, P. L. 207). The counties have no part in the selection of these boards, nor have they any voice in the work for doing which the boards are responsible. The institutions are exclusively State institutions and there is no relation of any character between the State and the counties as far as their operation is concerned.

Accordingly, the only relation between the State and the counties under the legislation to which we have referred at the beginning of this opinion is that of creditor and debtor.

The counties are liable for a definite charge of three dollars per week for each person for whose maintenance they are responsible. This charge becomes due from the counties to the State regardless of the total cost of maintaining patients in the respective institutions and regardless of the weekly cost in any particular institution.

It follows that there could be no possible reason why a county should claim or be given the right to audit the books of a State institution for indigent mental patients, and that the counties cannot lawfully decline to pay bills for maintenance of patients chargeable to them because they desire additional information respecting the records of any of the patients for whose maintenance they are being billed. If a county doubts that a particular patient has been in an institution during the period for which the county is asked to pay maintenance, the institution should furnish the county with satisfactory proof that the patient has been cared for during the period. That, however, is the only type of information to which the counties are entitled.

What we have said disposes of your first five questions.

In answer to your sixth question, we beg to advise that if these institutions cannot finance themselves from quarter to quarter there is nothing to prevent them from billing the counties at intervals of a month rather than upon a quarterly basis. It would not, however, be lawful to bill the counties in advance on the basis of an estimate of the number of patient weeks for which the counties will, respectively, be liable for the current period. This could be done only if there were specific statutory authority permitting it. There is no such authority.

B—HOSPITALS FOR THE CRIMINAL INSANE.

The Farview State Hospital is the only institution of this class.

If a person convicted of, and under sentence for, crime is committed to a hospital for mental diseases, the county in which the person was committed to the hospital must pay, during the term for which the prisoner was sentenced, the expenses "of the care and treatment, including clothing" of such person. After the sentence has expired, if the person remains in the institution, the proper county must pay the same rate which it would pay if such person were an inmate of an institution for the indigent insane. Section 507 of the Act of July 11, 1923, P. L. 998. Collections of such expenses from counties required to pay them must be made by the institution in which such insane persons are confined.

If a county questions the amount which it is asked to pay as representing the cost of caring for, maintaining and clothing insane prisoners under sentence, for whose maintenance and clothing the county

is responsible, the institution should promptly endeavor to satisfy the county of the accuracy of its bill. This should be done regardless of the institution's legal duty to do so. However, the county does not have the right, through its own employes or otherwise, to insist upon auditing and examining the books and records of the institution.

In addition to the questions quoted at the beginning of this opinion you asked another question which is solely applicable to the relations between the counties and the Farview State Hospital, namely:

> "Was it the intention of the Act of July 11, 1923, P. L. 998, to establish an annual rate for clothing patients to be charged to counties, or is the institution to be reimbursed for only the cost of such clothing?"

It is our opinion that under Section 507 of the Act of July 11, 1923, P. L. 998, the counties can be charged only with the actual cost of clothing insane prisoners. It would, therefore, be unlawful to attempt to collect from the counties an annual rate for clothing prisoners.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

State Institutions—Department of Welfare—Inmates.

Employment of inmates and patients of State institutions and the disposition made of products raised or made in or taken from property of State institutions.

Department of Justice,
Harrisburg, Pa., June 29, 1928.

Honorable Arthur P. Townsend, Budget Secretary, Harrisburg, Pennsylvania.

Sir: In this opinion we shall advise you with regard to the employment of inmates and patients of State institutions within the Department of Welfare, and the disposition of products made or raised in or taken from the property of such institutions.

I

STATE HOSPITALS FOR MENTAL PATIENTS AND MENTAL DEFECTIVES

Under Section 601 of the Act of July 11, 1923, P. L. 998, every

mental patient in any institution or place for mental patients within the Department of Welfare has, among others. the following rights:

> "(c) To be employed at a useful occupation in so far as the condition of such patient may permit, and the institution or place is able to furnish useful employment to the patients;"

and

> "(d) To sell articles, the product of his individual skill and labor, and the produce of any small individual plot of ground which may be assigned to and cultivated by him, and to keep or expend the proceeds thereof or send the same to his family."

The Act of May 28, 1907, P. L. 290, as amended by the Act of April 27, 1925, P. L. 307, provides that all inmates of any State institution or hospital for the care and treatment of insane, feebleminded, and epileptic persons "may make, manufacture, or produce such supplies, manufactured articles, goods, and products for said institution or hospital 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." All supplies, manufactured articles, goods, and products so made, manufactured, or produced "may be sold or exchanged to or with the Commonwealth or any county, city, borough, or township thereof, or any State institution or any educational or charitable institution receiving aid from the Commonwealth."

The proceeds of such sales may, under the Act, be expended, with the approval of the Department of Welfare, for salaries, wages, or other compensation of employes, the purchase of supplies or equipment, or any other expenses of any kind or description necessary for the proper conduct of the work of the institution.

However, all supplies, manufactured goods, and products sold under the Act of 1907, as amended, must bear a stamp giving the full name or title of the institution in which the article was made, manufactured, or produced. A fine of not more than five hundred dollars ($500) is provided in the event that any trustee, manager, superintendent, or other person connected with any such institution permits articles to be sold or exchanged contrary to the provisions of the Act.

You ask the following questions, which we shall answer as we state them:

> "1. Do the boards of trustees of these institutions have the authority under the Act of July 11, 1923, P. L. 998, to divert funds received from the sales of products of individual patients to the benefit of all patients?"

The answer to this question must be unqualifiedly in the negative.

The earnings of individual patients cannot under the Act of 1923 be diverted to a fund for the benefit of all patients.

> "2. Under the Act of May 28, 1907, P. L. 290, as amended by the Act of April 27, 1925, P. L. 307, do the boards of trustees of these institutions have the authority to make sales of agricultural products to anyone other than the Commonwealth of Pennsylvania, any county or municipality thereof, or any State-owned or State-aided institution?"

The answer to this question is also in the negative. The institution may use products made or raised under the provisions of the Act of 1907 as amended. If it does not use them, the market for the sale or exchange of such products is limited as stated in your question.

> "3. Should the moneys derived from the profits of an occupational therapy department, wherein articles of merchandise are manufactured by patients for sale and also for the use of the institution, be used for the direct benefit of such patients or should such profits be used for maintenance purposes."

In our opinion the products of an occupational therapy department maintained by an institution must be used by the institution or sold or exchanged under the provisions of the Act of May 28, 1907, P. L. 290, as amended by the Act of April 27, 1925, P. L. 307. Profits from sales are not, however, required to be devoted to what are, strictly speaking, "maintenance purposes." They may, under the Act of 1925, be used, with the approval of the Department of Welfare, for maintenance purposes "or any other expenses of any kind or description necessary for the proper conduct of the work of" the board of trustees. This language comprehends expenditures for purposes, other than maintenance, which the board of trustees and the Department of Welfare believe necessary for the proper conduct of the board's work.

We call attention to the fact that an "accurate record" of all sales and expenditures of the proceeds thereof, must be kept, subject to examination and audit by the Auditor General.

Patients may retain the proceeds of their labor, under the Act of 1923, only if the articles sold were produced by their "individual" skill and labor.

> "4. Does the superintendent of an institution have the authority to segregate funds received from the sales of agricultural products such as vegetables, wood, and flowers, from the maintenance moneys and use these funds for the purchase of automobiles for the benefit of the institution, operations, etc., and what disposition should

be made of balances of cash remaining in such fund? Also, who is responsible for illegal expenditures of such moneys?"

Under the Act of May 28, 1907, P. L. 290, as amended by the Act of April 27, 1925, P. L. 307, receipts from the sale of products raised by inmates or patients of these institutions may be used for the payment of any expenses "of every kind or description necessary for the proper conduct of the work of" the institution, provided the expenditure has been approved by the Department of Welfare. As indicated in answering your previous question, the proceeds of sales of products raised by the inmates may be used for what are not strictly "maintenance purposes;" and they may also be used for purposes for which the Legislature may not have made an appropriation.

Products raised by employes,—not inmates or patients,—cannot be sold under any circumstances as there is at present no statutory authority permitting boards of trustees of State institutions to sell or exchange such products.

If any funds have accrued from such sales they should be held pending action by the Legislature directing what disposition should be made of them.

For the illegal disbursement of any money in the possession of the board of trustees of a State institution, the person or persons who made the disbursement would be liable.

"5. Can farm products raised by an institution be bartered for groceries or other products used in the institution?"

Farm products raised by these institutions may be exchanged only in the course of a transaction with the Commonwealth, a county, city, borough, or township, or a State-owned or State-aided institution. If, therefore, groceries or other products used in an institution can be obtained from any of the sources mentioned, in exchange for farm products, the exchange would be lawful. Otherwise, the exchange would be unlawful.

"6. Should employes be permitted to sell tobacco or confectionery to patients and employes and retain the profits therefrom for their personal use?"

In our judgment this question must be answered in the negative. Boards of trustees of State institutions within the Department of Welfare cannot permit employes to engage in business for their own benefit within the institution. The Administrative Code requires boards of trustees to fix the compensation of their employes in accordance with the classification adopted by the Executive Board. To permit any individual employe to make extra money by selling ar-

ticles to inmates would enable such employe to be compensated in excess of the standard compensation to which the boards of trustees are required to conform.

> "7. In an institution for indigent insane or feeble-minded persons, should a patient classed as 'indigent' be required to pay out of his earnings, if any, a part of the cost of his maintenance?"

To be indigent, it is not necessary that a person be penniless and a board of trustees can properly allow a patient who is classed as indigent to retain for his own use a small sum of money. If, however, the patient earns an amount sufficient to cover the cost of his maintenance or more, it would be entirely proper to deduct from his earnings the whole or a part of his maintenance cost, leaving him, however, a small amount for his own use. We do not interpret Section 601 of the Act of July 11, 1923, P. L. 998, as requiring the institution to permit the individual patient to keep everything which he earns, notwithstanding that he entered the institution as an indigent person, whose maintenance was charged jointly to the community from which he came and to the Commonwealth. If his earnings are such that he ceases to be indigent while within the institution, he must pay his way just as every other patient, who is able to do so, is required to do.

You also ask the following question which applies only to institutions for mental defectives:

> "8. Does the board of trustees of an institution for the feeble-minded have the legal authority to arrange for the employment of patients outside of the institution and incur the expense of transporting the patients from and to the institution and paying the wages thus earned to the patients?"

We cannot sanction this practice.

To permit patients to work outside of the institution is not within either the letter or the spirit of the Act of July 11, 1923, P. L. 998, or the Act of May 28, 1907, P. L. 290, as amended by the Act of April 27, 1925, P. L. 307.

We are of the opinion that the practice in question should be discontinued.

II

PENAL AND CORRECTIONAL INSTITUTIONS

Industries in penal and correctional institutions are regulated by the following statutory provisions:

1. *Section 2012 of The Administrative Code* (Act of June 7, 1923,

P. L. 498, as amended by the Act of April 13, 1927, P. L. 207). Under this section of the Code, the Department of Welfare "shall have the power, and its duty shall be" 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." The products of these industries are directed to be sold by the Department of Welfare "to the Commonwealth, or to any county, city, borough, or township thereof or to any State institution, or to any educational or charitable institution receiving aid from the Commonwealth." The proceeds of all such sales are required to be paid into the "Manufacturing Fund," out of which all costs of manufacturing and selling products are paid, including wages to inmates, as provided in clauses (e) and (f) of Section 2012 of the Code.

2. *The Act of April 7, 1925, P. L. 188, as amended by the Act of May 10, 1927, P. L. 862.* This Act permits the Department of Welfare to sell products of industries established under Section 2012 of The Administrative Code, which are not purchased by the public agencies mentioned in that section, to "the Government of the United States, including all departments, bureaus, commissions, and all agencies thereof existing under acts of the Congress of the United States; and to the Government of any State or Commonwealth of the United States; and to any county, city, borough, township, school district, or other organized subdivision of any State or Commonwealth of the United States; and to any institution maintained by, or receiving aid from, any State or Commonwealth of the United States, or any organized subdivision thereof."

3. *The Act of April 27, 1925, P. L. 304.* This Act provides that the Department of Welfare shall pay out of the Manufacturing Fund to "inmates in said State institutions performing labor of any kind necessary to the proper maintenance of such institutions and the inmates thereof," wages at not more than twenty cents per day.

We shall now state and answer your questions:

> "1. A number of inmates pursue industries for private gain. Can industries be pursued by inmates if such industries are not under the direction of the Prison Labor Division of the Department of Welfare and if the products therefrom are not sold to departments of the Commonwealth of Pennsylvania, State-owned or State-aided institutions or to counties of the Commonwealth?"

When the Department of Welfare shall have provided industries in which all inmates of the State's penal and correctional institutions can be employed, it will be unlawful for the boards of trustees of

these institutions to permit any prisoners to be engaged at work other than that provided for them by the Department.

However, the industries thus far established furnish employment to only a part of the population of these institutions. We can find no law requiring the boards of trustees of these institutions to compel those prisoners to be idle for whom the Department of Welfare has not provided work. The boards cannot use any of the funds which they administer to establish additional industries for inmates; but if the inmates themselves have or can obtain necessary capital to enable them to manufacture and sell marketable articles, we are of the opinion that the boards may properly permit them to make such articles and sell them through outside agencies. In these cases, the proceeds of the sale of these articles are the property of the inmates who made them.

There are no restrictions upon the sale of such articles.

It would, of course, be preferable to have all prisoners engaged at work supplied by the Department of Welfare; and it is the duty of that Department, as rapidly as possible, to extend the prison industries to render this possible. The views we have expressed apply only pending the full performance of that duty.

> "2. Does the institution have the authority to carry on any industries except such as may be designated, established and carried on by the Department of Welfare?"

An institution, as such, cannot establish any industries. Only the Department of Welfare may establish industries in State penal or correctional institutions. To this effect, see the Opinion of Deputy Attorney General Frank I. Gollmar to the warden of the Eastern State Penitentiary, dated February 11, 1926.

> "3. Does the board of trustees have the legal authority to pay wages from maintenance funds to inmates employed in maintenance activities?"

In an Opinion rendered by Deputy Attorney General S. M. R. O'Hara to the Department of Welfare, on November 22, 1927, we held that the boards of trustees must pay to the Manufacturing Fund, amounts covering the wages of inmates employed in the so-called "maintenance activities" of their respective institutions. Otherwise, the Manufacturing Fund could not pay the wages required to be paid to inmates under the Act of April 27, 1925, P. L. 304; and it cannot be presumed that the Legislature intended by the Act of 1925 to require the Manufacturing Fund to be depleted to the point of exhaustion, as would be the case if the institutions should fail to contract with the Department of Welfare for the work of these inmates.

Any amounts paid to the Manufacturing Fund under Miss O'Hara's

opinion, must, of course, be charged to the counties as a part of the cost of maintaining or keeping prisoners.

> "4. Is it legal to sell farm animals, perishable and non-perishable products, etc., to persons other than the Commonwealth, any county or municipality, even though the latter have no use for same?"

Under the Act of April 7, 1925, P. L. 188, as amended by the Act of May 10, 1927, P. L. 862, the products of industries established in State penal and correctional institutions may be sold by the Department of Welfare to:

> 1. The Commonwealth of Pennsylvania;
> 2. Any county, city, borough, township, school district, State institution or State-aided institution of Pennsylvania;

and, if all of the products cannot be sold to these agencies, then to any of the following:

> 3. The United States government including all departments, bureaus, commissions and agencies thereof existing under Acts of Congress;
> 4. Any state of the United States other than Pennsylvania, or any county, city, borough, township, school district or other organized subdivision of any state other than Pennsylvania; and
> 5. Any institution maintained or aided by any state other than Pennsylvania or any organized subdivision thereof.

The Department of Welfare cannot lawfully sell any products of industries conducted by it, to any purchaser not listed above.

Boards of trustees cannot lawfully sell to anyone anything produced in their institutions or on the grounds over which they have jurisdiction, unless such sales are authorized by statute.

The only penal institution which has the right to sell surplus farm products is the Board of Trustees of Western Penitentiary, which, in our opinion, has authority under the Act of April 4, 1913, P. L. 44, to dispose of surplus farm products raised on the farm connected with the Rockview Penitentiary. The Act of 1913 expressly provides that farm implements and live stock may be purchased by the Board of Trustees and the cost thereof charged to the counties as maintenance items. In view of the fact that implements and live stock needed for the operation of this farm are chargeable to the counties, the Legislature must have intended that the Board of Trustees might sell any surplus products of the farm, and credit the income from this source to the cost of keeping prisoners.

"5. What is the law in regard to branding of prison labor products? How can it be enforced? What are the penalties for violating it?"

The Act of June 20, 1883, P. L. 125 has never been repealed. It required the branding of all goods, wares, merchandise or other articles or things made by convict labor in any institution in which convict labor is employed "whether for the direct benefit and maintenance of" such institution, "or upon contract by the authorities of the same with any person."

While this act has never been repealed we are of the opinion that it has no application whatever to the Department of Welfare in the conduct of industries within the State penal and correctional institutions, and that it has no application in connection with the sale, through outside agencies, of articles manufactured by inmates by the use of their own or borrowed capital.

The Act of 1883 was intended to apply in cases where penal and correctional institutions established industries for their own benefit or contracted with outside parties for the use of convict labor. As we have previously advised you, boards of trustees of State penal or correctional institutions cannot under our present laws either establish industries or contract with outside parties for the employment of convicts.

Accordingly the Act of 1883 has no force or effect at the present time.

As there is no other Act of Assembly requiring goods produced by prison labor to be branded, we advise you that such goods need not be branded.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

State Institutions.

Collection of the cost of caring for, maintaining and clothing patients in the three State institutions, viz: Laurelton, Pennhurst, Polk.

Department of Justice,

Harrisburg, Pa., July 6, 1928.

Honorable Arthur P. Townsend, Budget Secretary, Harrisburg, Pennsylvania.

Sir: You have asked to be advised upon a number of questions relative to the collection of the cost of caring for, maintaining and cloth-

ing patients in the three State institutions for mental defectives; namely, the Laurelton State Village, the Pennhurst State School and the Polk State School.

We shall answer your questions as we state them:

> "1. When a patient is admitted either upon voluntary application or upon court order into a State feebleminded institution, what powers and duties have the trustees of such institutions and the Department of Justice and its Bureau of Collections to collect and receive money for the care and maintenance of such patient from the patient or the persons legally liable therefor:
>
> (a) Have the trustees any right or duty to receive or collect any sum or proportion less than the actual cost of maintenance?
>
> (b) If so, what power or duty has the Department of Justice to collect the difference between the actual cost and the proportion paid by the patient or persons liable to pay same to the trustees?
>
> (c) If not, is the Department of Justice bound by the amount determined by the trustees in accordance with Section 309 of the Mental Health Act, or by the court, in accordance with Section 311 of the Mental Health Act, as being the amount that is *able* to be paid and which can be collected in a particular case?
>
> (d) If not, does the Department of Justice and its Bureau of Collections follow the same procedure as is followed in collection of money for the maintenance of the indigent insane?

The admission, care and discharge of patients in State institutions for mental defectives is covered by the Mental Health Act of 1923 (Act of July 11, 1923, P. L. 998).

Sections 309, 310 and 311 of that act deal particularly with the admission of mental defectives to State institutions and also contain provisions definitely providing who shall pay the cost of caring for, maintaining and clothing such patients. Section 309 applies to the admission of mental defectives under twenty years of age, and Sections 310 and 311 to the admission of all other mental defectives.

In the case of an application for the admission of a mental defective without court order, Sections 309 and 310 of the Mental Health Act provide that the application may be acted upon favorably only after it shall have been endorsed by the poor authorities of the county or the overseers or directors of the poor of the district in which the patient resides.

In endorsing the application, the poor authorities are required to state whether the mentally defective person has an estate sufficient to

pay for his or her support and if not, whether the parents of the patient are of sufficient financial ability to defray the expenses, in whole or in part, of supporting their child at the institution.

If there be means of support in part only, it is the duty of the poor authorities to state the amount per month which the parent or parents or guardian of the patient will be able to pay.

The person making the application for the admission of the patient is required to make a statement under oath as to the means of supporting the patient.

In accepting the application, it is the duty of the authorities of the institution to fix the amount, if any, which shall be paid for the support of the patient and to require payment for such support "so far as there may be ability to pay," as a condition to the admission or retention of the patient. However, "said amount may at any time be changed by said managers or superintendent upon receiving further information concerning such means of support."

In the event that there are no means of support, "in whole or in part" the poor authorities or directors or overseers of the poor endorsing the application are required to agree to pay the cost of clothing "as may be required for the comfort and advantage of said person at an annual rate to be established by the trustees or managers of the school after submission of the same to and approval by" the Department of Welfare. All other support is to be paid for by the State.

In the case of admissions of mental defectives to State institutions upon court order, Section 311 of the Mental Health Act requires the court or judge hearing the application for admission to inquire into the financial circumstances of the patient and if the same be sufficient for the purpose to make an order directing the payment therefrom "of the cost of clothing and other support" of the mental defective. If there be no such estate, the court is required to order "that such payment be made by the husband or parent of such mentally defective person, if it appear that the circumstances of such husband or parent are such as to make such an order proper and advisable."

If the estate of the patient is insufficient, and the circumstances of the husband or parent are not such as to warrant an order for the payment of clothing or other support, "the expense of clothing of said mentally defective person shall be paid for by the said county in which such mentally defective person resides; and all other support shall be provided for by the Commonwealth * * *."

Before answering your specific questions, we call attention to Section 504 of the Mental Health Act which provides that whenever any person is maintained as a patient in any mental hospital, wholly or in part at the expense of the Commonwealth, the Attorney General, through any agency authorized by him, "may investigate the financial

ability of such patient or of the person liable for the support of such patient to defray the expense, in whole or in part, of his care and maintenance at such hospital." Under the definitions contained in Section 103 of the act, this section applies to institutions for mental defectives as well as to all other mental institutions.

We also call attention to the Act of June 1, 1915, P. L. 661, which empowers the Attorney General to make collections in all cases in which persons are maintained as inmates of any institution of the Commonwealth, in whole or in part at the expense of the Commonwealth. This act is of general application and is not limited to inmates of institutions of any particular class. It applies generally to every institution maintained in whole or in part at State expense.

The Act of 1915, in Section 3, provides that "the husband, wife, father, mother, child or children or any person who is an inmate of any asylum, hospital, home or other institution maintained in whole or in part by the Commonwealth of Pennsylvania, and who is legally able so to do, shall be liable to pay for the maintenance of any person as hereinafter provided."

The remaining sections of the act specify in detail the procedure to be followed by the Attorney General, acting for the Commonwealth, in collecting such maintenance.

The provisions of the Mental Health Act to which we have called attention and the provisions of the Act of 1915 are inconsistent. Under these circumstances, the later act prevails and, to the extent of the inconsistency, the earlier act must give way. Accordingly, the Mental Health Act of 1923, insofar as it is inconsistent with the Act of 1915, must be regarded as the law now in force, and we are of the opinion.

(a) That the trustees of State institutions for mental defectives are by law empowered to receive or collect the cost of maintaining an inmate, as per the agreement between the trustees and the person at whose instance he was admitted, or as per the order of the court made at the time of admission. If the agreement or the order of court provided for the payment of less than the actual cost of maintenance, it is the duty of the trustees to collect the amount stipulated in the agreement or court order.

(b) The trustees may request the Attorney General to investigate the financial ability of any patient or his relatives liable for his support to pay in full the cost of maintenance, and if, upon investigation by the Attorney General, or as the result of any information coming to the trustees from other sources, it appears that the patient's estate or the financial ability of his relatives liable for his support are such that the full cost of maintenance can be paid, the agreement should be amended or the court which committed the patient should be asked to revise its order so as to provide for payment of the cost of clothing and support in full instead of only in part.

Where the admission was upon court order, application to the court to revise its order should be made by the Department of Justice.

(c) There is no duty on the part of the Department of Justice to collect the difference between the actual cost of support and the amount specified in the agreement or court order made at the time of admission. The only duty which the Department of Justice has in the premises is to investigate the facts, as provided in Section 504 of the Mental Health Act, and in cases where the facts justify such action, to apply to the court which committed the patient to increase the amount to be paid for his or her support.

(d) From what has already been said, it is evident that the Department of Justice does not follow the same procedure in dealing with these cases as it does in making collections of money for the maintenance of the indigent insane.

> "2. What persons are *legally* liable for the care and maintenance of feeble-minded persons? Are the persons enumerated in the Act of June 1, 1915, P. L. 661, as amended, viz; the husband, wife, father, mother, child or children of the patient liable for the care and maintenance of such patient, or have Sections 309, 310 and 311 of the Mental Health Act restricted this class to the husband or parents of such persons, as the case may be?"

The only persons who can be compelled to pay the cost of care, maintenance and clothing of mental defectives are those specified in Sections 309 and 311 of the Mental Health Act; namely, the husband, parent or parents of the patient. Section 3 of the Act of 1915 does not apply in these cases.

> "3. Does that portion of Section 503 of the Mental Health Act which provides that the support of a mental patient (which includes feeble-minded persons) 'shall be paid by such person as is liable under existing laws for his support,' refer to the Act of 1915 or Sections 309 and 311 of the Mental Health Act insofar as the feeble-minded are concerned?"

In our opinion, Section 503 of the Mental Health Act has no application whatever to the payment of the cost of supporting mental defectives in State institutions. This subject is fully covered in Sections 309 to 311, inclusive. Section 503 is applicable only to the extent to which its subject matter is not fully covered in other sections of the same act.

> "4. Do Sections 401, 506 and 508 of the Mental Health Act embrace the feeble-minded as well as the insane? This would seem to be the case in view of the

definitions of 'Mental Hospital' and 'Mental Patient' '' as set forth in Section 103.

(a) If so, then the cost of the transfer and discharge or removal of feeble-minded in certain instances would be payable from the appropriation for the care, treatment and removal of the indigent insane. Could such payments legally be made from an appropriation for the *'insane?'* If not, from what fund should such payments be made?''

In our opinion, Section 401 of the Mental Health Act applies to the transfer of mental defectives as well as to the transfer of other mental patients, but Sections 506 and 508 do not apply in the case of mental defectives.

Section 506 provides that the cost of transfers shall be paid out of the appropriation ''for the care, treatment and removal of indigent insane'' made to the Department of Welfare. Mental defectives are not ''indigent insane,'' and it is therefore quite evident that the section was not intended to apply to cases of the transfer of mental defectives.

As Section 508 refers specifically to and depends for its effectiveness upon Section 503 of the Mental Health Act, and as that section does not apply to mental defectives, it is impossible to construe Section 508 as embracing mental defectives.

''5. The Commonwealth makes no collections from patients in the Laurelton State Village institution for the expenses incurred in the maintenance of indigent feeble-minded. It is true that from 1917 to 1919 the burden of caring for the indigent patients in this institution was borne by the counties, but since the Act of July 16, 1919, P. L. 982, the burden of supporting the indigent feeble-minded in Laurelton has been borne by the Commonwealth.

(a) Does Laurelton stand on a different footing from the Polk and Pennhurst institutions in regard to collection of money for the care and maintenance of the indigent feeble-minded patients?''

The Laurelton State Village does not stand on a different footing from the Polk and Pennhurst State Schools as far as concerns the collection of money for the care and maintenance of indigent feeble-minded patients.

''6. It has been the practice at the three State institutions for feeble-minded to charge an annual rate to the poor districts and counties for clothing. This is the only amount contributed by the counties and poor districts toward the maintenance of indigent patients.

(a) While the annual rates seem to be author-

ized in regard to the poor districts by Section 309 of the Mental Health Act, it appears as if only the actual cost of such clothing should be charged to the counties according to Section 311 of the Mental Health Act.

(b) Also, should the annual rate for clothing fixed by the trustees with the approval of the Department of Welfare, be uniform in all the institutions or should it vary in each institution as it now does?

(c) What proportion, if any, of the cost of maintaining inmates in the above institutions over and above the cost of clothing are the counties and poor districts legally required to pay to these institutions?

(d) Where a patient or the persons legally liable for care and maintenance, can only pay a proportion of the actual cost of maintenance of the patient, is the proper county or poor district legally required to pay the cost of said patient's clothing *or any proportion thereof?*"

(a) While it is true that Section 309 of the Mental Health Act authorizes an annual rate for clothing and Section 311 requires the trustees to collect the actual cost of clothing the annual rate to which Section 309 refers is intended to be established on the basis of the estimated actual cost. There is, therefore, no substantial difference between the two sections and, in our opinion, the trustees, with the approval of the Department of Welfare, are justified in fixing an annual rate for clothing for all inmates. This rate may, however, not be arbitrary, but must be in such an amount as will pay the cost of clothing and no more.

(b) Each institution, with the approval of the Department of Welfare, has the right to fix its own rate for clothing. We cannot, however, conceive any reason which would justify the Department of Welfare in approving rates for clothing for the several institutions which are not substantially the same.

(c) The counties and poor districts are not required to pay any amount to these institutions in excess of the annual rate covering the cost of clothing.

(d) If the patient or the persons liable for his care and maintenance can pay only a portion of the actual cost of maintaining him, the county or poor district from which he came is nevertheless not required to pay any part of the cost of clothing the patient. The duty of the county or poor district to pay for clothing arises only in

cases in which the patient or the persons liable for his support are unable to pay anything on account of such support.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

State Institutions—Boards of Trustees.

Depletion of natural resources of lands owned by the Commonwealth and under the control of boards of trustees of State institutions.

Department of Justice,

Harrisburg, Pa., July 6, 1928.

Honorable Arthur P. Townsend, Budget Secretary, Harrisburg, Pennsylvania.

Sir: We have your letter of recent date on the subject of the depletion of natural resources of lands owned by the Commonwealth and under the control of boards of trustees of State institutions.

It will enable us to answer your questions more precisely if we quote your letter in full. It follows:

> "In certain instances the natural resources of lands owned by the Commonwealth are being depleted by the trustees of the various State institutions occupying such lands. This depletion is in various forms such as the selling of moulding sand, the cutting of standing timber and selling of same as cord wood, and the quarrying of rock for purposes of sale. As a general rule the trustees of these institutions do not appear to have any express legislative authority to do any of the above acts. The income received from the above sources is used by the trustees to defray the ordinary maintenance expenses of the institutions which otherwise would be paid by the Commonwealth.
>
> "Also, at several of the institutions the Commonwealth acquired land, the oil or gas rights of which had been sold or leased to private enterprise subject to royalties. In one instance, the trustees receive a monthly rent for the gas rights and will be entitled to royalties if any wells are erected in the future, while the trustees of another institution receive royalties on the oil produced by the wells now in operation. The trustees receive such rents and royalties and use same to defray the ordinary maintenance expenses of their institutions.
>
> "As a result of the foregoing, the following questions present themselves:

"1. Have the trustees of a State-owned institution or any other State agency, in the absence of legislative authority, any power whatsoever to deplete the natural resources of land owned by the Commonwealth and occupied by a State institution by:

"(a) removing moulding sand therefrom for purposes of sale or any other purpose?

"(b) cutting standing timber to be sold as cord wood or for any other purpose?

"(c) quarrying stone, digging or mining minerals for purposes of sale or any other purpose?

"(d) selling or leasing oil, gas, or mineral rights?

"2. If not, is there any legislative authority for the trustees of any particular institution or any other State agency to do any of the aforesaid acts?

"3. If not, what is the status of and what disposition shall be made of contracts relating thereto that are executory, partly performed, or executed?

"4. In any event, what disposition is to be made of the income derived in the past, or future from any of the aforesaid sources? Is it permissible for the trustees to use such income to defray ordinary maintenance expenses of the respective institutions or should it be paid into the State Treasury either directly or through the trustees?"

"5. Where the Commonwealth owns the surface rights of land used by a State institution, but does not own the mineral or oil rights thereunder or leases same, and as a result is entitled to and does receive royalties or a periodical rent;

"(a) Is it permissible for the trustees to use this income to defray the ordinary maintenance expenses of their particular institution?

"(b) Or, should it be paid direct into the State Treasury by the grantee or lessee?

"(c) Or, should it be paid to the trustees and by them paid into the State Treasury?"

1. We have already answered your first question in an opinion rendered to you on June 25, 1928. Trustees of State institutions do not have any power without express legislative authority to deplete the natural resources of land owned by the Commonwealth and occupied by a State institution in any of the respects mentioned in your question.

2. We should prefer not to answer your second question abstractly. If you will mention the institution or institutions you have in mind we shall be glad to advise whether its or their trustees have any legislative authority to do any of the acts mentioned in your first question.

3. In any case in which a board of trustees has without express legislative authority entered into a contract for the sale of sand, timber, stone, oil, gas or minerals the contract is unlawful and void.

If such contract is wholly or partly executory further performance thereunder should be refused by the board of trustees having jurisdiction over the land.

We shall not undertake to advise you what action should be taken in cases where such contracts have been fully performed. Any such cases must be dealt with individually and it would be necessary for us to have before us all of the facts and records in any particular case before we could render an opinion thereon.

4. Money received under an illegal contract for the disposition of State property could not lawfully be used for maintenance purposes by the board of trustees which illegally entered into the contract. All such money should be held separate and apart from other funds in the possession of the board of trustees, the facts should be laid before the Legislature, and the Legislature should be asked to determine what disposition shall be made of the money.

5. In cases in which the Commonwealth acquired only surface rights of land used by a State institution subject to outstanding mineral or oil leases providing for the payment of royalties or rentals to the owner of the surface rights, all royalties or rentals received should be paid into the State Treasury. The surface rights are the property of the Commonwealth, not of the institution which is using them.

If in any such case the Legislature does not desire royalties to be paid into the General Fund of the State Treasury it can by appropriate enactment provide for such other disposition of the money as it sees fit; but pending legislative action all such royalties should be paid into the General Fund.

It would be preferable in such cases to have the royalties or rentals paid directly into the State Treasury by the lessee of the oil or mineral rights, but if the money is received by the trustees it is their duty forthwith to pay it to the State Treasurer.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

Hospitals—Patients—Care, Treatment and Clothing of.

Charges which State mental hospitals may make for care, treatment and clothing of patients.

Department of Justice,
Harrisburg, Pa., July 6, 1928.

Honorable Arthur P. Townsend, Budget Secretary, Harrisburg, Pennsylvania.

Sir: We have your letter of June 14, asking a number of questions relative to the charges which State mental hospitals may make for care, maintenance and clothing of patients.

The circumstances out of which your questions arise are, briefly stated, as follows:

Excluding the Farview State Hospital for the criminal insane, there are seven State hospitals for the insane, namely, the Allentown, Danville, Harrisburg, Norristown, Torrance, Warren and Wernersville State hospitals. At the present time these hospitals are admitting two classes of patients known respectively as "pay patients" and "indigent patients."

Pay patients are charged flat rates per week for care, maintenance and clothing, these rates running from six dollars to fifteen dollars per week. The care and treatment which these patients receive is exactly the same as that afforded to indigent patients.

Indigent patients, under the system now in vogue, are those who do not have sufficient property to pay in full for their own care, maintenance and clothing, and for whose care, maintenance and clothing relatives or other persons legally liable to do so are unable to pay in full.

In cases in which the cost of an inmate's care, maintenance and clothing can be paid, in part only, either out of his own property or by his relatives or other persons liable for his support, the hospitals, as a general rule, collect nothing. They report the patient as indigent, collect three dollars per week from the county or poor district in which the patient resided prior to his admission, and the balance of the cost of his care, maintenance and clothing from the Commonwealth. Of this balance, three dollars is collectible out of the current appropriation; and the excess has always in the past, been paid out of a deficiency appropriation. In certain cases, however, the hospitals collect such part of the cost of maintenance as they are able to collect, and, notwithstanding this collection, bill the county or poor district for three dollars per week and the State for the balance of the cost of care, maintenance and clothing.

The admission, care and discharge of mental patients is the subject of the Mental Health Act of 1923, (Act of July 11, 1923, P. L. 998). That Act deals with mental patients of all kinds, including those described in the Act as "mentally ill" or insane, the criminal insane, and "mental defectives."

The Act also deals with the payment of the expense of caring for, maintaining and clothing all types of mental patients.

Sections 309, 310 and 311 govern the payment of the cost of caring for, maintaining and clothing mental defectives; Section 507, insane prisoners; and Section 503, all other mental patients.

Your inquiry relates only to, and in this opinion we shall deal only

with, the payment of the cost of caring for, maintaining and clothing mental patients other than those known as mental defectives and other than those who are detained in the Farview State Hospital for the criminal insane.

Your questions which we shall answer in the order in which they are stated, are as follows:

> 1. May a State hospital for the insane lawfully charge certain patients, designated as "pay patients," flat rates, exceeding cost, for care, maintenance and clothing?
> 2. May State hospitals for the insane collect from an inmate's property or from his relatives or the persons liable for his support, a part of the cost of caring for, maintaining and clothing such inmate, and collect the balance in equal shares or in any other proportion from the Commonwealth and the county or poor district from which the inmate came? If not, may the hospital collect a part of the cost from the inmate's guardian, or his relatives or other persons liable for his support, and also collect the entire cost from the Commonwealth and the county or poor district from which the inmate came?
> 3. How much may a State hospital for the insane collect out of an inmate's property or from his relatives or other persons liable for his support, for the inmate's care, maintenance and clothing?
> 4. Should all State hospitals for the insane charge the same rate for care, maintenance and clothing of inmates having sufficient property, or relatives or other persons liable for their support financially able, to pay in full therefor?
> 5. What disposition should State hospitals for the insane make of money collected for the care, maintenance and clothing of inmates?

1. Section 503 of the Mental Health Act is as follows:

> "Whenever any mental patient is admitted, whether by order of a court or judge, or in any other manner authorized by the provisions of this act, to any mental hospital maintained wholly or in part by the Commonwealth, the cost of care and maitnenance, including clothing, of such patient in such hospital shall be defrayed from the real or personal property of such patient; and this liability may be enforced by writ of fieri facias, venditioni exponas, or attachment execution, if he have any such property. If he have no such property, or is not possessed of sufficient property to defray such expenses, then so much of said expenses as shall be in excess of any amount collected from his said property and paid on account of said expenses shall be paid by such person as is liable under existing laws for his support; and if there be no such person, or if he is financially unable to pay such expenses or any proportion thereof, then such expenses or the proportion thereof which cannot be collected from the pa-

> tient, or the person liable for his support, shall be paid by the county or poor district or municipality which is liable for his support and by the Commonwealth in the proportion which is now or shall hereafter be fixed by law."

Under this Section it is quite clear that the Legislature had in mind that every patient in the hospitals to which this opinion applies should be a pay patient unless he or she does not have sufficient property out of which the cost of care, maintenance and clothing can be paid, or unless the person or persons liable under existing laws for the support of the patient be financially unable to pay in whole or in part the expense of caring for, maintaing and clothing such patient.

The amount to be paid for all patients, no matter by whom the cost is paid, is "the cost of care and maintenance, including clothing." The Legislature did not contemplate the possibility in any case of having any of those hospitals collect for the care, maintenance and clothing of the patient, an amount exceeding its cost.

There is no difference whatever between the word "cost" in cases where patients or their families are able to pay it, and in cases in which it is divided wholly or partially between the Commonwealth and the county or poor district from which the patient came.

Accordingly, we advise you that it is unlawful for any of these hospitals to charge a flat rate exceeding cost for the care of any patient. This practice should be stopped.

2. The answer to the second problem which your questions raise is complicated by the fact that the Legislature has not, since the passage of the Mental Health Act, conformed to the provisions of that Act in its appropriation legislation and in the legislation fixing the extent to which the counties and poor districts shall participate with the State in paying for the care, maintenance and clothing of patients whose property is insufficient to pay therefor in full, and whose relatives or other persons legally liable, are unable to do so in full.

Section 503 of the Mental Health Act unquestionably contemplated two classes of patients for whom the State and the counties or poor districts should pay, namely, those patients for whom the full cost of care, maintenance and clothing must be provided out of public funds, and those patients for whom only a part must be thus provided.

It was the intention of Section 503 that from patients, or those liable for their support, the hospitals should collect as much of the cost of care, maintenance and clothing as possible, if the full cost could not be collected; and that the balance only should be divided between the State and the county or poor district in such proportion as the Legisature should determine by law.

The sharing of the cost between the Commonwealth and the local

political sub-divisions is now regulated by the Act of April 7, 1927, P. L. 157, which is as follows:

> "* * * the expense of the care and treatment of the indigent insane, whether chronic or otherwise, in the State and semi-State hospitals for the insane, is hereby fixed at the uniform rate of three dollars per week for each person, including clothing, chargeable to the respective county or poor district from which such insane person shall come, and the excess over said three dollars per week shall be paid by the State; but in no case shall said excess exceed three dollars per week for each indigent insane person."

The current appropriation out of which the State's share of this cost is to be paid is contained in the Act of May 4, 1927, Appropriation Acts, Page 59.

This Act appropriates upwards of five million dollars "to pay for the care, treatment, removal and maintenance of the indigent insane" for the current biennium. It requires that before any money can be paid by the Auditor General out of the appropriation the trustees of the several hospitals and asylums for the insane shall have made a sworn statement to the Auditor General "setting forth the actual total number of weeks of service rendered to the mental patients in said hospitals and asylums for the insane, respectively, during the period for which the report is made."

Neither the Act of April 7, 1927, nor the Appropriation Act of May 4, 1927, make any provision for cases in which the State and county or poor district should be called upon to pay only a part of the cost of caring for, maintaining and clothing patients. Within the contemplation of these acts patients are either "indigent" or "non-indigent."

Accordingly, in our opinion, the only procedure which can be followed under these acts is that which is now in vogue in most of the hospitals to which this opinion applies. The hospitals should not take anything out of the patient's property or collect anything from the person or persons liable for his support, but should rate the patient as indigent and collect the full cost of his maintenance from the State and county or poor district liable for his support, leaving it to the State, on the one hand, and to the county or poor district, on the other, to collect, if possible, by way of reimbursement.

Obviously, it is not proper for an institution to collect from the person or persons liable for the patient's support, or take out of the patient's property any part of the cost of caring for, maintaining and clothing the patient, and in addition thereto collect from the State and the county or poor district the full cost of care, maintenance and clothing. This is a double collection by the hospital, which is absolutely illegal.

3. In the case of patients whose property is sufficient to pay the

cost of their care, maintenance and clothing, and in cases in which the person liable for the support of such patients is able to pay in full such cost, it is our opinion that the institution is justified in collecting the actual cost of care, maintenance and clothing notwithstanding the provisions of the Act of April 7, 1927, P. L. 157, which attempts to limit to six dollars per week the cost of care, maintenance and clothing of indigent patients.

This Act is a relic of the past. It is wholly inconsistent with existing legislation requiring all financial obligations of the Commonwealth to be upon a budget basis. It is a well known fact that, notwithstanding every effort at economy, it has been found impossible in practically all of the State mental hospitals properly to care for, maintain and clothe patients for six dollars per week. The necessary effect of the Act of April 7, 1927, is, therefore, to limit the cost to counties or poor districts to three dollars per week, but instead of limiting the cost to the Commonwealth to three dollars per week, actually to compel the Legislature by a deficiency appropriation, to provide as much of the cost as exceeds six dollars per week.

This is a practice which should be corrected by legislation consistent with the budget system on which the State is now operating; but in the meantime, there is nothing in any statute requiring these hospitals to collect for the care, maintenance and clothing of non-indigent patients less than the actual cost thereof. On the contrary, Section 503 of the Mental Health Act specifically provides that cost shall be collected.

In computing cost, it would be unlawful to include any items in the case of a non-indigent patient which are not included in computing the cost of caring for, maintaining and clothing indigent patients. Those items are specifically limited in the Appropriation Act of May 4, 1927, previously cited, to "medical and surgical treatment and nursing, food and clothing, and absolutely necessary repairs to existing buildings of such hospitals and asylums." The State provides the plant in which all of these hospitals are conducted, and has always held itself responsible for additions and permanent improvements to buildings, and extraordinary repairs. Maintenance includes ordinary repairs which are necessary to keep existing buildings in proper condition. The cost of making such repairs can and should be included in the cost of maintenance.

4. For the reasons which we have previously expressed, it would be impossible to have all of the State mental hospitals charge the same amount per week for the care, maintenance and clothing of non-indigent patients. The costs vary in the several hospitals, and as each hospital is required to collect cost and no more, it is the duty of the several boards of trustees to make collections on the basis of the cost figures of their respective hospitals.

5. All amounts collected for the care, maintenance and clothing of non-indigent patients should be expended by the boards of trustees for maintenance purposes. Collections should not be paid into the State Treasury.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

OPINION TO THE BOARD OF FINANCE AND REVENUE

OPINION TO THE BOARD OF FINANCE AND REVENUE

Bonus—Increase of Capital Stock—Sale of property and franchises of one domestic corporation to another—Authority of Board of Finance and Revenue to revise accounts "erroneously or illegally" settled.

Department of Justice,

Harrisburg, Pa., July 17, 1928.

Honorable Frank H. Lehman, Secretary, Board of Finance and Revenue, Harrisburg, Pennsylvania.

Sir: The Board of Finance and Revenue has asked this Department for advice as to whether or not there can be found any authority, or precedent, which would sanction the allowance of a bonus resettlement to the Graham Bolt and Nut Company, as requested in its petition to the Board under date of March 31, 1928, setting up a transferable credit in the amount of $1666.67, on account of an alleged erroneous payment of bonus on $500,000 of capital stock.

The basis of the allegation, that there has been an erroneous payment of bonus, is to be found in the fact that on May 1, 1922, the Graham Bolt and Nut Company acquired, by virtue of proceedings taken under the Act of April 17, 1876, P. L. 30, the property and franchises of the Graham Nut Company, which then had an outstanding capital stock of $500,000 upon which it had paid bonus. The error is alleged to have occurred on the part of the Graham Bolt and Nut Company, when on April 29, 1922, *two days before it had acquired the property and franchises of the Graham Nut Company,* it actually increased its capital stock from $5,000 to $1,250,000 and mailed to the Secretary of the Commonwealth, along with the return of actual increase, a check covering bonus upon the increase of $1,245,000. The sole question involved is whether the payment of bonus on this increase of $1,245,000 was "erroneously or illegally" made, for if its payment was regular, proper and legal when made, then there is no jurisdiction in the Board of Finance and Revenue to grant a resettlement.

The facts, as they appear from the records in the office of the Secretary of the Commonwealth, are, briefly, as follows:

On May 1, 1922, the Graham Bolt and Nut Company filed in the office of the Secretary of the Commonwealth an Election Return, from which it appears that an increase in capital stock from $5,000 to $1,250,000 was authorized. This Return embodied a resolution showing that the action authorizing such increase had been taken by the stockholders on April 29, 1922. The Return of the actual increase in like amount, which was filed in the office of the Secretary of the Com-

monwealth on May 1, 1922, showed that the actual increase must necessarily have been made on *April 29, 1922,* for the Return was sworn to by the proper officer of the corporation as of that date.

On November 1, 1927, there was filed in the office of the Secretary of the Commonwealth an Election Return showing that on May 1, 1922 the stockholders of the Graham Nut Company had passed a resolution authorizing the transfer of the property and franchises of that company to the Graham Bolt and Nut Company.

On November 1, 1927, the President of the Graham Nut Company filed a Return showing that the sale had actually taken place as authorized by the above resolution, and there was attached a copy of a bill of sale dated May 1, 1922.

From this it is clear that the stockholders of the Graham Bolt and Nut Company authorized the increase in capital stock, and that it was actually increased, two days *before* the authorization of the sale of the property and franchises of the Graham Nut Company to the Graham Bolt and Nut Company.

Since, so far as bonus credits are concerned, the so-called "short merger" proceeding under the Act of April 17, 1876, P. L. 30, has the same incidents as a merger proceeding under the Act of May 3, 1909, P. L. 408, the instant case, in principle, is entirely similar to the case of two merging corporations, one of which had previously paid bonus on $1,000,000 of capital stock and the other on $500,000 of capital stock, and the new corporation growing out of the merger has need for a capital stock of only $1,000,000. The new corporation would have a bonus credit on $500,000 of capital stock to apply against future increases, but it would not be entitled to a resettlement which would make this bonus credit transferable or available for other tax purposes. There is nothing in the case of *Commonwealth v. The Matheson Automobile Company, 16 Dauphin 14,* much relied upon by the petitioner, which would indicate that any other conclusion is possible under present practice. There the credit for bonus previously paid by the Matheson Motor Car Company, whose property and franchises were acquired at a Receiver's Sale by the Matheson Automobile Company, was claimed as to a capital stock increase made by the purchasing corporation *after* the date of such acquisition, and the claim was also made when such increase proceedings were filed in the office of the Secretary of the Commonwealth. Furthermore, the increase proceedings showed on their face that the increased stock was issued in payment for the property and franchises purchased from the Matheson Motor Car Company. The property and franchises of the Matheson Motor Car Company were sold to the The Matheson Automobile Company at a Receiver's Sale on *November 17, 1910,* (Corporation Index, Auditor General's Department). On December 19, 1910, the proper officer of The Matheson Automobile Company filed in the office

of the Secretary of the Commonwealth a Return of actual increase of capital stock from $150,000 to $2,031,750. This Return was sworn to as of *November 26, 1910.*

The Board of Finance and Revenue has authority, under Paragraph (b) Section 1102, Article XI of the Administrative Code of June 7, 1923, P. L. 498, to revise any settlement made by the fiscal officers "when it may appear from the accounts, or from other information, that the same has been *erroneously* or *illegally* made." The amount of bonus in question was paid upon an increase of capital stock which was actually made *before* the property and franchises of the Graham Nut Company were purchased, hence its payment was entirely proper and legal. It is not a sufficient answer to say that had the Graham Bolt and Nut Company pursued a reverse sequence in time in its purchase and increase proceedings the bonus in question would not need to have been paid. There would seem, therefore, to be no jurisdiction in the Board of Finance and Revenue to grant the resettlement requested, since no erroneous or illegal settlement is involved. We are also of the opinion that it would constitute an entire departure from precedent and practice to grant the credit resettlement requested in the instant case, and we accordingly advise you that in our opinion the prayer of the petitioner should be refused.

Furthermore, the payment of the bonus in question was made May 1, 1922. The present petition for resettlement was filed March 31, 1928, five years and eleven months after the date of the payment. Under a ruling of the Board it has been the uniform practice in cases of this sort not to go back more than five years in revising accounts. The application of this ruling alone is sufficient to dispose of this case.

Very truly yours,

DEPARTMENT OF JUSTICE,
LEON D. METZGER,
Deputy Attorney General.

OPINION TO THE SECRETARY OF FORESTS AND WATERS

OPINION TO THE SECRETARY OF FORESTS AND WATERS

Waters—Public lakes—Bed of lakes—Riparian rights.

1. The waters of navigable lakes are public and not private waters, and the land underlying them is not the subject of private ownership, but belongs to the state bordering on the lake, and the laws and rules regulating riparian rights on natural watercourses do not apply to it.

2. The state owns the beds of navigable lakes below the low water-mark in its sovereign capacity in trust for the people, and not in a proprietary capacity.

3. For the purpose of enhancing the rights and privileges of the people, the state may, by approriate means, grant the title to limited portions of the land under navigable waters, but not so as to divert them from their proper uses for the public welfare.

4. The commission appointed under the Act of May 27, 1921, P. L. 1189, relating to the development of certain lands for park purposes and for the improvement of the harbor of Erie, has no dominion over the waters of Lake Erie or its submerged land in Presque Isle Bay, nor can it, as now constituted, protest against the invasion of such water by house-boats, duck-boats, or grain vessels for mooring.

Department of Justice,

Harrisburg, Pa., December 27, 1928.

Honorable Charles E. Dorworth, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Sir: You present to this Department a communication through Mr. W. E. Montgomery, Chief, Accounts and Maintenance, accompanied with a letter from Captain W. L. Morrison, Superintendent of the Pennsylvania State Park and Harbor Commission of Erie, Pennsylvania, in which a request is made that you be informed as to the jurisdiction in the Commission relative to the waters of Presque Isle Bay outside of the harbor line, and specifically as to the right in others in "mooring of houseboats and boats used by duck hunters, and the anchorage of a grain fleet during the winter season," etc.

For a solution of this problem, it may simplify our presentation by entering somewhat into the early history of the title to and interest in part of the lands surrounding the bay, the fee to which is vested absolutely in the Commonwealth. We then ascertain the rights of the Commonwealth as they are limited in the waters and bed of the bay.

The charter of Charles II, King of England, dated 4 March, 1681 granted William Penn the territory known as Pennsylvania, lying between 39th and 42nd parallel north latitude, and extending from the Delaware River 5 degrees of longitude to a point in Lake Erie. The triangle formed by the 42nd parallel on the south, the Lake on the north and the State of New York on the east was acquired under

an act of Congress by patent signed by George Washington, President of the United States, on September 4, 1788.

This grant awarded Presque Isle Peninsula and also the bay lying within the Peninsula and the mainland to the Commonwealth. By Act 4 February 1869, P. L. 105, the Peninsula known as Presque Isle was patented to the Board of Directors of the Marine Hospital of Pennsylvania; but by the Act of Assembly approved 11 May, 1871, P. L. 746, the Marine Hospital was authorized to reconvey, the Peninsula to the Commonwealth of Pennsylvania, and deed thereto was executed, delivered and recorded in Erie County. This Peninsula extends from the mainland bordering the Lake northeasterly, approximately 5 miles, thence eastwardly about 3 miles and again southward a distance in excess of a mile. Within the arm formed by this plot, and the shore of the lake lies Presque Isle Bay, and the Erie Harbor.

On the south side of the bay and bordering thereon is a rectangular strip of land owned by the State, fully described in Section 9 of the Act of 27 May, 1921, P. L. 1180, the eastern boundary of which is the United States Harbor Line, where it has a width of 1700 feet and extending westwardly along the shore of the lake 9266 feet, where its width is 1400 feet. It will thus appear that the Commonwealth of Pennsylvania is owner in fee absolute of the land lying on the north, west and partially on the south side of the bay. Accompanying these grants are necessarily included the riparian rights in the State and access to the bay forming a shore line more than ten miles in length.

> "The riparian right is the result of that full dominion which everyone has over his own land, by which he is authorized to keep all others from coming upon it except upon his own terms. * * * It is the right of the owner to preserve and improve the connection of his property with the navigable water. The rights which a riparian proprietor has with respect to the water are entirely derived from his possession of the land abutting thereon."

Potomac Steamboat Company vs. Steamboat Company, 27 L. Ed. U. S. 1070.

> "The term does not include the right to appropriate the water front with old vessels to be dismantled or broken up, as it is the exclusive appropriation of the fee itself and not merely an exercise of an easement. It is not necessary that the act should interfere with navigation."

Town of North Hampstead vs. Gregory 66 N. Y. Supp. 28.

Our next inquiry relates to the rights of the Commonwealth as a State in the Lake, which is one of the inland seas, and therefore is within the constitutional grant of admiralty and maritime jurisdiction to the Courts of the United States. It is public and not private waters,

and the land underlying it is not the subject of private ownership, but belongs to the State bordering on it, and the laws and rules regulating riparian rights on natural water courses, do not apply to it. 40 Cyc. 635.

The State owns the beds of navigable lakes below the low water mark in its sovereign capacity, in trust for the people and not in a proprietory capacity. The trust under which the title to the land is held, is governmental in its nature and cannot be wholly aliened by the State. But for the purpose of enhancing the rights and privileges of the people, the State may by appropriate means, grant the title to limited portions of the land under navigable waters, but not so as to divert them from their proper uses for the public welfare. *Broward vs. Mabrey, 58 Fla. 398.*

In *McLennan vs. Prentice, 85 Wis. 427,* the Court in reference to a grant under the waters of Lake Superior said:

> "In the absence of express and competent grant to some other, the State is the owner of the fee of all land under navigable waters in the Great Lakes, but in trust only, for the public uses and purposes of navigation and fishing, and they may not be granted by the United States to a private person for a purely private purpose. * * * The State has no proprietory interest in them, and cannot abdicate its trust in relation to them, and while it may make a grant to them for public purposes, it may not make an irrepealable one; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation." Cited in 23 A. L. R. 772.

The ownership, dominion and sovereignty of the lands covered by the tide water within the limits of the several States belong to the respective States in which found, with the right to dispose of a portion where there is no substantial impairment of the public interest in the waters.

In *Illinois Central Railroad Company vs. People of the State of Illinois, 36 L. Ed. U. S. 1018,* it is held that:

> "The land covered by fresh water in the Great Lakes over which is conducted an extended commerce with different states and foreign nations, is owned by the sovereignty of the state. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over land covered by the fresh waters of these lakes."

There is a dearth of authority in the State Reports within our Commonwealth to guide us with regard to the rights of the State in navigable waters or the submerged lands underlying the lakes. The only case available which pertains to our inquiry is that of *Conneaut Lake Ice Company vs. Quiggley, 225 Pa. 605,* in which is cited with approval, *Pewaukee vs. Savoy, 103 Wis. 271,* wherein the principle or rule is expressed as follows:

> "It is the settled law that submerged lands of lakes within the boundaries of the State belong to the State in trust for public use, substantially the same as submerged lands under navigable waters at common law. Upon the admission of the State into the Union, the title to such land by operation of law vested in it in trust to preserve to the people of the State forever, the common rights of fishing and navigation, and such other rights as are incident to public waters at common law, which trusteeship is inviolable, the State being powerless to change the situation by in any way abdicating its trust."

From these decisions it may be concluded, that as to the lands of Presque Isle and the rectangular plot lying on the boundary of the Lake south of the bay, the title is an unlimited or absolute fee which is vested in the Commonwealth, and in which it may exercise the same dominion over it, and enjoy the same riparian rights which are accorded to any individual patentee of land bordering on the Lake. But the waters being navigable and the submerged bed belonging to the State in its sovereignty is in trust to serve the public in providing transportation and commercial intercourse.

The Legislature of the State represents its sovereignty, and through enactments, by that body may grant rights, not inimical to that of navigation upon the bosom of its navigable waters within or bordering upon the State.

The delegation of authority conferred upon the commission is by Act of May 27, 1921, P. L. 1180, which provides that:

> "The commission shall have power to enter upon and take possession of the lands hereafter dedicated and such other lands as may be acquired under the provisions of this Act and exercise full power to manage, control, protect, maintain and develop said lands for public park purposes and for the improvement of the harbor of Erie, and to adopt, establish and enforce all necessary rules and regulations therefor."

Thus is conferred upon the commission jurisdiction over the lands which abut or border on the bay with riparian rights subjoined hereto, but it vests no dominion over the waters of the lake or its submerged land within the bay, nor can the Commission under the Act

above cited or any other which we were able to find, protest against the invasion of houseboats, vessels, etc., now complained of, until further power is delegated to the Commission by the Legislature.

Very truly yours,

DEPARTMENT OF JUSTICE,
JAS. W. SHULL,
Deputy Attorney General.

OPINIONS TO THE BOARD OF GAME COMMISSIONERS

OPINIONS TO THE BOARD OF GAME COMMISSIONERS

Bureau of Refuges and Lands—Board of Game Commissioners—Tillable land—Purchase of—Refuge keeper's home.

The Board of Game Commissioners is authorized to purchase land at a price to exceed $10 per acre and may erect thereon buildings as may be deemed necessary. Act of May 24, 1923, P. L. 359.

Department of Justice,

Harrisburg, Pa., February 7, 1927.

Mr. W. Gard Conklin, Chief, Bureau of Refuges and Lands, Board of Game Commissioners, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your letter of January 31st. in which you ask to be advised converning the right of the Board of Game Commissioners to purchase a tract of tillable land, at a price exceeding $10.00 per acre, upon which land the Board of Game Commissioners intends to construct a refuge keeper's home.

Section 801 of the Act of May 24, 1923, P. L. 359, provides that:

> "The board may acquire title to or control of lands within the Commonwealth, suitable for protection and propagation of game or for hunting purposes or to be used as hereinafter provided, by purchase, lease, gift, or otherwise, to be known as State Game Lands. * * * The board may purchase or erect such buildings as may be deemed necessary properly to maintain and protect such lands of for propagation of game."

Section 803 of this Act provides that:

> "No land shall be purchased at a price to exceed ten dollars per acre, except where buildings or cultivated lands deemed necessary to the proper maintenance and administration of game refuges or for game propagation *are included.*"

Under Section 803 of this Act of Assembly the Board of Game Commissioners is authorized to purchase at a price to exceed $10.00 per acre cultivated lands provided such lands are necessary to the proper maintenance and administration of game refuges or for game propagation.

Under Section 801 of this Act the Board of Game Commissioners is authorized to erect upon such cultivated land such buildings as may

be deemed necessary properly to maintain and protect State Game Lands or for propagation of game.

Very truly yours,

DEPARTMENT OF JUSTICE,
THOMAS G. TAYLOR,
Deputy Attorney General.

State Board of Game Commissioners—Acts of Assembly—Damage to Growing Crops—Reduction of Does—Powers and Authority to Adopt Methods Deemed Best—Code of 1923.

The Board of Game Commissioners of Pennsylvania under "The Game Laws" as now on the statute books have authority to permit an open season on female deer with power to adopt such regulations and adopt such means as may be deemed necessary to control their number and reduce the damage done to crops on improved lands.

Department of Justice,

Harrisburg, Pa., January 20, 1928.

Honorable John B. Truman, Executive Secretary, Board of Game Commissioners, Harrisburg, Pennsylvania.

Sir: Your inquiry of this Department, as to whether Section 509 of the Game Law will permit an open season for killing of doe deer, has been submitted to the writer.

At the 1923 Sessions of the Legislature the laws of the Commonwealth regarding game, fur-bearing animals and protected birds, were amended, modified and some repealed. The whole were compiled and styled "The Game Laws" which cover sixty-four pages of the Pamphlet Laws of that Session, beginning at page 359. In the preliminary provisions of the Act, at Section 101, certain terms used therein are defined. These are here set forth in so far as the same relate to the inquiry submitted, to wit:

> "The term 'game animals' shall include (a) the wapiti or elk (b) the deer * * *. The word 'game' shall include wild animals and game birds."

And the "board" shall mean the "Board of Game Commissioners."

> "The term 'open season' shall mean the time during which the game * * * may be legally taken or killed and the term 'close season' shall mean the time during which game * * * may not be lawfully taken."

Section 501 provides that:

> "The open season for game birds and game animals * * * is as follows:

> "Male deer with two or more points to one antler: Provided, A male deer with an antler six or more inches long without points, measuring from the top of the skull as the deer is in life, shall be considered legal."

The open season "from December 1st to December 15th."

At the subsequent Session of the Legislature some of the Sections of the Game Law Act were revised and amended, and in so far as these changes affect your inquiry, the Sections amended are quoted in part for convenience in passing upon the question submitted.

Section 509 as amended by the Act approved May 14, 1925, P. L. 752, provides that:

> "When it is proven to the satisfaction of the board that * * * game animals * * * are materially destroying property, or otherwise becoming a nuisance, or the sexes are not balanced properly, or the natural food supply is insufficient or that hunting or trapping in addition to the regular open season provided by this act may be permitted without jeopardizing the future supply of game * * * animals of any kind in any section of the Commonwealth, the board may at any time remove or have removed such animals * * * from that section, or may direct or authorize the killing of such * * * animals, or grant an extension of the open season, or permit additional hunting or trapping, under such rules governing seasons * * * methods of taking and other regulations as the case may require, regardless of protection afforded or open seasons * * * fixed by this act."
>
> * * * *
>
> "To aid in the better protection of game * * * in any part of the Commonwealth, the board may also reduce open seasons * * * or may close seasons, as in their judgment may be necessary to guarantee a future supply of * * * animals in any part of or throughout the entire Commonwealth."

In passing upon this Section of the Act it is essential that there be kept in view the Act as a whole, that the legislative intent may be considered and fully ascertained, because one part may be construed by another. A part of an Act must be so construed that when taken together with the other parts, the whole Act will present a complete, uniform and harmonious system. *Brown vs. Commonwealth, 3 S. and R. 273; Lancaster County vs. Lancaster City, 160 Pa. 411.*

At the Sessions of 1925, P. L. 754, Section 511 was also amended to read as follows:

> "Upon receipt of a petition signed by residents of any county, giving their addresses and vocation, setting forth that deer have become a nuisance in that county, or

> any township thereof, stating the manner in which such animals are a nuisance, or upon information otherwise obtained by the board indicating that deer have become destructive to property, or that the herds should be reduced for any reason, the board, if satisfied that conditions warrant, may declare any section of the Commonwealth open to the killing of deer without visible antlers, * * * by residents of the Commonwealth during a special season of such length as the board may deem advisable either prior to or following the regular open season of male deer. During such special season the killing of deer shall be in accordance with such rules and regulations as the board may adopt."

It will thus appear that two methods are provided under which an open season may be declared. First, upon a petition signed by residents of the county presented to the Board in which is set forth that deer have become a nuisance in the county or township. Second, upon information otherwise obtained by the Board, indicating that deer have become destructive to property, or for any reason, if the Board is satisfied that conditions warrant, it is within the province of the Board to declare an open season.

It has become common knowledge in the very recent years, that owners of improved lands in certain sections of the Commonwealth, have suffered serious damage to crops because of invasions by herds of deer.

Whole fields of wheat, corn and other of the cereals are eaten off close to the ground, and not this alone, but the seeds when sown are scratched out by deer and used as food, before time is afforded for the grain to germinate. Orchards are entered in the night time by herds and the fruits, ripe and unripe, are devoured. Twigs and branches, and in some instances, the roots of fruit trees are eaten off, thereby causing the destruction of the tree. Because of these injuries inflicted by the foraging herds, legislative enactments were passed to correct, in so far as possible, the abuses.

The means provided in these Sections, while seemingly so, are not in antagonism with each other, but when considered as a whole, they pretty fully effect the purpose contemplated by the Legislature. The residents within the locality where the injury is done have that ancient right of the people, to petition the powers for the correction of the grievances. On the other hand, those in authority, to wit, the Board of Game Commissioners, may take congnizance of the material destruction to property and abate the nuisance on their own volition. It is not only the matter of injury to property which has been considered by the Legislature in the Act, but care of the animals themselves in balancing of the sexes, and the sufficiency of the natural food

supply, has been kept in view in order that the animals do not become extinct.

In every well regulated society or government there must somewhere exist a supreme and uncontrollable authority. Under the statue being considered this authority is vested in the Board of Game Commissioners. The residents of a locality have the right of petition. Others interested in property or in game may furnish the "information otherwise obtained," referred to in the statute. But the Board of Game Commissioners is the arbiter or tribunal created by the statute who shall decide what shall be done, and the manner and method of its performance.

The Act, under Section 506, specifies the season or days between which the male deer may be killed, but nowhere designates a period or date in which the female deer may be killed. The fixing of a period of the year in which the female may be taken or killed is left to the descretion of the Board who "may declare any section of the Commonwealth open to the killing of deer * * * by residents of the Commonwealth during a special season of such length as the Board may deem advisable." This relates to both male and female deer. The only limitation prescribed by the Act, upon the Board's power in this respect is, that such special season shall be "either prior to or following the regular open season for male deer." If, however, the open season shall be declared closed as to male deer, under the provisions of Sections 504, 505 and 506, the Board may declare the period fixed by the statue as the open season for killing female deer.

While not within the compass of your inquiry, it may not be amiss to signify the writer's impression as to the intent of the Legislature, in its enactments on this subject, of caring for or depleting the herds of deer. If for the several reasons assigned for reducing the number in any section, the primary method contemplated is, that the Board shall cause the removal from that section, which implies transportation to another section. Second, upon petition of citizens or on its own volition, the Board may declare an open season in certain locations, during which season special deer licenses shall be issued in such number as the Board may deem advisable. But the license would be confined to killing of a single female deer. Third, if the above provisions do not prove effective or "rapid enough to relieve the condition" then "detail its officers or other responsible citizens as the Board may designate to kill such number * * * as the Board may deem necessary to relieve the situation promptly."

In answer, therefore, to the pertinent question submitted, I advise that the Sections referred to will permit an open season on female

deer, such season to be established by the Board of Game Commissioners.

Very truly yours,

DEPARTMENT OF JUSTICE,
JAS. W. SHULL,
Deputy Attorney General.

Board of Game Commissioners—Special open season for killing doe deer—Special license—Restricted territory.

For the special open season declared by the Board, a special license is required, confined or restricted to killing of deer in the county or township designated by the Board and stated on the license.

Department of Justice,

Harrisburg, Pa., July 31, 1928.

John B. Truman, Executive Secretary, Board of Game Commissioners, Harrisburg, Pennsylvania.

Sir: In your letter of the 20th instant reference is made to an opinion uttered by the writer January 20, 1928, and you now request that further elaboration may be had upon the subject of an open season for the killing of female deer. Specifically, you wish to be advised upon the questions of

(a) An open season covering the entire State;
(b) The necessity for a special or additional license;
(c) Whether such killing of doe deer may be done by non-residents.

The inquiries are not free from perplexities, in the matter of construction, because of numerous amendments to the Acts of Assembly controlling the subject and the interpretation of the Act as a whole to effect the full purpose and intent of the Legislature in presenting a workable system. To further complicate the situation and render more intricate the task, you submit pages of suggestions emanating from sportsmen's associations in which are set forth views with rather insistent tones, representing the most effectual means of accomplishing the ends to be attained. The purposes which pervade the minds of the members composing the Board and the individuals who comprise the organizations are apparently the same, in one aspect. Each is seeking, according to its several ideas, to further the best means of propagating and protecting the game, and doing the least possible harm to those who suffer loss to property by the ravages

of game in localities where it has become too plentiful, but these views are widely divergent. The problem arises, therefore, in finding a solution, if possible, that will reconcile the minds of all as to what should be the true or proper method of meeting the conditions. That deer are too plentiful in some localities, and in many localities there are none or very few, is common knowledge. The Legislature has taken cognizance of the conditions and has provided various means of correcting the consequent evils which arise where there are too many. Your first inquiry is as to whether the special open season for killing female deer may cover the entire State.

Section 509 of the Act of May 14, 1925, P. L. 752, provides that:

> "When * * * game animals * * * are materially destroying property, or otherwise becoming a nuisance, or the sexes are not balanced properly, or the natural food supply is insufficient * * * in any section * * * the board may * * * remove or have removed such animals * * * declare additional open seasons * * * for the killing of game * * * in any county or part thereof * * * "

> "Section 511. * * * if satisfied that conditions warrant, may declare any section of the Commonwealth open to the killing of deer without visible antlers * * * by residents of the Commonwealth during a special season of such length as the board may deem advisable, either prior to or following the regular open season * * *"

If the power is conferred upon the Board to open for killing of deer "any section" of the State, it is vested with authority to open all sections. Had it been intended that some sections or some counties only should be opened, it readily could have so delegated the authority. It may be that the Legislature concluded that it were possible even though barely probable, a condition might arise, whereby the entire State should be declared open for a special season. But the various acts taken together and the amendments thereto, by reason of the frequent use of the terms "township," "county," or "district" apparently intended the opening of only parts of the State at a season, that is, the opening of a township or townships, or the opening of part of a county, a whole county or several counties in a section or in several sections of the State for a limited season. The Board would thereby test the expediency or advisability of widening or lessening the area at a subsequent period in the same or in a future year. Many years have been occupied under the protection of game by statutes, in building up the magnificent herds of deer that roam our forests and which are the pride and boast of our citizenry in the State. It would be a calamity, indeed, if by one fell swoop, a drastic edict or

regulation by the Board should raze the whole fabric. The burning of a house will divest it of annoyances by rats. The remedy is complete and absolute; but, it may be unwise to resort to such violent measures, else we repent the folly when too late to amend. The opening of a few townships or a county, or several counties here and there for a brief season, will disclose the prudence and wisdom of the method provided by the statute "to relieve *** damages being done to private property *** balance the sexes *** correct any insufficient natural food supply" or for other purposes contemplated in the Act, by reducing the number of deer.

Discretion is often the better part of valor. Diplomatists are endeavoring to inculcate in the minds of peoples of the earth, that the olive branch of peace is of greater worth than the spoils of war in victory. In the Board is vested the power of the State to regulate and control. It is the arbiter which shall determine, and it doubtless will act conscientiously and wisely under the broad powers reposed in it. It will read the sign posts all along its way and find on each the oft-repeated words in the statute "protection of game" and "jeopardizing future supply." The special open season which the Board may call into requisition only arises on petition of residents, setting forth that the animals are a nuisance, have become destructive to property, etc., or upon its own volition on finding such existing conditions as are above set forth, warranting such measure, and bearing in mind that what is done must be done "without jeopardizing the future supply of game," declare a special open season and "grant such number of licenses as may be deemed advisable."

The second, or inquiry (b), the necessity for a special or additional license, which may be be held raises the question as to who may kill deer during a special open season.

Section 301 divides hunters of game into residents of the Commonwealth and non-residents and under Section 302, as amended, of the Act of May 5, 1927, P. L. 815, provides that:

> "Each such resident *** upon application *** and the payment to said county treasurer of two dollars, shall be entitled to the license herein designated as a Resident Hunter's license ***"
>
> "Section 303. (Act of May 24, 1923, P. L. 359.) Every non-resident of this Commonwealth, upon application made, *** and the presentation of proof that he is a citizen of the United States, and the payment of fifteen dollars *** shall be entitled to *** a Non-resident Hunter's license ***"

This broad declaration to the nonresident hunter, entitled to a license must be read with the modifications further appearing in the Act, and

the license issued to such nonresident should bear upon its face the restrictions and limitations imposed by the statute upon the license of the resident hunter. The special season for killing deer authorized by the statute and declared by the Board, is open to residents of the Commonwealth only and not to nonresidents.

In this connection the third paragraph of Section 511 of the Act of May 14, 1925, P. L. 752, will aid in the interpretation of the previous section:

> "Before any person shall hunt for deer during a special open season declared by the board, such person shall have a resident hunter's license before hunting on any property where this act requires such license, and shall also apply to and obtain from the board, at Harrisburg, a special deer license, the fee for which is hereby fixed at two dollars, except that no fee shall be charged for a special deer license applied for by an owner or lessee of lands residing upon and cultivating lands lying within the territory opened to deer hunting by the board, under the provisions of this act, or applied for by any member of his family, or any employe, who regularly assists in the cultivation of such lands. Such license issued without fee shall be good only on the lands upon which such person resides and cultivates. Such licenses shall entitle the holder to kill one deer without visible antlers. Such special deer licenses shall be issued only in such number for each county or township as the board may deem advisable, and shall be issued in the order of the applications made to the board."

These abstracts from the several sections are quite simple, and require no special explanation or interpretation. We, therefore, briefly deduce the following: That for the special open season declared by the Board, a special license is required, which said license is procurable only from the Board at Harrisburg and for which the sum of two dollars is charged. That such special deer licenses shall be issued only in such number for each county or township as the board may deem advisable, and that the special open season license is not a roving license, good in all parts of the State, but is confined or restricted to killing deer in the county or township, designated by the Board and stated in the license, and confines the licensee to killing of a single deer in a season. In this construction we have made answer to inquiry (c) of your letter.

Very truly yours,

DEPARTMENT OF JUSTICE
JAS. W. SHULL,
Deputy Attorney General.

OPINIONS TO THE SECRETARY OF HEALTH

OPINIONS TO THE SECRETARY OF HEALTH

Water supply—Bituminous coal companies—Permit from Secretary of Health—Acts of April 22, 1905, and June 7, 1923.

Where corporations organized to mine bituminous coal construct water-works and supply water for domestic purposes to the inhabitants of mining villages living in houses owned by such companies, they are supplying water to the public within the meaning of section 3 of the Act of April 22, 1905, P. L. 260, and the Act of June 7, 1923, P. L. 498, and should obtain a written permit from the Secretary of Health so to do.

Department of Justice,

Harrisburg, Pa., December 5, 1927.

Honorable Theodore B. Appel, Secretary of Health, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your letter of recent date asking to be advised whether certain bituminous coal companies are supplying water to the "public" within the meaning of Section 3 of the Act of April 22nd, 1905, P. L. 260, which reads as follows:

> "No * * * private corporation, company or individual shall construct waterworks for the supply of water to the public * * * without a written permit to be obtained from the Commissioner of Health,* * *."

The circumstances under which this water is supplied you describe as follows:

> "In the bituminous coal regions of Pennsylvania it is believed to be a common practice for a coal company to select a spring, well, or surface stream as a source of water or to make a contract for a supply of water with a nearby water company or municipality and convey such water by means of a system of pipes to the village wherein the coal company's employes dwell.
>
> "Sometimes the water is supplied to the inhabitants of the village by means of hydrants in the streets or on the premises; sometimes the water is piped within the houses; sometimes apparently no charge whatever is made for the water; sometimes it is understood that the rent of the house includes furnishing the water and sometimes water rent is specifically mentioned in the lease for the house and constitutes a charge separate from the rent of the house."

"Waterworks" has been defined as "a term that includes streams, springs, wells, pumps, engines and all machinery, lands, buildings,

and things for supplying or used for supplying water." 40 Cyc. 846. See also *Randall v. Smith, 51 Southern 917;* Words and Phrases Volume 8, page 7417.

It may properly be assumed that the coal companies referred to have constructed waterworks and are furnishing water for human consumption. The more difficult question for determination is, are these coal companies engaged in the "supply of water to the public," as contemplated by the act of 1905? If so, they should obtain written permits from the Secretary of Health.

The word "public" does not have a fixed or definite meaning. It is variously used, and a reference to the cases will show that it has widely different meanings as used in acts of Assembly whose objects are dissimilar. As stated in *Huston Township Poor District v. Benezette Township Poor District 135 Pa. 393, 398*:

> "The word 'public' is a convertible term, and when used in an act of Assembly may refer to the whole body politic; that is to say, to all the inhabitants of the state, or to the inhabitants of a particular place only; it may be properly applied to the affairs of the state or of a county or of a community. * * *"

In the case of *State v. Luce 32 Atlantic (Del.) 1076,* the court said:

> "When, with reference to an alleged nuisance, the people or citizens of a neighborhood, or the public, are mentioned, it does not mean all the people, or all the public, but only such considerable number of them as to show that more than a few merely are meant. * * * The term 'public' does not mean all the people, nor most of the people, nor very many of the people of the place; but so many of them as contradistinguishes them from a few. * * *"

On the other hand there are many definitions of the word "public" which if considered alone might seem to indicate that the coal companies here in question are not supplying water to the "public." These latter definitions, however, do not involve the word "public" as used in a statute which has been enacted as a police regulation, "for the protection of public health."

The Supreme Court in the case of *Commonwealth v. Emmers 221 Pa. 298,* in discusing the Act of 1905, said:

> "* * * The statute was pased in the exercise of the police power of the state. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace and safety, of society. All sorts of restrictions and burdens are imposed under this power, and when these are not in conflict with any constitutional prohibition, or fundamental principle, they cannot be suc-

> cessfully assailed in a judicial tribunal. That the preservation of the waters of the state from pollution, involving danger to health, is a proper subject for the exercise of the police power, cannot be seriously questioned."

The purpose of the Legislature in enacting the statute is shown quite clearly in the language found on page 312 of the above opinion:

> "* * * This statute required every individual, corporation or municipality supplying the public with water to file in the office of the Health Department of the state a statement of its source of supply. It requires every municipality which, at the time of the adoption of the statute, was maintaining a system of sewerage, to file in that Department a plan thereof. These provisions necessarily result in making a matter of public record, in the office of the commissioner of health, the sources from which the public water supply of every community in the state is taken, and a like record of every opening of a public sewer system into the waters of the state. Should an epidemic develop in any community the health authorities immediately have accurate information as to the source from which the public water supply of that community is derived, and whether any public sewer system is discharged into the water. The state legislation requiring physicians in municipalities to make reports to the health authorities of all cases of diseases, will place at the disposal of the commissioner of health information as to the health conditions existing in the municipalities using the various public sewer systems. The commissioner of health and officers under his control will thus constantly have a large part of the information necessary to deal with the health conditions of any community."

Thus the purpose of this Legislation as above defined would seem to embrace as well the case of a supply of water to the inhabitants of a mining village living in "company" houses, which water is supplied by such company to its own tenants and none other, as to the case of the supply of water to all the people requiring such service in an entire "town, borough, city, or district" by a company incorporated under paragraph 9 of Section 2 of the General Corporation Act of 1874, for "the supply of water to the public." Whether the people served live in "company" houses and receive their supply of water from the company for which they work or whether they receive it along with other members of the community in which they live, from an incorporated water company would not seem to be a fair test of whether or not they are comprehended within the meaning of the word "public" as used in this statute which has to do with the important problem of the protection

of "public" health. The public complexion of the group served and the general public injury that might follow from serving impure water to such a group of people, should not be permitted to be obscured by a reference to the powers, purposes and obligations of the corporation serving.

In support and explanation of the foregoing, the following text excerpts, well fortified by authority, may be cited:

> "It is well settled that, in construing any statute, all the language shall be considered, and such interpretation placed upon any word or phrase appearing therein as was within the manifest intent of the body which enacted the law. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the legislature * * *." *25 Ruling Case Law 988.*
>
> "Among the statutes which have been declared to be remedial in their nature and consequently entitled to liberal construction are those seeking the correction of recognized errors and abuses by introducing some new regulation for the advancement of the public welfare; * * * laws and regulations necessary for the protection of *health,* morals, and safety of society; * * * *25 Ruling Case Law 1079.*

The fact that we are dealing with a statute designed to protect the public health should, therefore, be given paramount consideration in its interpretation and construction. That the companies supplying this water have not condemned and dedicated to the public use certain sources of water supply, or that they do not possess the power so to do, so that undeniably they are "private use" as distinguished from "public use" corporations does not mean that they cannot supply water to the "public" within the meaning of this Act. An interesting parallel is found in the case of *Commonwealth v. Kennedy 240 Pa. 214* where the defendant contended that since only the riparian owners and not the public generally have an interest in a private stream, the pollution of such a stream could result only in private injury and not in a public injury. In repudiating this contention the court said, page 220:

> "The act (same act here under consideration) defines 'waters of the state' to mean, 'all streams and springs, and all bodies of surface and ground water, whether natural or artificial, within the boundaries of the state.' This does not make all such streams public streams, but it does subject them to police control, because, while not public streams, they are suceptible of being turned into public nuisances.

> "We simply repeat that it is not necessary to constitute a public nuisance in running water that the stream shall be a public stream."

Thus, it is not necessary that a company should hold itself out to supply water generally to all of the public of a given locality in order to endanger the public health from an impure water supply; the public health may as readily be endangered by the supply of impure water for domestic purposes to people living exclusively in the "company" houses of a mining village as would a similar supply to all the people of a certain "town."

In other words even though the purpose, the powers, and the obligations of a corporation are not such as to make *it*, technically speaking, a "public use" corporation, the recipients of the water may still be enjoying a service which is charged with "public" attributes, within the meaning of a health protection act.

In addition, the Administrative Code of 1923 P. L. 498, Section 1802, practically re-enacts Section 8 of the Act of April 27, 1905, P. L. 312, by providing as follows:

> "The Department of Health shall have the power, and its duty shall be:
>
> "(a) To protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease."

This shows a deliberate effort on the part of the Legislative body to give to the Health Department a general blanket authority to employ the most efficient and practical means, in each and every case arising, for the prevention and suppression of disease to the end that the health of the "people of this Commonwealth" may be protected.

We believe that the word "public," as used in Section 3 of the said Act of April 22, 1905, was intended to have much the same meaning, as "people of this Commonwealth," as used in Section 1802 above, and we find further evidence of this in the title of the Act of April 22, 1905, where reference is made to the "public health." See *Dixon v. Sheffer 46 Pa. Super. Ct. 452.*

We are accordingly of the opinion, and so advise you, that where bituminous coal companies construct waterworks and supply water for domestic purposes, to the inhabitants of a mining village, they are supplying water to the public within the meaning of Section 3 of

the Act of April 22, 1905, P. L. 260, and the Administrative Code of June 7, 1923, P. L. 498, and should obtain a written permit from the Secretary of Health so to do.

Very truly yours,

DEPARTMENT OF JUSTICE,
THOS. J. BALDRIDGE,
Attorney General.

Department of Health—School Districts—Medical Inspectors—Appointment of assistants.

There is no authority in a medical inspector to appoint assistant or additional inspectors to do all or a part of the work for which he was appointed and employed. Inspectors must be appointed by the proper school boards and the names of all appointees reported to the Department of Health.

Department of Justice,

Harrisburg, Pa., January 19, 1928.

Dr. Theodore B. Appel, Secretary of Health, Harrisburg, Pennsylvania.

Sir: We beg to acknowledge receipt of your request for an opinion relative to the authority of medical inspectors appointed under the provisions of Sestion 1501 of the School Code to appoint assistants.

Section 1501 of Article XV of the Act of May 18, 1911, P. L. 309, known as the School Code, which section was amended last by the Act of May 20, 1921, P. L. 939, No. 329, Section 1, provides that each school district of the first, second or third class in this Commonwealth shall provide medical inspection by proper medical inspectors who shall "be appointed by the board of school directors of the district." Section 1504 of the same Article of the School Code requires that the names of all inspectors so appointed shall be reported to the Commissioner of Health. A medical inspector is appointed because of his personal qualifications for the position; it is his individual services which are desired. There is no authority in a medical inspectior so appointed to appoint assistant or additional inspectors to do all or a part of the work for which he was appointed and employed. Inspectors must be appointed by the proper school boards and the names of all appointees reported to your Department.

Any person purporting to act as medical inspectors who have not been appointed by the school board of the proper district and whose appointments have not been reported to your Department are acting without authority and appropriate proceedings may be instituted in a court of proper jurisdiction to restrain them from so doing.

Very truly yours,

DEPARTMENT OF JUSTICE
PAUL C. WAGNER,
Deputy Attorney General.

OPINIONS TO THE DEPARTMENT OF HIGHWAYS

OPINIONS TO THE DEPARTMENT OF HIGHWAYS

State Highway Patrol—Motorcycles—Awarding of contract.

Contract with Indian Motorcycle Company, regular and award made according to law. The Secretary of Highways authorized to draw requisition on motor license fund for payment of contract price.

Department of Justice,

Harrisburg, Pa., January 13, 1927.

Hon. W. H. Connell, Acting Secretary of Highways, Harrisburg, Pennsylvania.

Sir: We have your request for an opinion concerning the authority to purchase certain Indian motorcycles under the following circumstances:

At your request some time ago the Department of Property and Supplies advertised for bids for motorcycles for use by the State Highway Patrol. After bids were received and opened, but before the award of any contract the Department of Property and Supplies, with your approval, rejected all bids, the reason for doing so is immaterial in the discussion of the questions now raised.

Subsequently the Department of Property and Supplies re-advertised for bids for seventy-five motorcycles with side-car attachments. The advertisement was made and bids were received based upon specifications approved by you.

The lowest bid received was that of Harley-Davidson Motor Company of $343.13 each for seventy-five motorcycles having a sixty-one cubic inch displacement, known as Model 27-J, and complete with side car. The second lowest bid was from the Indian Motorcycle Company of $347.08 each for seventy-five motorcycles having a thirty-seven cubic inch displacement, known as Model GE 1927, complete with side cars. Other bids received need not be considered. After an investigation and a detailed study of these two makes of motorcycles and the needs of your patrol you decide that the bid of the Indian Motorcycle Company should be accepted and so advised the Department of Property and Supplies, and thereupon the bid of that Company was accepted and the contract awarded to it for the seventy-five motorcycles.

The question is now raised as to the regularity of this award, no specific objections, however, being made. Therefore, we must review and discuss the matter in a general way.

We do not feel it to be within our province to comment upon the exercise of business judgment involved in the selection of one of these

types of motorcycles in preference to the other. Your reasons for preferring the Indian machine to the Harley-Davidson may be summarized as follows:

1. Greater safety and efficiency of operation, it being possible to operate the former with greater safety to the patrolman because of its light weight and greater efficiency;

2. Economy of operation which is supported by statistics compiled by your patrol; and

3. The advantages to be gained by a standardization of machines, the Highway Patrol now having 176 Indian and no Harley-Davidson motorcycles.

Authority to purchase motorcycles for the use of the State Highway Patrol is found in Section 12 of the Act of 1919, as amended by the Act of April 27, 1925, P. L. 282, (the same provisions being found in Section 13 of the Act of 1923), as amended by the Act of April 27, 1925, P. L. 286), which after establishing a motor license fund, appropriates it 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 purpose of assisting in the maintenance, construction, replacement, reconstruction, improvement and repairs of State highways and of State-aid Highways, * * *; for the purchase, through the Department of Property and Supplies as purchasing agency of * * * motor vehicles * * * necessary for the conduct of the work of the Department * * * and for any and all other expenses of every kind and description necessary * * * 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, and for that purpose the Commissioner is authorized to appoint such employes as in his descretion are necessary, * * *."

These motorcycles are to be purchased by the Department of Property and Supplies as purchasing agency for your Department (Sections 507 (c) and 2103 (e) of the Administrative Code of 1923, P. L. 498). There is no statutory requirement directing your Department to advertise for bids before the award of a contract, or to award such contract to the lowest bidder, except the provisions with reference to the letting of contracts for the construction, repair or maintenance of State highways or State-aid highways, and the advertisement requirements of Section 2103 (b) and (c) of the Administrative Code, applicable to purchases made by the Department of Property and Supplies direct, do not apply to the purchases made by it as purchasing agency for Departments which by law are authorized to purchase supplies and pay for the same out of moneys specifically appropriated to them by the General Assembly. (Section 2103 (e). There is, therefore, no statutory requirement for the advertising for proposals prior

to the award of the contract for these motorcycles, nor is there any statutory provision that such award should be made to the lowest bidder.

The rule is well established that in the absence of special Constitutional or statutory provision requiring a contract to be let after advertisement to the lowest bidder, a contract for public work may be let without advertisement (19 R. C. L. 1068; 28 Cyc 657 and 664. See also many cases cited in 36 Am. Dig. Century Edition pages 649, 955, 959; also 14 Dec. Dig. page 1165). Also, that, where competitive bidding is not required by statute but the authorities voluntarily advertise for bids, they may reject all and enter into private negotiations and awards the contract irrespective of the bids. (19 R. C. L. 1071; *Price vs. City of Fargo, 139 N. W. 1054 (N. D.); Waco vs. Chamberlain, 47 S. W. 527 (Texas).* Even where the statue requires the awarding of a contract for public supplies to the "lowest responsible bidder" there is a discretion placed in the authorities to determine who is the lowest responsible bidder, and the Courts will not restrain them from awarding a contract to one who is not the lowest bidder, unless it appear that they have acted correctly or in bad faith *(Findley vs. Pittsburgh, 82 Pa. 351).*

The contract with the Indian Motorcycle Company, hereinbefore referred to, appears to us to be regular and awarded according to law, and you are authorized to carry it out and draw your requisition on the motor license fund for the payment of the contract price, which requisition should be paid by the Auditor General and the State Treasurer.

Yours very truly,

DEPARTMENT OF JUSTICE
JAMES O. CAMPBELL,
First Deputy Attorney General.

State Highway Patrol—Violation of Traffic Laws—Motor Vehicles—Punching Licenses—Surrender of Cards—Statutory Requirements.

Members of the State Highway Patrol or other peace officer may not lawfully punch the license cards of persons licensed to operate automobiles whenever they apprehend such persons in violation of the laws governing the operation of motor vehicles on the highways of the Commonwealth. The Department of Highways has full authority to cause highway patrolmen to report to the department every case in which a patrolman believes that a motorist has violated the law, and can keep a record of these reports and can cause informations to issue whenever and as often as it deems it advisable to cause arrests to be made, but the punch system cannot lawfully be continued.

Department of Justice,

Harrisburg, Pa., July 14, 1927.

Honorable Benj. G. Eynon, Registrar of Motor Vehicles, Harrisburg, Pa.

Sir: We have your request to be advised whether members of the State Highway Patrol may lawfully punch the license cards of persons licensed to operate automobiles whenever they apprehend such persons in violations of the laws governing the operation of motor vehicles on the highways of this Commonwealth.

This question involves an inquiry into the powers of the members of the State Highway Patrol as well as into the nature of an operator's license card and the property which the holder thereof enjoys therein.

The State Highway Patrol was created by the Department of Highways under its general authority to see that the laws governing the registration and operation of motor vehicles within this Commonwealth are enforced. Accordingly, the powers of the members of the State Highway Patrol can rise no higher than the powers of the Department of Highways itself in dealing with owners and operators of motor vehicles.

Under the Act of June 30, 1919, P.L. 678, as amended by the Acts of May 16, 1921, P. L. 582, June 14, 1923, P. L. 718 and April 27, 1925, P. L. 254, it is the duty of all resident owners of automobiles before operating them on the highways of this Commonwealth to register them with the Department of Highways; and the same Act, as amended, prohibits persons (other than those holding learners' permits and non-residents, who are excepted under certain conditions) from operating motor vehicles within this Commonwealth unless they have been specifically licensed by the Department of Highways to do so.

As evidence of the registration of a motor vehicle with the Department of Highways that Department is required by the Act mentioned and its amendments to issue an owner's registration certificate; and as evidence of the fact that an operator has been licensed to operate a motor vehicle within this Commonwealth the Department of Highways is required to issue to him or her an annual operator's license card.

These registration certificates and license cards merely evidence privileges conferred upon the lawful holders thereof, by this Commonwealth acting through the Department of Highways; but as long as the privilege is effective the evidence thereof is, in our opinion, unqualifiedly the property of the person to whom the Department of Highways issued it. In dealing with this property the Department of Highways cannot exceed the powers which the Legislature has by statute conferred upon it.

An examination of the Act of 1919 as amended renders it manifest

that unless a registration or license has been revoked or suspended the Department of Highways cannot compel the holder of a registration certificate or license card to surrender it either to the Department or to an employe thereof, except for the purpose of inspection. The law requires the operators of a motor vehicle to "exhibit his registration certificate or license" to any constable, police officer, member of the State Police Force or designated officer of the Department of Highways, who shall be in uniform and shall exhibit his badge, or other sign of authority, and to "write his name in the presence of such officer, if so required, for the purpose of establishing his identity." Section 26 of the Act of 1919, as amended by the Act of April 27, 1925, at P. L. 280.

We are of the opinion that in requiring motorists to "exhibit" registration certificates and operators' license cards to officers who are in uniform and display their badges or other signs of authority, the Legislature intended that such officers should have the privilege of examining manually the certificates or cards held by operators to the extent to which such examination is necessary to enable officers to read the certificates or cards and ascertain whether they appear to be genuine certificates or cards, issued by the Department of Highways. An officer, however, does not have the right to mutilate, mark or punch a registration certificate or license card, whatever the purpose of such mutilation, marking or punching may be; and immediately upon concluding his examination of the certificate or card, it is the officer's duty to return the same to the person from whom he received it.

On the back of operators' license cards issued for 1927, the Department of Highways caused to be printed the following:

> "A good operator keeps his card free from punches."
> "Highway Patrolmen will punch your card for law violations."

Appropriate marks are then provided to guide Highway Patrolmen in punching cards for various offenses. A punch over the letter "W" indicates that the holder of the license card has been warned regarding a particular offense. A punch over the letter "A" indicates that the holder of the license card has been arrested. On the margin of the card appears the following:

> "WARNING: A record of each violation is maintained in the Bureau of Motor Vehicles and the license of habitual violators will be suspended or revoked."

Obviously the Department of Highways prepared the 1927 operators' license cards intending to treat as evidence of violations of the motor laws, punches made by Highway Patrolmen in operators' license cards.

The objection to this course is apparent. The Act of 1919 as amended provides specifically how persons violating the motor laws

shall be prosecuted for offenses, what their rights shall be when charged with violations, and under what circumstances licenses may be revoked or suspended. Nowhere in the Act has the Legislature disclosed any intention of permitting any peace officer's dictum that a motorist has violated the law to be regarded as conclusive and as a substitute for the trial of the person charged with an offense, before either a justice of the peace, an alderman, a magistrate or a court of record. Indeed the Legislature could not under the constitutional safeguards which surround the liberty of a citizen of this Commonwealth, effectually repose in peace officers such authority.

Therefore, it is quite clear that even if State Highway Patrolmen or other peace officers could lawfully require holders of operators' license cards to surrender them for the purpose of having them punched, such punch marks could not form the basis for any action to be taken by the Department of Highways in the nature of a revocation or suspension of the license evidenced by the card. These marks at best would be only a record of actions of members of the Highway Patrol and could under no circumstances be regarded as evidence of violations of the motor laws by the holder of the card.

However, as previously indicated, under our existing statutes a peace officer does not have the right to demand the surrender of registration certificates or license cards for the purpose of permitting him to place any marks thereon or to make any punches therein.

We understand that the punch system was inaugurated by the Department of Highways not for the purpose of oppressing motorists, but for the purpose of rendering it unnecessary to cause arrests to be made for first offenses. It was adopted to lessen rather than to increase the severity with which Highway Patrolmen deal with persons operating motor vehicles on the highways. For this purpose the Department of Highways is to be commended, but whatever the purpose the punch system cannot lawfully be continued.

The Department of Highways has full authority to cause Highway Patrolmen to report to the Department every case in which a Patrolman believes that a motorist has violated the law. The Department can keep a record of these reports and can cause informations to issue whenever and as often as it deems it advisable to cause arrests to be made. In addition the new Vehicle Code enacted by the 1927 Session of the Legislature will, effective January first next, permit members of the Highway Patrol not merely to make reports but also to arrest on view persons who, in their opinion, have violated the motor laws.

Accordingly the abandonment of the punch system does not mean that your Department will have any less ability to enforce the motor laws than it now has.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM A. SCHNADER,

Special Deputy Attorney General.

Municipalities—Vehicular traffic—Ordinances—Application of fines—Act of May 11, 1927.

Cities and boroughs are authorized, under the Act of May 11, 1927, P. L. 886, to pass ordinances with regard to signal lights erected, installed and operated by such municipalities for the regulation of vehicular traffic, and they may, in such ordinances, provide penalties and retain the fines where violations of the ordinances have occurred and fines have been collected.

Department of Justice,

Harrisburg, Pa., September 28, 1927.

Honorable James L. Stuart, Secretary of Highways, Harrisburg, Pa.

Sir: In your letter of September 4, 1927, you ask this Department to violator if, at the time and place of the alleged violation, and approoutline for the Department of Highways the subjects upon which cities and boroughs are empowered to pass ordinances regarding vehicular traffic, under the provisions of the Vehicle Code, approved May 11, 1927 (Act No. 452) and effective January 1, 1928. You also ask to be advised as to what fines or penalties may be retained by the cities or boroughs of the Commonwealth instead of being paid into the State Treasury.

The particular question that has arisen is whether cities and boroughs are authorized and empowered to pass ordinances with regard to signal lights erected, installed and operated in and by said cities and boroughs, and whether they may, in such ordinances, provide penalties, and retain the fines in such instances where violations of the ordinances have occurred and fines have been collected.

Section 1033 provides:

> "Local authorities except as expressly authorized by this act, shall have no power or authority to alter any speed limitations declared in this act, or to enact or enforce any ordinance, rule or regulation contrary to the provisions of this act, except that local authorities shall have power to provide by ordinance for the regulation

> of traffic by means of traffic officers or semaphores or other signaling devices, on any portion of the highway where traffic is heavy or continuous, and may regulate or prohibit parking, or prohibit other than one-way traffic, upon certain highways, and may regulate the use of the highways by processions or assemblages."

This section clearly gives the local authorities the right to provide by ordinance for the regulation of traffic under the circumstances outlined in said Section. Section 1039 authorizes the local authorities to erect appropriate signs for the purpose of giving notice of local parking and other special regulations.

Section 1216 provides as follows:

> "Any city, borough, incorporated town, township, or county which enforces an ordinance or resolution on a matter concerning which authority is expressly delegated to said authorities by this act, or for traffic matters not covered by this act, may impose a fine of not more than fifty ($50) dollars, to be collected by summary conviction before any mayor, burgess, magistrate, alderman or justice of the peace as fines and penalties are now by law collected. In the event of non-payment of fine and costs of prosecution, the mayor, burgess, magistrate, alderman or justice of the peace may sentence any person convicted of violating an ordinance or resolution to undergo imprisonment for a period of not exceeding ten (10) days: Provided, That any person so convicted shall have the right of appeal as in other cases of summary conviction: And further provided, That any person accused of violating a local ordinance or resolution, enforced under the authority of this act, may waive summary hearing and give bond, in the sum equal to double the amount of the maximum fine that might be imposed, for appearance for trial before a judge of the court of quarter sessions, or in the county court, or in the municipal court in counties wherein such courts exist; and thereupon the mayor, burgess, magistrate, alderman or justice of the peace shall within fifteen (15) days return the complaint or information to the said court; and, if any person so accused shall be convicted in such court of the offense charged, he shall be fined as prescribed by said ordinance or resolution, or, in event of non-payment of such fine and costs of prosecution, to suffer imprisonment for a period not to exceed ten (10) days. All fines and bail forfeited, as provided for in this section, shall be paid to the treasurer of such city, borough, incorporated town, or township for the construction, repair, and maintenance of the highways thereof. No operator or driver of a vehicle, violating any of the provisions of this act, shall, upon conviction, be fined under any ordinance or resolution except on those matters

concerning which authority is expressly delegated to local authorities by this act."

Section 1211 provides that all fines and penalties collected under the provisions of this Act for violation of the same shall be paid to the State Treasurer, except those collected for violations of the provisions as to speed or weight, which fines and penalties shall be paid to the treasurer of the municipality for the construction, repair and maintenance of the highways thereof. There is no conflict between Section 1211 and 1216, in our opinion, and there should be no difficulty in interpreting these sections when read together. But, it is suggested that Section 1040, providing for signal interpretations, might have some weight in support of the view that the State Treasurer should receive fines collected for violation of ordinances regulating traffic signal lights. This suggestion is not convincing. Signal lights and semaphores are installed by the municipalities interested and are maintained and operated at their expense, which in some cases is not inconsiderable. It is, therefore, only fair that the municipalities should have the right to fines collected for violations of ordinances for the regulation of traffic by signal lights or semaphores. And this is what we think the Legislature intended. It will be noted that Section 1203 does not provide a penalty for violations of Section 1040.

Section 1040 merely provides a uniform State-wide interpretation of signal lights so that the motorist, in going from one municipality to another, does not find himself confronted with varying interpretations imposed by different ordinances. This Section compels municipalities in the passage and enforcement of their ordinances to a uniformity in regard to the interpretation of signal lights throughout the State. No ordinance may in anywise contravene any of the provisions of Section 1040.

It is, therefore, the opinion of this Department that cities, boroughs, incorporated towns and townships may lawfully pass ordinances providing for the regulation of traffic by means of traffic officers, semaphores, traffic control lights or other signaling devices on any portion of the highways within their proper jurisdiction, where traffic is heavy or continuous. In such cases the municipal law-making bodies are to be the judges as to where such traffic policeman, semaphores or other signaling devices or traffic control lights shall be maintained.

In addition such municipalities may regulate or prohibit parking, or prohibit other than one way traffic upon certain highways within their respective jurisdiction; and they may regulate the use of highways by processions or assemblages.

In such ordinances the penalties provided may be a fine of not more than $50.00, to be collected by summary conviction in the manner

provided by Section 1216 of the Act. Such fines belong to the municipality for construction, repair and maintenance of the highways thereof.

Of course it is needless to say that no ordinance may in any way contravene, curtail, or alter any of the explicit provisions of the Vehicle Code, and the power of local authorities is expressly restricted to the cases mentioned in Section 1033 and hereinabove discussed at length, and to "traffic matters not covered by this Act" (Section 1216).

It will be noted that Section 1039 provides that local parking and other special regulations shall not be enforceable against an alleged violator if, at the time and place of the alleged violation, an appropriate sign, giving notice thereof, is not in proper position and sufficiently legible to be seen by an ordinarily observant person.

And Section 1216 concludes with the proviso that no operator or driver of a vehicle, violating any of the provisions of this act, shall, upon conviction, be fined under any ordinance or resolution except on those matters concerning which authority is expressly delegated to local authorities by the act.

Municipal authorities must not overlook the requirements of Section 1204:

> "(a) All prosecutions for offenses defined in this act, except as otherwise herein provided, committed by any person, shall be brought under this act, and not under any local ordinance rule or regulation.
>
> "(b) All prosecutions instituted under local ordinances, rule or regulation, which are based on acts for which there is a specific penalty provided in this act, shall be deemed and considered as having been brought under this act."

The foregoing limitations must, of course, be borne in mind by municipalities in the enactment and the enforcement of their traffic ordinances.

Very truly yours,

DEPARTMENT OF JUSTICE,
ROSCOE R. KOCH,
Deputy Attorney General.

State Registrar—Certificates of Title—Disputed Ownership—Right of Possession—Discretion—Applications—Statutory Regulations.

The State Registrar of Motor Vehicles in issuing certificates of title is not a forum for the adjusting of controversies regarding the ownership or the right to possession of motor vehicles, and after reasonable diligence and inquiry,

may or may not, issue a certificate, depending on whether he is satisfied with the truth of the facts set forth in the application.

Department of Justice,

Harrisburg, Pa., September 28, 1927.

Honorable Benjamin G. Eynon, Registrar of Motor Vehicles, Department of Highways, Harrisburg, Pennsylvania.

Sir: The Secretary of Highways has requested this office to advise you regarding the procedure your office should adopt when the following stated facts are presented.

The owner of a motor vehicle enters into an agreement with a dealer for the purchase of a new motor vehicle, part payment for which is to be made by turning in the owner's old automobile. Pursuant to this agreement the owner assigns his title certificate to the dealer, who makes application to your office for a new title certificate in his own name and transmits the proper fee therefor. Meanwhile the owner and the dealer have a dispute which culminates in calling off their original deal. The dealer refuses to return the title papers to the owner; the owner refuses to deliver physical possession of his old automobile to the dealer. The owner notifies your office to hold up the issuance of the new title certificates in favor of the dealer. Your office holds up the transfer and communicates with the dealer and the owner requesting affidavits in support of their respective positions. The owner files an affidavit stating that he has physical possession of the car and is entitled to a return of his assigned title certificate because the negotiations originally entered into have not been consummated. The dealer will not consent to this being done and insists upon the issuance of a new certificate of title in his favor under the terms of the assignment duly executed by the owner and filed with the Bureau. He does not, however, claim actual possession of the car.

Section 2 of the Act of May 24, 1923, P. L. 425, provides that the Secretary of Highways shall use reasonable diligence in ascertaining whether or not the facts stated in the application for a certificate of title are true before issuing such title certificate. I take this to mean that such reasonable diligence is to be exercised when an assigned title is turned in for transfer, just the same as when an application is made for an original title covering a new car. It will be noted that in the sworn application for certificate of title by the dealer, the affirmative statement is made that he has acquired possession of the motor vehicle described in the certificate of title by purchase or lease. Obviously, this affidavit does not portray the real facts because physical possession of the car has at all times been retained by the original owner. Therefore, the exercise of due diligence would require you to

assure yourself, before issuing a new title certificate in favor of the dealer, that physical possession of the car had been delivered to him by the former owner.

You are, therefore, advised that you should not issue any title certificate unless, after the exercise of reasonable diligence, you are satisfied that the applicant is entitled thereto. Ordinarily when the assignment and application are regular on their face you need not look any further than these papers to satisfy yourself as to the truth of the facts therein set forth. But when you are put on notice that the facts are not correctly set forth, it is your duty to be satisfied of the truth of the matter before you decide whether or not to issue the new certificate of title. This does not mean that you should become the forum for the adjusting of controversies regarding ownership or the right to possession of any motor vehicle. The Courts still exist as the proper tribunal by which these questions must be determined.

Very truly yours,

DEPARTMENT OF JUSTICE

ROSCOE R. KOCH,

Deputy Attorney General.

Criminal law—Violations of Motor Vehicle Act of June 30, 1919—Repeal Act of May 11, 1927—Effect of repeal act on pending cases.

Under the Act of May 11, 1927, P. L. 886 (effective on Jan. 1, 1928), which repealed the Act of June 30, 1919, P. L. 678, cases pending on Jan. 1, 1928, cannot be further prosecuted.

Department of Justice,

Harrisburg, Pa., January 5, 1928.

Honorable Samuel Eckels, Deputy Secretary of Highways, Harrisburg, Pennsylvania.

Sir: In your letter of January 3, 1928, you call attention to the fact that the newspapers report that the Lancaster County Court dismissed certain cases involving violations of the Motor Vehicle Act of June 30, 1919, P. L. 678, and its amendments, on the ground that that Act has been repealed by the Vehicle Code, which went into effect January 1, 1928, (Act of May 11, 1927, P. L. 886). You inquire whether you may expect to successfully prosecute cases now pending and undetermined involving violations of the Act of 1919 and its amendments.

Said Act of 1919 and its amendments, as well as all other Acts inconsistent with the Vehicle Code, are specifically repealed in Section 1301

of the Vehicle Code. No saving cause is contained in the Code to take care of prosecutions that have not gone to final judgment before the effective date of the new Act.

I am reluctantly forced to the conclusion that these prosecutions cannot be successfully maintained where they are based entirely upon the Act of 1919 and its supplements.

In the case of *Scranton City vs. Rose, 60 Superior Court 458, 462,* the court makes this significant observation:

> "There is no vested right in the Commonwealth, existing after the repeal of a criminal statute, to prosecute an offense in existence prior to the repeal of such statute. It is unnecessary to cite authority as to the effect of the repeal of a criminal statute on pending proceedings. It is well settled that all proceedings which have not been dedetermined by final judgment, are wiped out by a repeal of the act under which the prosecution for the offense took place.

The question here involved has received careful consideration by Craig, P. J. in the case of *Commonwealth vs. Brown, 20 C. C. R. 139; 7 D. R. 117,* in which opinion the following is cited from Endlich on the Interpretation of Statutes:

> "Where a penal law is broken the offender cannot be punished under it if it expires or is repealed before he is convicted, although the prosecution was begun while the Act was still in force, unless the repealing Act contains a saving clause. Every step taken under a statute that has been repealed is utterly void: presentment, trial, conviction and sentence become illegal. If an indictment has been found, it may be quashed on motion, for the court is bound to take notice of the repeal. Though a conviction has been had the judgment is arrested, and though judgment has been entered, if an appeal from it, or other proceeding for review of it, is pending, the judgment must be set aside. And so, even after conviction, appeal and argument, but before final judgment, and though a repeal after final judgment will not ordinarily arrest the execution of the sentence, and will not do so even in capital cases where the sentence has been pronounced and the day set for execution, yet, in the latter class of cases, if the sentence of death has been pronounced, but not executed on the day set for its execution, a repeal of the statute, before the criminal is resentenced, requires his discharge. The same effect follows any modification of a penal statute which exempts without special reservation, a particular class from its operation."

This has been the law for a long time in Pennsylvania, for it was held as early as 1833, in the case of *Commonwealth vs. Beatty, 1*

Watts, 382, that where a remedy has been provided by statute and proceedings were instituted under it, but during their pendency the statute was repealed, in such cases the remedy was thereby taken away and further proceedings brought to enforce it were illegal. See also *Abbott vs. Commonwealth, 8 Watts 517.*

The several District Attorneys of the Commonwealth having been put on notice of the passage and approval of the Act, it became their duty to press for indictment, trial, conviction and sentence, in all cases involving violations of the Motor Vehicle Acts, before the effective date of the new Vehicle Code. No doubt many of them have done so, but there is no relief where such prosecutions have not been completely terminated at the last term of criminal Court in their respective jurisdictions, and these prosecutions, under the aforegoing authorities, cannot now be maintained.

Very truly yours,

DEPARTMENT OF JUSTICE,
ROSCOE R. KOCH,
Deputy Attorney General.

Highways—State-Aid and Construction Contracts—Municipalities—When to Be Paid—Interest—Act of May 31, 1911, P. L. 468.

The Commonwealth is entitled to interest on amounts due the Department of Highways from counties, boroughs and townships on State-aid construction and State-aid maintenance projects. Under the Act of May 31, 1911, P. L. 468, the amounts due are to be paid within thirty days after being certified. On construction contracts the amounts are due within ten days. Interest is chargeable after each of these periods.

Department of Justice,
Harrisburg, Pa., February 15, 1928.

Honorable Samuel Eckels, Deputy Secretary of Highways, Harrisburg, Pennsylvania.

Sir: In your letter of January 31, 1928, you request the opinion of this Department as to the legality of charging interest on the amounts due your Department from counties, boroughs and townships on State-aid construction and State-aid maintenance projects.

It appears that your contracts to which counties and other local authorities are parties, provide that on State-aid construction projects the counties or other local authorities shall pay their respective shares of the cost within ten days after the certification thereof by the Secretary of Highways.

Section 33 of the Sproul Act (approved May 31, 1911, P. L. 468) as amended, provides that the share payable by a county of the total

cost of the improvement and maintenance of State-aid highways shall be paid "as provided by its contract, and otherwise, by the provisions of this Act." The share of the townships or boroughs interested shall be paid in the same manner and form as the payment by counties. Section 33 further provides as follows:

> "If the said shares or amounts so certified by the State Highway Commissioner, of the cost and expense of the improvement, or of the subsequent maintenance thereof, as provided by contract and the provisions of this act, of the county, township, borough, or incorporated town, or all or either of them, shall not be paid to the State Treasurer within thirty days after being certified, then the said shares of the county, township, borough, or incorporated town, either or all of them, remaining unpaid, shall be charged by the State Treasurer against any funds of said county, township, borough, or incorporated town which may be in the hands of the State Treasurer, or which may thereafter come into his hands, excepting school funds, and may also be recovered by action at law or equity as any other debts of such counties, townships, boroughs, or incorporated towns are by law **recoverable.**"

I see no reason why the relationship of the Department of Highways to the counties, townships and boroughs in such cases is not the ordinary relationship of creditor and debtor. The Act indicates that the municipalities involved must pay their share of the bill within thirty days after the same has been certified, and provides two methods of collection; first, by withholding by the State Treasurer, of any funds in his hands belonging to said municipalities, excepting only school funds; and second, by action at law or in equity. Interest would, under the ordinary and accepted practice, accrue from and after the expiration of said thirty day period, and I feel that it is entirely within your province and right to insist upon municipalities paying interest after the expiration of thirty days.

In the case of construction contracts, where your time limit is ten days, I think you can demand interest after the expiration of ten days, but under the Act, could not avail yourself of either of the remedies above provided until the expiration of thirty days from the date of certification, although interest in any event would be collectable as accruing after the expiration of the ten day period.

Very truly yours,

DEPARTMENT OF JUSTICE,
ROSCOE R. KOCH,
Deputy Attorney General.

OPINIONS TO THE INSURANCE COMMISSIONER

OPINIONS TO THE INSURANCE COMMISSIONERS

State Tax—Companies Authorized to Do Business in This State—Foreign—Premiums on Reinsurance in Domestic Corporations—Act of May 17, 1921, P. L. 682.

The term "licensed to do business in this Commonwealth," as used in Section 321 of the Act of May 17, 1921, P. L. 682, in the provision authorizing certain deductions from gross premiums received by foreign insurance companies, associations and exchanges, means "authorized to do business in this Commonwealth," and comprehends thereby both domestic and foreign companies, associations and exchanges authorized to do business in Pennsylvania.

In making annual report for the purpose of gross premium state tax, foreign insurance companies, authorized to do business in Pennsylvania, are allowed by the Insurance Act of May 17, 1921, P. L. 682, to deduct, from the gross premiums received, the premiums of said companies actually paid for reinsurances in domestic companies, associations or exchanges, upon the mutual plan without capital stock, as well as those paid for reinsurances in domestic fire insurance stock companies.

Department of Justice,
Harrisburg, Pa., March 2, 1927.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: In a recent letter to this Department you present various facts with respect to certain deductions from the tax on gross premiums of foreign insurance companies as provided for in Section 321 of the Insurance Company Act of May 17, 1921, P. L. 682, and you make, briefly, the following inquiries upon which you request an opinion: First, in making annual report for the purpose of the gross premiums tax, are foreign insurance companies, licensed to do business in Pennsylvania, allowed by said Act of Assembly to deduct, from the gross premiums received, the premiums of said companies actually paid for reinsurances in domestic companies or associations upon the mutual plan without capital stock? Second, in making annual report for the gross premiums tax, are foreign fire insurance companies, licensed to do business in Pennsylvania, allowed by said Act of Assembly to deduct, from the gross premiums received, the premiums of said companies actually paid for reinsurance in domestic fire insurance stock companies?

Section 321 of said Act of May 17, 1921 provides, inter alia, as follows:

> "Section 321. Additional Annual Reports from Foreign Companies and Associations.—Every stock or mutual insurance company, association, or exchange of another State or foreign government, authorized to do

> business in this Commonwealth, shall make report to the Insurance Commissioner, on or before March first of each year, under oath of its president, secretary, or attorney, showing the gross premiums of every character and description received from business transacted in the Commonwealth during the year, or fraction of year, ending with the thirty-first day of December preceding, whether said premiums were received in money or in the form of notes, credits, or any other substitute for money, or whether the same were collected in this Commonwealth or elsewhere, and to pay into the State Treasury the requisite tax upon all such premiums. *Such companies, associations, and exchanges, in making such report, may deduct, from the gross premiums received, all premiums returned on policies canceled or not taken, and all premiums actually paid for reinaurances where the same are effected in companies duly licensed to do business in this Commonwealth; etc.*"

You have called our attention to the fact that Section 24 of the Act of June 1, 1889, P. L. 420, as amended by the Acts of June 28, 1895, P. L. 408, and May 6, 1925, P. L. 526, provides, inter alia, that the annual tax upon premiums of foreign insurance companies shall be at the rate of two per centum upon the gross premiums received from business done within this Commonwealth during the preceding calendar year; and that domestic insurance companies or associations, except companies doing business upon the mutual plan without any capital stock, and certain purely mutual beneficial associations, are required to make annual report to the Auditor General, of their gross premiums, premium deposits, or assessments received during the year preceding, less certain deductions expressly provided for, and pay a tax of eight mills on the dollar upon the gross amount of said premiums. You state, in connection therewith, that if foreign insurance companies reinsuring in Pennsylvania mutual insurance companies having no capital stock, are allowed the deduction of the premiums paid for reinsurances it would mean a loss of tax to the State on the amount of business so reinsured because said domestic mutual insurance companies pay no gross premiums tax. You further state that, if foreign fire insurance companies, who are authorized to do business in this State reinsure in domestic stock fire insurance companies, and are thereby allowed the deduction of the premiums paid for said reinsurance, it would mean a loss of tax to the State to the extent of twelve mills on each dollar of the amount of premiums so reinsured.

The particular provisions of said Section 231 of the Act of May 17, 1921, requiring construction in view of your inquiries, is as follows:

> "Such companies, associations and exchanges, in making such report, may deduct, from the gross pre-

> miums received * * * all premiums actually paid for reinsurances where the same are affected in companies duly licensed to do business in this Commonwealth."

It is unnecessary to cite authority that the underlying principle of all construction of statutes is that the intent of the Legislature should be sought in the words employed to express it, and the Legislature must be understood to intend what is plainly expressed. By the words employed in the provision in question, the meaning is plain that the Legislature intended to allow deductions to foreign insurance companies, associations and exchanges, from the gross premiums received, of all premiums actually paid for reinsurances where the same are affected in a certain class of companies. The limitation set by the Legislature as to the "companies" referred to is: "Companies duly licensed to do business in this Commonwealth." I note that you state in your letter that "Pennsylvania companies are not licensed. They are registered to do business in this State." This suggests to me that you may have in mind that the use of the words "licensed to do business" in the provision just quoted from said Section 321 might restrict the deductions to be allowed foreign insurance companies from the gross premiums received, to the premiums paid for reinsurances in foreign insurance companies authorized to do business in Pennsylvania because of the fact that domestic companies are not "licensed to do business" in Pennsylvania, but are "registered to do business."

Does the use of the term "licensed to do business" restrict the deductions to be allowed foreign insurance companies, associations and exchanges, from their gross premiums received, simply to foreign insurance companies authorized to do business in Pennsylvania? In Section 208 of the Insurance Department Act of May 17, 1921, P. L. 789, it is provided that the Insurance Commissioner shall issue "certificates of authority" to foregn insurance companies, associations and exchanges who are qualified under the laws of this Commonwealth to transact business herein. Neither in this section nor in any other section of the Act do I find that any reference is made to the issuance of a "license" to foreign insurance companies or associations to do business in Pennsylvania, but frequent reference is made to the "certificate of authority" required by the Act. In said Section 208 of the Insurance Department Act of 1921, in one instance, the term "license" is used when provision is made for the Insurance Commissioner to renew the "certificate of authority" of any mutual assessment or accident association lawfully doing business in this Commonwealth, beginning April 1st of each year and continuing in force for one year unless sooner revoked by him or surrendered by the "licensee." Because of the fact that the renewal

here referred to is the renewal of a "certificate of authority," the use of the term "licensee" in connection therewith can have no particular significance on the immediate question at issue.

In the case of domestic insurance companies, associations and exchanges, under said Insurance Company Act of 1921, P. L. 682, in Section 215, Paragraph A, the Insurance Commissioner upon the receipt of the notice as therein provided for, and in case he finds that the provisions of the Act have been complied with, shall issue to said domestic companies "a certificate showing that it has been organized in accordance with the provisions of this Act, and that it has the requisite amount of capital for the transaction of business in the Commonwealth, which certificate shall empower the company to issue policies, and otherwise transact the business of insurance for which it was incorporated." This certificate issued to domestic insurance companies is also known as a "certificate of authority." Thus, it will be seen that in case of both the *foreign* and *domestic* insurance companies, associations and exchanges, qualified under the law to do business in this Commonwealth, the Insurance Commissioner issues a "certificate" authorizing them to do business in this Commonwealth. In the case of domestic companies, the law does not require the renewal of the certificates, while in the case of foreign companies, the certificates are issued annually by the Insurance Commissioner to those companies duly qualified. This latter fact does not change the fundamental nature of the "certificate" itself, however. Consequently, harmonizing the expression "licensed to do business in this Commonwealth," as used in said Section 321 of the Insurance Company Act of 1921, P. L. 682, with the context of the Act itself, as well as interpreting it in the light of the context of that part of the Insurance Department Act of 1921, P. L. 789, in pari materia, passed at the same session of the Legislature, it is manifest that the Legislature intended, by the use of this expression, to mean companies "authorized to do business in Pennsylvania," and thereby comprehend both domestic and foreign insurance companies, associations and exchanges who have "certificates" authorizing them to do business in Pennsylvania.

The provision of said Section 321 of the Insurance Company Act of 1921 here in question is the same as the proviso, allowing deductions from gross premiums, in Section 16 of the Insurance Department Act of June 1, 1911, P. L. 607. Deputy Attorney General Hargest in an opinion to the Insurance Commissioner, January 26, 1916, reported in Attorney General's Opinions 1915-1916, p. 221, had before him the question as to whether credit should be given for premiums paid for reinsurance by a domestic fire insurance company in the settlement against the liquidating receiver (the Insurance Commissioner) of said company for the tax on gross premiums. He held

that such credit should be given for premiums paid for reinsurance. In deciding this question he gave consideration to the interpretation, in certain respects, of the aforementioned proviso of said Act of 1911, and also considered the Act of May 8, 1899, P. L. 258, which latter Act relates especially to reinsurance and the transaction of business by fire and marine insurance companies or associations. The second section thereof relating to all fire insurance companies provided, inter alia, that said companies should be allowed deductions from the gross premiums received, of the premiums paid for reinsurance "in case any such company or companies shall effect reinsurance with any other company or companies of this State, or licensed to do business in this State." In this connection Deputy Attorney General Hargest said on page 222 as follows:

> "It is not to be presumed that foreign insurance companies would be exempt from taxation on the premiums representing reinsurance and our own companies, be required to pay the tax thereon. Moreover, to include in the tax on gross premiums a tax on the premiums paid for reinsurance, would be to impose a tax upon such premiums twice. The Warsaw Fire Insurance Company has paid the tax upon the premiums which it received for reinsuring the risks of the American Union Fire Insurance Company, and while double taxation is not unconstitutional, it must have clear legislative authority to support it."

With respect to your second inquiry, I thoroughly agree with the reasoning of, and reaffirm the conclusion reached by, Deputy Attorney General Hargest that if foreign insurance companies, licensed to do business in Pennsylvania, are not allowed to deduct from their gross premiums received, the premiums of such companies actually paid for reinsurance in domestic fire insurance stock companies, the gross premium tax would be imposed upon such premiums twice, and there is no clear Legislative provision in said Insurance Company Act of May 17, 1921, P. L. 682, or in any other Act, to support it.

I appreciate the facts as you have stated them that if foreign insurance companies and associations, licensed to do business in Pennsylvania, are allowed, in estimating the gross premiums tax, to deduct from the gross premiums received, the premiums of said companies paid for reinsurances in domestic companies or associations upon the mutual plan without capital stock, that considerable tax is lost to the State; and that this fact is equally true if foreign fire insurance companies are allowed, in estimating said tax, to deduct from the gross premiums received, the premiums of said companies paid for reinsurances in domestic foreign fire insurance stock companies. This, however, is entirely a matter for the State Legislature. The situation

so far as foreign fire insurance companies, licensed to do business in Pennsylvania, is concerned, has existed for a considerable period of time, as previously indicated. On the other hand, my investigation of this matter leads me to believe that this apparent loss in tax is equalized to a large extent. For instance, when foreign mutual insurance companies, who specialize in a certain type or types of insurance, take out reinsurance, I understand, they reinsure in domestic mutual companies doing the same type or types of business; and in turn when these domestic mutual insurance companies, without capital stock, reinsure their business they give it to a mutual foreign insurance company doing the same type of business. Consequently, although in the first instance there is no tax on gross premiums received, in the second instance there is a tax on the gross premiums at two per cent. I am likewise advised that there is a similar reciprocity existing in the matter of reinsurance between foreign fire insurance companies and domestic fire insurance stock companies, at least, to a rather large extent. Consequently, if this is true, although tax at the rate of twelve mills on the dollar of the amount of gross premiums is lost to the State when a foreign fire insurance company, licensed to do business in Pennsylvania, reinsures in a domestic fire insurance stock company, nevertheless, when the domestic fire insurance stock company, reinsures business in a foreign insurance company, authorized to do business in Pennsylvania, there is tax paid on these premiums by the foreign fire insurance company to the State at two per cent. on the dollar upon the gross amount of said premiums.

Therefore, I am of the opinion, and so advise you:

First, that the term "licensed to do business in this Commonwealth," as used in Section 321 of the Act of May 17, 1921, P. L. 682, in the provision authorizing certain deductions from gross premiums received by foreign insurance companies, associations and exchanges, means "authorized to do business in this Commonwealth," and comprehends thereby both domestic and foreign insurance companies, associations and exchanges authorized to do business in Pennsylvania.

Second, that in making annual report for the purpose of gross premiums tax, foreign insurance companies, authorized to do business in Pennsylvania, are allowed by said Insurance Company Act of 1921 to deduct, from the gross premiums received, the premiums of said companies actually paid for reinsurances in domestic companies, associations or exchanges, upon the mutual plan without capital stock.

Third, that in making annual report for the purpose of the gross premiums tax, foreign fire insurance companies, authorized to do business in Pennsylvania, are allowed by said Insurance Company Act of 1921, to deduct, from the gross premiums received, the premiums of

said companies actually paid for reinsurances in domestic fire insurance stock companies.

Yours very truly,
DEPARTMENT OF JUSTICE,
PHILIP S. MOYER,
Deputy Attorney General.

Workmen's Compensation—Insuranre Policy—Amount of Liability—Endorsement—Act of 1921, P. L. 682.

The Insurance Company Act of 1921, P. L. 682, requires that all policies of insurance against liability under the Workmen's Compensation Act of 1915 shall cover all amounts for which the insured employer may become liable under the Act during the term of such insurance. The insurer is prohibited from limiting his ability to a less amount, and the policy must be properly endorsed.

Department of Justice,
Harrisburg, Pa., July 7, 1927.

Colonel Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: I beg to acknowledge receipt of your letter of June 30th requesting that you be advised whether paragraph 2 of the Standard Pennsylvania Workmen's Compensation Endorsement, which is required to be attached to all policies of insurance issued against liability under the Workmen's Compensation Act of Pennsylvania, is authorized under the provisions of Section 651 and 653 of the Insurance Company Law of 1921 (Act of May 17, 1921, P. L. 682).

Paragraph 2 of the Standard Pennsylvania Workmen's Compensation Endorsement, referred to above, is as folows:

> "The Insuring Company hereby assumes the whole liability of the Insured Employer under the Workmen's Compensation Act of Pennsylvania, 1915, as amended and all Laws amendatory thereof which may be or become effective while this Policy is in force, without any exception, qualification or limitation.
>
> "The Insuring Company agrees to pay, in the Manner provided by the said Workmen's Compensation Act, all benefits due or to become due from the Insured Employer, including all funeral expenses, surgical, medical and hospital services, medicines and supplies, for which the Insured Employer may be or become liable under said Act. This agreement shall constitute a direct promise to the injured employee and to dependents of injured employees, enforceably by action brought in the name of such injured employee or such dependents. As between the employee, or his dependents, and the Insuring Company,

the notice to or knowledge of the occurrence of an injury on the part of the Insured Employer shall be deemed notice or knowledge on the part of the Insuring Company."

Sections 651 and 653 of the Insurance Company Law of 1921 are as follows:

"Section 651. Policy Provisions.—Every policy of insurance against liability under 'The Workmen's Compensation Act of nineteen hundred and fifteen,' and acts amendatory thereof, shall contain the agreement of the insurer to pay all compensation and provide all medical, surgical, and hospital attendance for which the insured employer may become liable under the act during the term of such insurance, and the further agreement that, as between the insurer and any claimant under the act, notice to the employer or the employer's knowledge of an accident or injury constituting the basis of a claim under the act shall be notice to and knowledge of the insurer. Such agreements shall be construed to be a direct promise to the injured employe or to the dependents of a deceased employe having a claim under the act, and shall be enforceable by action brought in the name of such injured employe or in the name of such dependents. Such obligation shall not be affected by any default of the insured, after the accident, in the payment of premiums or in the giving of any notices required by such policy or otherwise."

"Section 653. Prohibited Policy Provisions.—No policy of insurance against liability under 'The Workmen's Compensation Act of nineteen hundred and fifteen,' or acts amendatory thereof, shall contain any limitation of the liability of the insurer to an amount less than that for which the insured employer may become liable under the act during the term of such insurance. No such policy or contract of insurance, nor any agreement to deliver such insurance, shall be issued except upon a form approved by the Insurance Commissioner as complying with all the terms and provisions of this act. But a policy may be issued to a self insurer, qualified under section three hundred five of article three of 'The Workmen's Compensation Act of nineteen hundred and fifteen,' or acts amendatory thereof, providing for the payment of any stated loss in excess of ten thousand dollars falling upon such self insurer, under the terms of the said act, by reason of any single accident."

In my opinion Sections 651 and 653, quoted above, clearly require that all policies of insurance against liability under the Workmen's Compensation Act of 1915 shall cover all amounts for which the insured employer may become liable under the Act during the term of such insurance. The insurer is prohibited from limiting its liability

to an amount less than that for which the insured employer may become liable under the Act. The agreement of the insurer that it shall be liable for all amounts for which the insured employer may become liable can properly be secured only by the requirement that each policy issued to an insured employer shall cover the entire liability of the employer. I find no other method of complying with the above Section.

Paragraph 2 of the Standard Endorsement, quoted above, is strictly in accordance with the above Sections 651 and 653, and your Department is authorized to require an endorsement similar to paragraph 2 upon all policies insuring the liability of employers under the Workmen's Compensation Act.

Very truly yours,

DEPARTMENT OF JUSTICE,
PAUL C. WAGNER,
Deputy Attorney General.

Casualty insurance companies—Reserves—Amount of—Act of May 17, 1921.

The reserve of casualty insurance companies required in their annual statement for compensation claims under policies written in the preceding three years, under section 313 (*d*) of the Insurance Department Act of May 17, 1921, P. L. 789, must be for the first year of the three-year period either 65 per cent. of the earned premiums, less proper deductions, or the present value at 4 per cent. interest of determined and estimated unpaid claims, whichever may be greater, and for the second and third years, 65 per cent. of the earned premiums, less deductions.

Department of Justice,
Harrisburg, Pa., July 13, 1927.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: I beg to acknowledge receipt of your letter of July 7th requesting that you be advised relative to the proper method of computing the reserve required to be set up in the annual statement of a stock or mutual casualty insurance company or exchange for compensation claims under policies written in the three years immediately preceding the date as of which the particular statement is made under the provisions of Section 313 (d) of the Insurance Department Act of 1921 (Act of May 17, 1921, P. L. 789.)

Section 313 of the above Act prescribes the method for the computation of the reserve required of stock and mutual casualty companies for outstanding losses under insurance against loss or damage from accident to, or injuries suffered by, employes or other persons.

Sub-sections (c) and (d) of this Section deal with the computation of such reserve for compensation claims. The relevant parts of the Section are:

> "Section 313. Computation of Reserve.—The reserve required of stock and mutual casualty insurance companies and exchanges for outstanding losses under insurance against loss or damage from accident to, or injuries suffered by, an employe or other person, and for which the insured is liable, shall be computed as follows:
>
> * * * * *
>
> "(c) For all compensation claims under policies written more than three years prior to the date of which the statement is made, the present value, at four per centum interest, of the determined and estimated future payments.
>
> "(d) For all compensation claims under policies written in the three years immediately preceding the date as of which the statement is made, such reserve shall be sixty-five per centum of the earned compensation premiums of each of such three years, less all loss and loss expense payments made in connection with such claims under policies written in the corresponding years, but, in any event, in the case of the first year of any such three-year period, such reserve shall be not less than the present value, at four per centum interest, of the determined and the estimated unpaid compensation claims under policies written during such year."

To illustrate, let us assume the case of a company which has filed a statement as of December 31, 1926. The three-year period referred to in Section 313 (d) comprises, therefore, the years 1924, 1925 and 1926. It is required that the reserve for all compensation claims arising under policies written in these three years shall be sixty-five per centum of the earned compensation premiums of each of such three years less all loss and loss expense payments made in connection with such claims under policies written in such three years respectively.

A reserve so computed is a sufficient reserve for claims arising for the three years indicated, except, however, as to "the first year" of such three-year period. There is a proviso that the reserve for such first year shall be not less than the present value, at four per centum interest, of the determined and the estimated unpaid claims under policies written during each year. "The first year" of the three-year period used in the illustration is the year 1924. The only other construction which could be given to the phrase "the first year of any such three-year period" is that it refers to the year 1926. 1926, however, is not the first year of such period, but the last year of such period.

A consideration of sub-sections (c) and (d) of Section 313 confirm the construction herein given to the phrase "the first year of any such three-year period." Section 313 (c) provides that the reserve for all compensation claims under policies written more than three years prior to the date as of which the particular statement is made shall be the present value at four per centum interest of the determined and estimated future payments. In the illustration suggested, this would apply to the reserve for all claims under policies written in 1923 or prior thereto. It is therefore reasonable that the reserve for 1924 should be required to be either sixty-five per centum of the earned premiums for that year, less losses and loss expense payments made in connection with claims under policies written in that year, or the present value at four per centum interest of the determined and estimated unpaid claims under policies written during that year, whichever may be greater, and that the reserve for the years 1925 and 1926 should be required to be sixty-five per centum of the earned premiums for each of such years less the authorized deductions. It is unreasonable to assume that it was intended that the reserve for the years 1923 and prior thereto should be required to be the present value of future payments, that the reserve for 1924 and 1925 be sixty-five per centum of the earned premiums less authorized deductions, and that the reserve for 1926 be sixty-fixe per centum of the earned premiums less authorized deductions or the present value of the determined and estimated claims for that year, whichever may be greater.

I am, therefore, of the opinion that, in computing the reserve for compensation claims under Section 313 (d) of the Insurance Department Act of 1921, the reserve for the first year of any three-year period immediately preceding the date as of which any annual statement is made shall be either sixty-five per centum of the earned premiums of such year less authorized deductions, or the present value at four per centum interest of determined and estimated unpaid claims arising under policies written during such year, whichever is greater, and the reserve for the second and last years of any such three-year period, being the last and next to last years included in the statement, shall be sixty-five per centum of the earned premiums of such years less authorized deductions.

Very truly yours,

DEPARTMENT OF JUSTICE,

PAUL C. WAGNER,

Deputy Attorney General.

Insurance Department—Department audit—Cost.

Cost of department audit may be paid out of the general appropriation to the department for the biennium ending May 31, 1929.

Department of Justice,
Harrisburg, Pa., July 14, 1927.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: I beg to acknowledge receipt of your letter of July 1st relative to the audit now being made of the Insurance Department Fund in which you request that you be advised.

(a) Whether the cost of such audit is properly payable out of any balance remaining in said Fund, or

(b) If the cost of such audit is not properly payable out of any such balance, whether it is properly payable out of the appropriation to the Department of Insurance under the General Appropriation Act of 1927, approved May 11, 1927.

The facts of the case, as I understand them, are the following:

The Insurance Department Fund, which was created by the Act of May 6, 1925, P. L. 513, was abolished as of May 31, 1927 by the Act No. 428 of 1927, approved May 6, 1927. It was desirable that an audit of the Fund be made so that the account of the Insurance Commissioner in connection therewith might be closed properly. On May 25, 1927 the Insurance Commissioner wrote to the Budget Secretary requesting that an audit of the Fund be made as of the end of the then fiscal year and that it be authorized in such manner that, if possible, the expense of the audit might be paid out of any balance remaining in the Fund. This request was approved on May 31, 1927 by the Budget Secretary and the Disbursing Deputy Auditor General. Pursuant to this approval, McGee, Fleisher and Company, certified public accountants, were employed on June 7, 1927 to do this work, and on the same date a letter which was the firm's written authority to proceed with the audit was sent to it.

Replying to your first inquiry, it is unnecessary to consider whether or not the cost of the audit authorized as above set forth was payable out of any balance of the Insurance Department Fund. The unexpended balance of the Fund has already been paid into the General Fund of the State Treasury under the provisions of the Act of May 6, 1927, referred to above, and this was done before the above charge became an encumbrance or lien thereon. The Fund had therefore ceased to exist before the item under consideration became such an encumbrance or lien and there is, therefore, no balance thereof from which the cost of this audit could be paid.

Replying to your second inquiry, I am of the opinion that the cost of this audit is properly payable out of the appropriation of $680,000 to the Department of Insurance under the General Appropriation Act of 1927, as this appropriation was made for "the payment of the salaries, wages and other compensation of such * * * accountants, auditors, * * * and other assistants and employes as may be required for the proper conduct of the work of the Department * * *"

In an opinion by Honorable George E. Alter, Attorney General, to Mr. T. A. Crichton, Cashier of the Treasury Department, dated June 22, 1922, it was held that the expense of auditing the accounts of the State Treasurer was properly payable out of an appropriation to the State Treasurer, under the General Appropriation Act of 1921, Act of May 27, 1921, Appropriation Acts, p. 33, of $50,000 "for the salaries of additional auditors including necessary expenses."

You are, therefore, advised that payment of the cost of this audit may be made out of the general appropriation to your Department for the biennium ending May 31, 1929.

Very truly yours,

DEPARTMENT OF JUSTICE,

PAUL C. WAGNER,

Deputy Attorney General.

Insurance Department—Insurance Department Fund—Audit.

Cost of the audit of the Insurance Department Fund is properly payable out of the general appropriation to the department for the biennium ending May 31, 1929.

Department of Justice,

Harrisburg, Pa., August 4, 1927.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: I beg to acknowledge receipt of your letter of July 1st relative to the audit now being made of the Insurance Department Fund in which you request that you be advised.

(a) Whether the cost of such audit is properly payable out of any balance remaining in said Fund, or

(b) If the cost of such audit is not properly payable out of any such balance, whether it is properly payable out of the appropriation to the Department of Insurance under the General Appropriation Act of 1927, approved May 11, 1927.

The facts of the case, as I understand them, are the following:

The Insurance Department Fund, which was created by the Act of May 6, 1925, P. L. 513, was abolished as of May 31, 1927 by the Act

No. 428 of 1927, approved May 6, 1927. It was desirable that an audit of the Fund be made so that the account of the Insurance Commissioner in connection therewith might be closed properly. On May 25, 1927 the Insurance Commissioner wrote to the Budget Secretary requesting that an audit of the Fund be made as of the end of the then fiscal year and that it be authorized in such manner that, if possible, the expense of the audit might be paid out of any balance remaining in the Fund. This request was approved on May 31, 1927 by the Budget Secretary, acting for the Governor, and the Disbursing Deputy Auditor General. Pursuant to this approval, McGee, Fleisher and Company, certified public accountants, were employed on June 7, 1927 to do this work.

In replying to your first inquiry, it is unnecessary to consider whether or not the cost of the audit authorized as above set forth was properly payable out of any balance of the Insurance Department Fund. The unexpended balance of the Fund has already been paid into the General Fund of the State Treasury under the provisions of the Act of May 6, 1927, referred to above, and this was done before the above charge became an encumbrance or lien therein. The fund had therefore ceased to exist before the item under consideration became such an encumbrance or lien and there is, therefore, no balance thereof from which the cost of this audit could be paid.

In replying to your second inquiry, it is necessary to consider, first, the provisions of the Administrative Code relative to the employment and compensation of the employes of the several administrative departments and the method of disbursement by the heads of such departments of the appropriations made to the respective departments. Section 214, Article II, of the Code provides,

> "The heads of the several administrative departments, except the Auditor General, State Treasurer, and Secretary of Internal Affairs, and the independent administrative boards and commissions shall appoint and fix the compensation of such directors, superintendents, bureau or division chiefs, assistant directors, assistant superintendents, assistant chiefs, experts, scientists, engineers, surveyors, draftsmen, accountants, secretaries, auditors, inspectors, examiners, statisticians, marshals, clerks, stenographers, bookkeepers, messengers and other assistants and employes as may be required for the proper conduct of the work of their respective departments, boards or commissions: Except as otherwise provided in this act, the heads of the respective administrative departments shall appoint and fix the compensation of such clerks, stenographers, and other assistants as may be required for the proper conduct of the work of any departmental administrative bodies, boards, com-

> missions or officers, and of any advisory boards or commissions established in their respective departments. The number and compensation of all employes appointed under this section shall be subject to aproval by the Governor, and after the Executive Board shall have fixed the standard compensation for any kind, grade, or class of service or employment, the compensation of all persons in that kind, grade, or class appointed hereunder shall be fixed in accordance with such standard."

Section 223, Article II, provides,

> "All salaries and other compensation, payable under the provisions of this Act, shall be paid out of the State Treasury upon the warrant of the Auditor General drawn upon the State Treasurer. The Auditor General shall draw warrants for salaries or other compensation upon requisition of the head of the proper department, or of the proper independent administrative board or commission. All warrants for the payment of salaries, compensation or other disbursements of or for departmental administrative boards or commissions, or of advisory boards or commissions, shall be drawn upon requisition of the head of the department with which such departmental administrative boards or commissions, or advisory boards or commissions, are connected. Warrants for all salaries, compensation, or other disbursements of or for the Governor's office and the Executive Board shall be drawn by the Auditor General upon requisition of the Governor."

The meaning of the two sections when considered together is clear. The compensation of all persons and employes (the classes of which are enumerated in Section 214) required for the work of any department is fixed by the head of that department subject to the approval of the Governor and such compensation and all other disbursement and indebtedness incurred in the administration of the department are paid by the State Treasurer out of the appropriation made therefor upon warrant of the Auditor General drawn upon requisition of the head of the department. The expenditure of the funds appropriated to any particular department is under the supervision and control of the head of that department subject to the approval of the Governor.

Section 214 of the Code, quoted in full above, provides for the employment and compensation of accountants and auditors, being two of the various clauses of employes enumerated. The General Appropriation Act of 1927 provides for an appropriation of $680,000.00 to the Department of Insurance for "the payment of the salaries, wages and other compensation of such * * * accountants, auditors, * * * and other assistants and employes as may be required

for the proper conduct of the work of the Department. * * *'' The words ''accountants'' and ''auditors'' have the same significance in the two statutes.

The question which remains is whether the terms ''accountants'' and ''auditors'' include expert accountants and certified public accountants employed to perform services for one of the departments of the Commonwealth. In an opinion by Honorable George E. Alter, Attorney General to Mr. T. A. Crichton, Cashier of the Treasury Department, dated June 22, 1922, it was held that the expenses of auditing and verifying the accuracy of certain accounts of the Treasury Department by a firm of certified public accountants, an expenditure authorized by the State Treasurer, was properly payable out of an appropriation to the State Treasurer under the General Appropriation Act of 1921, Act of May 27, 1921, Appropriation Acts, Page 33 of $50,000.00 ''for the salaries of additional auditors including necessary expenses.''

It is, of course, the duty of the Auditor General to examine and adjust the accounts of the various State officers, departments, commissions, etc. His powers are broad and plenary and he is authorized to make such investigations as he may deem necessary for the proper administration of the public funds and for the protection of the public interest. The nature and frequency of the examinations are within the judgment and discretion of the Auditor General. For a further discussion of the duty of the Auditor General in this connection, reference is made to an opinion by Honorable George E. Alter, Attorney General to Honorable Samuel S. Lewis, Auditor General, dated March 30, 1922.

There is, however, no prohibition against the employment by the head of an administrative department of accountants and auditors to perform special services in connection with the work of his department. There are numerous cases in which such employment may be highly expedient. The installation of a new system of accounting in a department, the verification of certain accounts, the necessity of establishing the cost of a certain portion of the administrative work of a department, present situations which might, in the opinion of the head of the department, necessitate the securing of information additional to that obtained from the Auditor General. For your guidance in the future, it is suggested that any employment of accountants or auditors for your department for special service of the class under consideration, be made with the approval of the Auditor General as was done in the present case in order that there may be no conflict between the work of the Auditor General's department and that being performed by the accountants or auditors employed by you.

I am, therefore, of the opinion that the cost of the audits of

the Insurance Department Fund which was made upon your authorization for the purpose of settling finally the accounts of the Fund is properly payable out of the general appropriation to your department for the biennium ending May 31, 1929.

Very truly yours,

DEPARTMENT OF JUSTICE,

PAUL C. WAGNER,

Deputy Attorney General.

Insurance Commissioner—Dissolution of Corporation—Statutory Liquidator—Prior Action Pending—Parties—Act of May 17, 1921, P. L. 789.

The Statutory Liquidator of a corporation under the State Insurance Commissioner has the authority to institute and prosecute actions to judgment for debts, assessments, etc., due the Insurance Commissioner from the dissolved corporation without being first required to pay any costs which may have accrued in actions instituted by said corporation before dissolution to collect the same debts, assessments, etc. Such proceedings are not between the same parties and the rule as to prior payments of costs in pending actions before entering another suit has no application.

Department of Justice,
Harrisburg, Pa., November 10, 1927.

Colonel Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We beg to acknowledge receipt of your letter of November 4th requesting an opinion relative to the right of the Insurance Commissioner as Statutory Liquidator of the William Penn Motor Indemnity Exchange to institute an action in a court of this State to collect an assessment due to the Exchange at the time of its dissolution and the appointment of the liquidator without paying first the costs which had accrued in connecion with a suit brought by the Exchange itself before dissolution to collect the same assessment.

The William Penn Motor Indemnity Exchange was dissolved and its business ordered liquidated by and under the direction of the Insurance Commissioner in accordance with and under the authority of Article V of the Insurance Department Act of 1921 (Act of May 17, 1921 P. L. 789) by order of the Court of Common Pleas of Dauphin County, as of Commonwealth Docket 1925, No. 133. A certified copy of the order was duly entered, as required by Section 506 of the Act, in the proper office of the county where the Exchange had its principal office. The Exchange was thereupon dissolved and as provided by said Section 506 the Insurance Commissioner, as statutory liquidator, was "vested by operation of law with title to all of the property, con-

tracts and rights of action'' of such Exchange. *Com. ex rel. vs. Union Casualty Insurance Co., 287 Pa. 6; Martyne vs. American Union Fire Insurance Co. of Philadelphia, 216 N. Y. 183, 110 N. E. 502.*

The Statutory Liquidator was thereupon entitled to institute and prosecute to judgment, actions to collect the debts, assessments and other obligations due to the dissolved Exchange in the performance of his duty to collect its assets. If any actions had been begun by the Exchange before dissolution, the liquidator, like any other assignee or trustee appointed by a court to collect and conserve assets, should have been and should now be free to institute such actions as may be necessary in the premises regardless of any such previous suits or any costs incurred in connection therewith.

The practice of courts to stay proceedings in a second action upon the same cause between the same parties until the costs of the first action are paid is well established in Pennsylvania. *Smith vs. Smith 15 Pa. Superior Ct. 366; Murphy vs. Taylor 63 Pa. Superior Ct. 85.* But it is essential that the second suit be between the same parties.

The Insurance Commissioner as liquidator and the corporation or exchange which he is liquidating are not the same party for the purposes of the application of the above rule The only case which we have been able to find in the books bearing directly on the point is *Rosenheim & Sons vs. Lacey, 167 Ala. 585, 52 So. 833.* In this case a trustee in bankruptcy of one of two partners filed a bill to set aside certain sales of partnership property in order to subject it to the claims of partnership creditors. It was held that the trustee could not maintain the bill and it was dismissed. The creditors then filed a bill seeking the same relief sought in the prior suit. The chancellor ordered the complainants in the second suit to pay the costs of the first action instituted by the trustee before allowing them to proceed. Upon refusal, he creditors' bill was dismissed. They appealed and the orders requiring the payment of the costs and dismissing the bill were held to be error and the case reversed and remanded. The holding in this case is in accordance with our conception of the rule and its proper application.

We are therefore of the opinion that you are authorized to institute and prosecute actions for debts, assessments, etc. due you as Statutory Liquidator of a dissolved exchange without being required first to pay any costs which may have accrued in actions instituted by the exchange before dissolution to collect the same debts, assessments, etc.

Very truly yours,

DEPARTMENT OF JUSTICE,
THOMAS J. BALDRIGE,
Attorney General.

Insurance Commissioner—State Treasurer—Securities Deposited by Insurance Companies. Act of May, 1921, P. L. 789.

Rights and duties of the Insurance Commissioner and State Treasurer with relation to the securities deposited by insurance companies, with the Insurance Commissioner.

Department of Justice,
Harrisburg, Pa., January 6, 1928.

Colonel Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We beg to acknowledge receipt of your request for our opinion concerning the rights and duties of the Insurance Commissioner and State Treasurer respectively with relation to the securities deposited by insurance companies of this Commonwealth or of foreign governments with the Insurance Commission and held by the State Treasurer under the provisions of Sections 401-404, Article IV of the Insurance Department Act of 1921 (Act of May 17, 1921, P. L. 789). These sections are as follows:

"ARTICLE IV

Deposits of Securities to do Business

Section 401. Deposit of Securities with Insurance Commissioner.—Any insurance company, association, or exchange, incorporated or organized under the laws of this Commonwealth, desiring to transact business in other States, the laws whereof require that such company, association, or exchange shall first deposit securities of a designated value with the Insurance Commissioner or other proper officer of this Commonwealth in trust and and for the benefit of all its policyholders, or any insurance company or association of a foreign government desiring to make the deposit required of foreign companies or associations in order to transact business in the United States, is hereby authorized to deposit with the Insurance Commissioner securities for such an amount as the laws of such other States designate, or as the laws of this State require for foreign companies or associations. If the Insurance Commissioner is satisfied that such securities are worth the required amount, it shall be his duty to receive the same, or those given in exchange therefor as hereinafter provided, for the purpose aforesaid. Upon the written request of said insurance company, association, or exchange, the Insurance Commissioner shall certify, under his hand and official seal, to the proper officer of such other State or States or of the United States Government, wherein said insurance company, association or exchange may desire to transact business, that said company, association or exchange has deposited with him

securities, giving the items of kind thereof, and that he is satisfied they are worth the sum designated by the laws of such other State or States, or required by the United States Government.

Section 402. State Treasurer to Be Guardian of Securities.—The Insurance Commissioner shall, upon receipt of any deposit made under this act, immediately place the same with the State Treasurer, whose duty it shall be to receive and hold the same, in the name of the Commonwealth, in trust for the purposes for which such deposit is made. The State Treasurer shall at all times be responsible for their custody and safekeeping. The company, association, or exchange making the deposit shall be entitled, from time to time, to demand and receive from the State Treasurer, the whole or any portion of any securities so deposited, upon depositing with him, in lieu thereof, other securities of at least equal value; and also to demand, receive, sue for, and recover the interest and income from said securities, from the payee or obligee thereof, as the same becomes due and payable.

Section 403. Return of Securities by State Treasurer.—Upon request of any company, association, or exchange, organized under the laws of this Commonwealth, making the deposit, the Insurance Commissioner may authorize the State Treasurer to return to such company, association, or exchange the whole, or any portion, of the securities held by him on deposit, if the Insurance Commissioner shall be satisfied that the securities so asked to be returned are subject to no liability, and are not required to be longer held by any provision of law, or for the purpose of the original deposit. He may, in like manner, return to the trustees, or any representatives authorized for that purpose, of an insurance company, or association of a foreign government, any deposit made by such company, if it shall appear that such company or association has ceased to do business in this Commonwealth, and is under no obligation to policyholders or other persons in this Commonwealth or in the United States, for whose benefit such deposit was made. No deposit, when once made, shall be wholly withdrawn or diminished so long as any liability to policy holders remains unsatisfied, except in case of dissolution by a court or judge of any company, association, or exchange making the deposit, in which case the State Treasurer shall, upon the written order of said court or judge, assign and transfer to the receiver duly appointed all securities or funds in his possession belonging to the company, association or exchange.

Section 404. Suits in Equity to Enforce, Administer, or Terminate Trusts Created by Deposit of Secur-

ities.—An insurance company, association or exchange which has made such deposit, or its trustees or resident manager in the United States, or the Insurance Commissioner, may, at any time, bring, in any court having jurisdiction, a suit in equity, against the Commonwealth and other parties properly joined therein, to enforce, administer, or terminate the trust created by such deposit. The process in such suit shall be served on the State Treasurer, who shall appear and answer on behalf of the Commonwealth, and perform such orders and decrees as the court may make thereon."

The first legislation in this State upon the subject matter covered by the above Article IV was the Act of April 6, 1868, P. L. 65, which was entitled, "An act to enable insurance companies to transact business in other States." This Act authorized insurance companies of this Commonwealth desiring to transact business in other States to deposit with the Auditor General or other proper officer of the Commonwealth securities in such amount as the laws of such other States should require and empowered the officer receiving such deposits to furnish, to the companies making the same, the certificates required to enable them to transact such business. Upon the establishment of the office of Insurance Commissioner these securities were deposited with the Insurance Commissioner and held by him in a safe deposit box rented for the purpose.

Subsequently it was deemed advisable to relieve the Insurance Commissioner of the responsibility for the actual custody of the securities deposited with him and to make the State Treasurer such custodian. The Act of 1868, referred to above, was accordingly repealed and a new Act, the Act of June 1, 1911, P. L. 602, was passed to take its place. This Act is in substantially the same form as Article IV of the Insurance Department Act of 1921. It is entitled, "An act authorizing insurance and surety companies to make a deposit of certain securities with the Insurance Commissioner, to enable them to do business in other States or with the United States Government; and requiring the State Treasurer to hold all deposits, so made, in the name of the Commonwealth."

Under any construction of the respective duties and powers of the Insurance Commissioner and the State Treasurer it is our opinion that the deposited securities are the property of the insurance company depositing the same and as such the company is entitled to include such securities among its assets. It is true that they may be applied for the benefit of the policy holders of the company by the Insurance Commissioner under certain conditions, but until such conditions arise the securities must be considered as belonging to the respective companies depositing them.

It is also our opinion that, in view of the purposes for which the

deposit is made, namely, to enable the company making the deposit to do business in other States or in the United States and to enable the Insurance Commissioner to give a certificate to the effect that the securities have been so deposited and that they are of the sum designated by the laws of the respective States or the United States Government, the securities should be under the direction and authority of the Insurance Commissioner and entirely subject to his order. Article IV, quoted above, clearly indicates that the Insurance Commissioner is to be the sole judge of the nature and value of the securities which he will accept for deposit, of the propriety of accepting such securities as may be offered in exchange for securities already deposited and of the circumstances under which deposited securities or any part thereof may be returned to the depositing company.

On the other hand, the State Treasurer is designated as the custodian of the securities deposited with the Insurance Commissioner, that is, he is responsible for the safe-keeping of the particular pieces of paper representing these securities delivered to him by the Insurance Commissioner. If the State Treasurer returns to the Insurance Commissioner or to the depositing company, upon the order of the Commissioner, the securities so held by him, his responsibility is at an end. In all cases of the delivery of securities by the Insurance Commissioner to the State Treasurer or by the State Treasurer to the Insurance Commissioner or a depository company, upon the order of the Commissioner, proper receipts should be taken.

It is further our opinion that any security deposited under the provisions of the above Article IV which is registered in a particular name (either because registration is required or is deemed desirable in the particular case) should be registered in the name of the Insurance Commissioner, or if registered in the name of the depositing company, should be accompanied by a properly executed power of attorney and when so registered should be placed with the State Treasurer for custody and safekeeping.

Very truly yours,

DEPARTMENT OF JUSTICE,

PAUL C. WAGNER,

Deputy Attorney General.

Beneficial societies—Endowment benefit certificate—Act of May 20, 1921.

A fraternal benefit society organized under the Act of May 20, 1921, P. L. 916, has no authority to issue twenty-year endowment benefit certificates.

Department of Justice,
Harrisburg, Pa., February 28, 1928.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We have your request of February 9th for an opinion relative to the power and authority of a fraternal benefit society organized and existing under, and in pursuance of, the provisions of the Act of May 20, 1921, P. L. 916 to issue to its members benefit certificates in the nature of twenty-year endowment certificates.

The sections of the Act which are pertinent to the question propounded are Sections 8 and 5, which read as follows:

> "Section 8. Every such society shall have power to issue whole life, old age, or whole life combined with old age, limited payment life, term, sick, or relief and dependent benefit certificates, and make the specified benefit payment in a single cash payment or in instalments or a term or life annuity. Every such certificate shall specify the amount of benefit furnished thereunder, and shall provide that the certificate, the charter or articles of incorporation, or, if a voluntary association, the articles of association, the constitution, and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the obligation of the society. Copies of the same, certified by the secretary of the society or corresponding officer, shall be received in evidence of the terms and conditions thereof; and any changes, additions, or amendments to said charter or articles of incorporation, or articles of association if a voluntary association, constitution, or laws, made or enacted subsequent to the issuance of the benefit certificate, shall bind the member and his beneficiaries in all respects the same as though such changes, additions, or amendments had been made prior to, and were in force at the time of, the application for membership."
>
> "Section 5. Every such society shall provide for the payment of death benefits, and may provide for the erection of monuments to mark the graves of its deceased members. It may also provide for the payment of old age benefits which mature for payment to the member at not under sixty years of age, and for permanent and temporary disability payments. It may provide that a member, when permanently disabled or upon attaining not less than sixty years of age, shall have the option to surrender his certificate upon payment of all or such portion of its face value as may be authorized under the constitution and laws.
>
> "Any society may provide for the acceptance of liens against benefit certificates, with interest at not less than four per centum per annum, in lieu of cash payments,

> but the total of such liens against any benefit certificate shall not exceed its share of the accumulation thereunder. Any such society collecting a level rate of contribution, under any of its benefit certificates, based upon any table of mortality allowed for valution purposes in this act, may grant to members holding such certificates extended and paid up protection or such withdrawal equities as may be allowed under its constitution and laws, but no such grants or privileges shall exceed in value the portion of the accumulations to the credit of such certificate at the time such grant or privilege is allowed."

Section 8 enumerates the various classes of benefit certificates which a fraternal benefit society has power to issue. Included in this enumeration are whole life, limited payment life, term, and old age certificates. Endowment certificates are not included and failure to so include them is, in our opinion, indicative of an intention on the part of the Legislature that no power or authority should exist in such societies to issue such certificates, their authority being limited to the classes enumerated.

It has been argued that the latter part of Section 5 reading

> "* * Any such society collecting a level rate of contribution, under any of its benefit certificates, based upon any table of mortality allowed for valuation purposes in this act, may grant to members holding such certificates extended and paid up protection or such withdrawal equities as may be allowed under its constitution and laws, but no such grants or privileges shall exceed in value the portion of the accumulations to the credit of such certificate at the time such grant or privilege is allowed,"

specifically authorizes the issuance of endowment certificates. It is evident, however, that Section 5, although placed before Section 8 in numerical order, is intended to grant certain privileges in connection with the benefit certificates authorized by Section 8 and to describe more specifically some of such certificates, and not to extend the classes of benefit certificates authorized in Section 8.

For example, Section 8 authorizes the issuance of old age certificates. Section 5 restricts the old age benefits which may be paid to benefits which mature for payment when the member reaches sixty years of age.

Section 5 likewise authorizes the granting to members holding benefit certificates under which there is collected a level rate of contribution, extended and paid up protection or certain withdrawal equities. It should be noted, however, that this grant is restricted to members holding "its benefit certificates" and it therefore becomes

necessary to refer to Section 8 to determine the classes of benefit certificates authorized to be issued.

You are therefore advised that, in our opinion, the classes of benefit certificates which a fraternal benefit society organized and existing under the above Act of May 20, 1921 is authorized to issue are restricted to those classes enumerated in Section 8 of the Act; that the classes enumerated do not include endowment insurance; and that therefore such fraternal benefit society has no authority or power to issue a twenty-year endowment benefit certificate.

Nothing in this opinion, however, is to be construed as limiting the authority of any such fraternal benefit society to issue old age benefit certificates which mature for payment to the member at not under sixty years of age.

Very truly yours,

DEPARTMENT OF JUSTICE,

PAUL C. WAGNER,

Deputy Attorney General.

Taxation—Foreign fire insurance companies' premiums—Collection—Payments to municipal treasurers—Acts of July 15, 1919, and May 6, 1925.

Under the Act of July 15, 1919, P. L. 964, amending section 2 of the Act of June 28, 1895, P. L. 408, the total amount to be paid to the treasurers of municipalities designated therein is limited to 2 per centum of the premiums received by foreign fire insurance companies within the Commonwealth, paid as a tax levied in accordance with the provisions of the Act of May 6, 1925, P. L. 526; and the amount to be paid to the treasurer of any particular municipality is limited to 2 per centum of the premiums paid by such foreign fire insurance company on account of the business done within such municipality.

Department of Justice,

Harrisburg, Pa., March 23, 1928.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We beg to acknowledge receipt of your request of February 21, 1928 for our opinion relative to the proper interpretation and construction of the Act of July 15, 1919, P. L. 964, amending Section 2 of the Act of June 28, 1895, P. L. 408, which supplemented Section 24 of the Act of June 1, 1889, P. L. 420, providing for the payment by the State Treasurer to the treasurers of the several cities, townships and boroughs within the Commonwealth of the two per centum tax paid upon premiums by foreign fire insurance companies, with particular reference to:

(a) The amount of tax paid upon premiums by foreign fire insurance companies which should be paid to the treasurers of the designated municipalities; and

(b) The proper method of computing the amounts to be paid to such treasurers, respectively.

The two per centum tax paid upon premiums by foreign insurance companies is levied under the provisions of the Act of May 6, 1925, P. L. 526, the latest amendment of Section 24 of the Act of June 1, 1889, P. L. 420, (referred to above), supplementing the Act of June 7, 1879, P. L. 112. The payment of part of this tax to the treasurers of designated municipalities of the Commonwealth is authorized by the said Act of July 15, 1919, which reads as follows:

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

By virtue of the provisions of Section 212 of the Insurance Department Act of 1921 (Act of May 17, 1921, P. L. 789), known as the Retaliatory Section, a foreign insurance company authorized to do business in this Commonwealth pays a tax in excess of two per centum on the premiums collected by it in this Commonwealth, if, under the laws of the State in which such foreign insurance company is incorporated, a tax in excess of two per centum is levied upon the premiums collected by a Pennsylvania insurance corporation in that State, the basis of taxation applied by this Commonwealth to the foreign corporation being the same as that applied by the foreign State to the Pennsylvania corporation.

It is our opinion that the Legislature intended by the above Act of July 15, 1919, to provide for the payment to the treasurers of the designated municipalities such amount, not in excess of two per centum, as should be received as a tax upon premiums from foreign fire insurance companies. Any additional tax received due to the

operation of the Retaliatory Section referred to above is not a two per centum tax or any part thereof and is therefore to be paid into the State Treasury as part of the general fund.

The said Act of 1919 does not prescribe a detailed method for computing the amounts to be paid to the various treasurers respectively. It is required that the amount to be paid shall be based upon the premiums received from foreign fire insurance companies doing business within the various cities, townships and boroughs. It is our opinion that it was the intention of the Legislature that the treasurer of a particular municipality should be paid an amount equivalent to two per centum of the premiums collected by foreign insurance companies on account of business done within the limits of such municipality. The amount of such premiums will, of course, be the aggregate of such premiums reported by the various foreign fire insurance companies doing business within the limits of any particular municipality.

In this connection reference is made to an informal opinion of Special Deputy Attorney General Schnader to Honorable Charles Johnson, Deputy Auditor General, under date of October 7, 1926, outlining the duties of the Insurance Commissioner and the Auditor General in connection with the payment of the amounts due to the respective treasurers, from which is quoted the following:

> "While the Act of 1919 does not require the Insurance Commissioner to present requisitions to the Auditor General for payments to the several cities, boroughs and townships thereunder, there can be no objection to the continuance of the practice which has hitherto prevailed. We understand that under the existing practice of the fiscal departments of the Commonwealth a requisition is drawn for every payment to be made out of the State Treasury. This is a practice which is highly desirable and it is entirely appropriate that the requisitions for payments to be made under the Act of 1919 should be presented to the Auditor General by the Insurance Commissioner, although as previously stated, the preparation and presentation of these requisitions is not obligatory upon the Insurance Commissioner.
>
> "If the Insurance Commissioner presents requisitions for payments to be made under the Act of 1919 such requisitions should be sufficiently definite to enable the Auditor General to prepare and forward warrants to the treasurers of the several cities, boroughs and townships entitled to payments. The warrants in order to reach their respective destinations must be sent to the treasurers of the several cities, boroughs and townships by mail. That being so, the requisitions forwarded to the Auditor General should specify the names and addresses of the treasurers of the several cities, boroughs and townships to which payments are due.

"If the Insurance Commissioner does not present to the Auditor General requisitions for the payments to be made under the Act of 1919 it is our opinion that it is the duty of the Auditor General to procure the names and addresses of the treasurers of the respective cities, boroughs and townships to which payments are to be made and to prepare the warrants upon the State Treasurer, such warrants to be made payable to the Treasurers of the several cities, boroughs and townships by name giving their respective addresses.

"To summarize, it is our opinion that it is the duty of the Insurance Commissioner to forward to the Auditor General a report showing collections of tax from foreign insurance companies doing business within the several cities, boroughs and townships; that if the Insurance Commissioner presents to the Auditor General requisitions for the payments to be made to the treasurers of cities, boroughs and townships, such requisitions should give the names and addresses of the respective treasurers to whom payments are due; and that if the Insurance Commissioner does not present requisitions to the Auditor General calling for the payments to be made under the Act of 1919 it is the Auditor General's duty to ascertain the names and addresses of the treasurers of the respective cities, boroughs and townships to which payments are due and to prepare and forward to the State Treasurer warrants for such payments."

It is therefore our opinion that under the provisions of the said Act of July 15, 1919, the total amount to be paid to the treasurers of the designated municipalities is limited to two per centum of the premiums received by foreign fire insurance companies within this Commonwealth, paid as a tax levied in accordance with the provisions of said Act of May 6, 1925, and that the amount to be paid to the treasurer of any particular municipality is limited to two per centum of the premiums received by such foreign fire insurance companies on account of the business done within such municipality.

Very truly yours,

DEPARTMENT OF JUSTICE,
PAUL C. WAGNER,
Deputy Attorney General.

Contracts Limiting Liability—Mutual Companies—Exchanges—Initial Premiums—Insurance Commissioner—Authority—Acts of 1921.

It is illegal for reciprocal and inter-insurance exchanges to include in the contracts issued by them any provision limiting the liability of the holders of

such contracts or the subscribers to such exchanges either to the initial premium paid or to any sum designated in the contract. The Insurance Commissioner has sufficient authority, under the provisions of Sections 208 and 501 of the Insurance Department Act of May 17, 1921, P. L. 789, and Sections 1004 and 1005 of the Insurance Company Law of May 17, 1921, P. L. 782, to correct this illegal practice, either by refusing to issue certificates of authority to such exchanges or by revoking or suspending certificates of authority heretofore issued.

Department of Justice,
Harrisburg, Pa., May 3, 1928.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We beg to acknowledge receipt of your request for our opinion relative to the legality of a provision in a reciprocal or inter-insurance contract limiting the liability of the holder thereof to the initial premium or to such additional amount as may be designated in the contract.

Reciprocal and inter-insurance exchanges provide a method for mutual insurance by the exchange of contracts among the members thereof for the purpose of "providing indemnity among themselves from any loss which may be insured against under any provision of the insurance laws excepting lie insurance." (Section 1001 of the Insurance Company Law of 1921—Act of May 17, 1921, P. L. 782). The basic principle upon which such exchanges are organized and operated is that the members insure themselves, assuming liability for any loss insured against, suffered by any particular member. Each member pays a designated initial premium. If the total amount of initial premiums collected is not sufficient to pay the losses incurred, the right of assessment exists to make up any deficit. In view of the fact that an exchange has no capital or reserves, but is operated solely for the mutual benefit and advantage of its members, resulting in an annual distribution of the profits, one of the major assets of the exchange is its right of assessment. In fact this is the only asset in addition to the initial premiums collected.

Certain exchanges have endeavored recently to eliminate or restrict the right of assessment by including in their contracts provisions limiting the liability of the holders thereof to the initial premium or to a specified amount, thereby reducing to such extent the prospective assets of the exchange. Reciprocal and inter-insurance contracts like insurance policies covering the same classes of insurance, insure against loss, damage or liability, as the case may be, with a maximum liability as stated in the contract. The inevitable result of the elimination or restriction of the right of assessment would be to limit the recovery which may be had under the outstanding contracts in case the aggregate of initial premiums is insufficient to pay the losses for which the exchange is liable.

It is our opinion that such a limitation of liability is illegal, in the absence of express legislation authorizing it. It is significant that the liability of members of mutual insurance companies, similar in many respects to exchanges, may be limited only in accordance with the provisions of Section 806 of the Insurance Company Law, referred to above. This Section is as follows:

> "The 'maximum premium" payable by any member of a mutual company, other than a mutual life company, shall be expressed in the policy, or in the application for the insurance if attached to the policy. Such maximum premium shall be a cash premium and an additional contingent premium not less than the cash premium, or may be solely a cash premium. No policy shall be issued for a cash premium without an additional contingent premium, unless the company has a surplus which is not less in amount than the capital required of domestic stock insurance companies transacting the same kind of insurance: Provided, That this section shall not be construed to require a surplus in excess of an amount equal to the unearned premiums on the policies without contingent premiums."

The necessary conclusion is that, in the absence of such statutory authority, the liability of members of mutual companies is unlimited.

We are therefore of the opinion that it is illegal for reciprocal and inter-insurance exchanges to include in the contracts issued by them any provision limiting the liability of the holders of such contracts or the subscribers to such exchanges either to the initial premium paid or to any sum designated in the contract. You have sufficient authority, under the provisions of Sections 208 and 501 of the Insurance Department Act of 1921 (Act of May 17, 1921, P. L. 789), and Sections 1004 and 1005 of the Insurance Company Law of 1921, referred to above, to correct this illegal practice either by refusing to issue certificates of authority to such exchanges or by revoking or suspending certificates of authority heretofore issued.

Very truly yours,

DEPARTMENT OF JUSTICE,

PAUL C. WAGNER,

Deputy Attorney General.

Foreign Insurance Companies—Admission to do business in this Commonwealth—Discretion of Insurance Commissioner—Act of May 17, 1921, P. L. 682, and Act of May 17, 1921, P. L. 789.

Department of Justice,
Harrisburg, Pa., May 3, 1928.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We have your request for our opinion relative to the extent of the discretion exercisable by the Insurance Commissioner in connection with the licensing of foreign insurance companies applying for certificates of authority to do business within this Commonwealth.

The duty of issuing certificates of authority to such foreign insurance companies, associations and exchanges as may be qualified to transact business in this Commonwealth is placed upon the Insurance Commissioner by Section 208 of the Insurance Department Act of 1921 (Act of May 17, 1921, P. L. 789) which reads as follows:

> "The Insurance Commissioner shall issue certificates of authority to insurance companies, associations, and exchanges of other States and foreign governments. He may renew the certificate of authority of any mutual assessment life or accident association, which is now lawfully doing business in this Commonwealth, beginning on the first day of April of each year, and continuing in force for one year unless sooner revoked by him or surrendered by the licensee. Any certificates issued after April first shall expire on the thirty-first day of March succeeding. Before granting certificates of authority to an insurance company, association, or exchange to issue policies or make contracts of insurance, he shall be satisfied, by such examination as he may make or by such evidence as he may require or demand, that such company, association, or exchange is qualified under the laws of this Commonwealth to transact business herein."

It will be noted that this Section applies both to stock and mutual companies and associations.

The requirements to be met by foreign insurance companies applying for authority to transact business in this Commonwealth are set forth in Section 301 of the Insurance Company Law of 1921 (Act of May 17, 1921, P. L. 682).

Section 301 relates to all stock and mutual insurance companies making application for certificate of authority. It provides as follows:

> "No stock or mutual insurance company or association of any other State or foreign government shall be admitted and authorized to do business until:
>
> "(a) It has filed with the Insurance Commissioner a certified copy of its charter or deed of settlement, a statement of its financial condition and business, signed and sworn to by its proper officers, and copies of forms of all policies it proposes to issue in this Commonwealth, with such other information as he may require.

"(b) It has satisfied the Insurance Commissioner that it is fully and legally organized under the laws of its State or government to do the business it proposes to transact. That it has, if a stock company, the requisite amount of capital fully paid up and unimpaired.

"(c) It shall, by a duly executed instrument filed in his office, constitute and appoint the Insurance Commissioner or his successor its true and lawful attorney, upon whom all lawful processes in any action, rule, order, or legal proceeding against it may be served; and therein shall agree that any lawful process against it which may be served upon him as its said attorney shall be of the same force and validity as if served on the company, and that the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this Commonwealth.

"(d) It shall file in the office of the Auditor General a statement showing: (I) The name of the company or association; (II) the date of incorporation or organization; (III) the act of Assembly or authority under which incorporated or organized; (IV) the place of business; (V) the post office address and names of the president, secretary, and treasurer; (VI) the amount of capital authorized by its charter; and (VII) of the amount of capital paid into the treasury of the company.

"Any company or association which shall neglect or refuse to file such statement shall be subject to a penalty of five hundred dollars ($500.00), which penalty shall be collected, on an account settled by the Auditor General and State Treasurer, in the same manner as taxes on stock are settled and collected."

Sections 301, 401, 516, 531, 601 and 801 of the Insurance Company Law of 1921, referred to above, prescribe the capital or assets required of foreign insurance companies making such application.

Section 401 applies to stock and mutual life insurance companies and reads as follows:

"Stock life insurance companies of other States and foreign governments, in order to be licensed to do business in this Commonwealth, must have a paid up and safely invested capital, if a company of another State, or a deposit in the United States, if a company of a foreign government, of not less than the capital required herein for domestic stock life insurance companies. Mutual life insurance companies organized under the laws of any other States of the United States, may be admitted to do business in this Commonwealth if they have the requisite funds of a mutual life insurance company, and, in the opinion of the Insurance Commissioner, are in sound financial condition, and have policies in force upon not less than five hundred lives, for an aggregate amount of not less than one million dollars. Any for-

eign stock or mutual life insurance company, licensed to transact business in this State at the time of the passage of this act, having less capital or assets than that required herein for domestic life insurance companies, may be relicensed so long as, in the opinion of the Insurance Commissioner, it is in a sound financial condition and otherwise complies with all requirements of law."

Section 516 refers to stock fire, marine, and fire and marine insurance companies, and reads as follows:

"Stock fire, stock marine, and stock fire and marine insurance companies, of other States and foreign governments, to be licensed to do, in this Commonwealth, any one of the classes of business mentioned in section two hundred and two (202), subdivision (b) of this act, must have a paid up and safely invested capital, if a company of any other State, or a deposit in the United States, if a company of a foreign government, of not less than two hundred thousand dollars ($200,000); and, if to do all of the classes of business mentioned in section two hundred and two (202), subdivision (b) of this act, a paid up capital or deposit of not less than four hundred thousand dollars ($400,000)."

Section 531 refers to mutual fire, marine, and fire and marine companies, and reads as follows:

"A mutual fire, mutual marine, or mutual fire and marine insurance company of another State may be licensed to transact the class of business mentioned in clause (1) subdivision (b) of section two hundred and two (202) of this act, when it has a surplus over all liabilities, including unearned premiums computed in accordance with the laws of this Commonwealth, of not less than one hundred thousand dollars ($100,000) or has continuously transacted business for not less than five years and has a surplus over all liabilities of not less than fifty thousand dollars ($50,000). If to transact the classes of business mentioned in clauses (2) and (3) of subdivision (b), section two hundred and two (202), of this act, its surplus over all liabilities must not be less than two hundred and fifty thousand dollars ($250,000)."

Section 601 refers to stock casualty companies and reads as follows:

"Stock casualty insurance companies of other States and foreign governments, organized to transact any of the classes of insurance mentioned in subdivision (c), section two hundred and two (202) of this act, in order to be licensed to do business in this Commonwealth, must have a paid up and safely invested capital, if a company of another State, or a deposit in the United States, if a company of a foreign government, of at least the

> amount required in this act for Pennsylvania companies. Nothing contained in this act shall prevent any foreign stock life insurance company now engaged in the business of accident and sickness or liability insurance, or both, from continuing the same, if the amount of its paid up capital shall be equal to the amount required of a domestic company to transact the business of life insurance, and at least fifty thousand dollars for each of the other classes of insurance undertaken."

Section 801 applies to mutual insurance companies other than life companies, and reads as follows:

> "Any mutual insurance company, other than a mutual life company, organized outside of this Commonwealth, and authorized to transact the business of insurance on the mutual plan, may, on application, be admitted to transact the kinds of insurance authorized by its charter or articles of association, to the extent and with the powers and privileges specified in this act, when it shall be solvent under this act and shall have complied with the provisions of law applicable to the filing of papers and furnishing information required of stock companies transacting the same kind of insurance. If organized without the United States, it shall make and maintain the deposit required of stock insurance companies formed without the United States transacting the same kind of insurance.
>
> "Upon compliance, by any such foreign company, with the provisions of this section, such company may be granted a certificate of authority to transact business in this Commonwealth. subject to all the provisions of law relating to information to and examinations by the Insurance Commissioner, annual reports, taxes, and a renewal of certificates of authority, applicable to stock insurance companies, transacting the same kinds of insurance, except as otherwise provided in this article."

Foreign insurance companies seeking admission to this Commonwealth are also required to comply with the provisions of the Insurance Company Law of 1921 and the Insurance Department Act of 1921, applicable alike to foreign and domestic companies, relative to reserves, required and prohibited policy provisions, etc. It is unnecessary to set forth these provisions in full in this opinion.

Section 208 of the Insurance Department Act, quoted above, provides that the Commissioner, before granting certificates of authority "shall be satisfied * * * that such company * * * is qualified under the laws of this Commonwealth to transact business herein." It is evident, however, that the requirements for the transaction of an insurance business in this Commonwealth are set forth in detail in the various sections of the Insurance Company Law and the Insur-

ance Department Law. The discretion of the Insurance Commissioner is limited to ascertaining whether or not the statutory requirements have been met, the standards comprising these requirements being specifically set up by the statutes themselves.

Section 301 (b) of the Insurance Company Law, quoted above, provides that the company making application must satisfy "the Insurance Commissioner that it is fully and legally organized under the laws of its State or government to do the business it proposes to transact." Here also the discretion of the Commissioner in deciding whether or not the company is legally incorporated is confined within very narrow limits.

We are able to find no other provisions in the insurance laws of this State granting to the Insurance Commissioner any discretion in deciding whether or not insurance companies are entitled to certificates of authority to transact business in this State. It will be noted that in those sections of the insurance laws which relate to the licensing of foreign insurance companies, the word "shall" is used when referring to stock insurance companies. It is apparent that, so far as stock insurance companies are concerned, if the requirements of the statute are complied with, the Commissioner has no authority to refuse to grant a certificate to do business.

On the other hand, the use of the word "may" with reference to mutual companies in the sections relative to the licensing of foreign companies is indicative of an intention to grant to the Commissioner a discretion in the case of the admission of foreign mutual companies. The statutes are vague as to the extent of such discretion and it is therefore impossible to lay down any general rule. Each case will have to be decided upon its particular facts.

An examination of the insurance statutes of other States discloses that, wherever a discretion is intended to be given to the Insurance Commissioner in the admission of foreign companies, such discretion is clearly provided for and the basis upon which it may be exercised is stated.

Article I. Section 9, of Chapter 28 of the Consolidated Laws of New York (2nd. Ed.), (the chapter dealing with insurance law), contains the following: "The Superintendent may refuse to issue any such certificate to a domestic or foreign corporation, if, in his judgment, such refusal will best promote the interests of the people of the State."

Section 11 of Chapter 275 of the Public Laws of New Hampshire (1926) provides that "if the foregoing provisions are complied with and the Commissioner is satisfied that the company (a foreign insurance company) has the requisite capital and assets and is a safe, reliable company, entitled to confidence, he shall grant a license * * *."

Section 5554 of the General Laws of Vermont (1917) provides that a license to a foreign insurance company "may re renewed * * * so long as the company complies with the requirements aforesaid and the Commissioner regards the company as safe and entitled to public confidence."

Section 9436 of the Ohio General Code (1921) provides that the Insurance Commissioner "shall refuse such certificate to any such (mutual protective) corporation, company or association, when in his judgment a refusal will best promote the public interest, but all decisions by him made shall be subject to review by courts of competent jurisdiction."

Section 10 of the Insurance Laws of Montana (R. C. M. (1921) 172) provides that the Commissioner "shall have the power after a hearing to refuse to grant any license requested under the provisions of this act, should he be satisfied the person, firm or corporation applying therefor is not a proper or fit person, firm or corporation to be permitted to engage in such business within this State."

We are therefore of the opinion that no discretion is exercisable by the Insurance Commissioner in the admission of foreign stock insurance companies applying for certificates of authority to do business within this Commonwealth, except in so far as may be necessary to ascertain whether or not the statutory requirements for the admission of foreign insurance companies, discussed above, have been met.

We are further of the opinion that in the case of the admission of foreign mutual insurance companies, the legislature intended to grant to the Commissioner a certain discretion to determine whether or not such companies should be authorized to transact business in this Commonwealth; it is, however, impossible to lay down any general rule as to the extent of this discretion and each case will have to be taken up as it arises.

Very truly yours,

DEPARTMENT OF JUSTICE,

PAUL C. WAGNER,

Deputy Attorney General.

Insurance—Group insurance—Rates—Automobile insurance—Act of May 17, 1921.

The writing of various classes of automobile insurance, including fire, theft, liability, collision and property damage, to all the members of a group at rates less than those charged individuals not members of the group is illegal under the Act of May 17, 1921, P. L. 682.

Department of Justice,
Harrisburg, Pa., May 8, 1928.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We have your request for our opinion relative to the legality of what is known as "group insurance" as applied to the various classes of automobile insurance, including fire, theft, liability, collision and property damage lines.

We understand that certain insurance companies and agents and brokers are now writing, or contemplate writing, automobile insurance for all of the members of a group who desire to secure the same, at rates which are less than those charged individuals, not members of the group, for the same kind of insurance. This insurance is written either by the issuance of a series of policies to the members of the group or by issuance of a master policy covering the entire group, with the issuance of certificates under the master policy to each member. The issuance of such group policies to the members of a designated automobile club or to the employes of a designated corporation are two examples of this method of writing insurance.

We are of the opinion that the writing of automobile insurance in this method is illegal, being in violation of the provisions of Section 626 of the Insurance Company Law of 1921 (Act of May 17, 1921, P. L. 682) which is as follows:

> "Discrimination between individuals of the same class in the amount of premiums or rates charged for any policy of insurance covered by this act, or in the benefits payable thereon, or in any of the terms or conditions of such policy, or in any other manner whatsoever, is prohibited."

We are unable to understand how a method of writing insurance which will permit a member of an automobile club to obtain automobile insurance at a rate less than that required to be paid by an owner of another automobile, resident in the same locality and subject to the same risks, who is not a member of the club, can be free from discrimination. The decrease in rate is dependent solely upon membership in a designated organization and in our opinion a determination of rates upon this basis alone constitutes discrimination.

We are not to be understood as holding that discrimination prohibits reasonable and proper classification. Classification of rates according to the nature of the risk is well known in other lines of insurance. If, however, a classification is to be recognized, the rate applicable to the class must be applied to individuals as well as to members of a designated organization or group who are able to qualify and come within the classification. The basis for such classification

will, of necessity, be established according to principles well known in the insurance world and applied in other classes of insurance, with such modifications as may be necessary to fit them to automobile insurance.

We are, therefore, of the opinion that the practice of writing automobile insurance to members of a group at rates less than those charged to individuals not members of the group is discriminatory and illegal.

Nothing contained in this opinion is to be construed as an expression of opinion legalizing what is termed "group insurance" as applied to and forms of casualty insurance.

Very truly yours,

DEPARTMENT OF JUSTICE,

PAUL C. WAGNER,

Deputy Attorney General.

OPINION TO THE SECRETARY OF LABOR AND INDUSTRY

OPINION TO THE SECRETARY OF LABOR AND INDUSTRY

Minors—Resident and Non-Residents—Hours of Employment—Theatres—Musical or Artistic Work—Act of May 13, 1915, P. L. 286.

The Department of Labor and Industry can make no exceptions and can grant no exemptions from the application of the Act of May 13, 1915, P. L. 286, no matter how meritorious or appealing the circumstances of any particular case might be. The law gives the Industrial Board no power or authority to suspend the operations of the law. No minor of less than fourteen years of age may be employed or engaged in any occupation within the Commonwealth of Pennsylvania, irrespective of the State of his residence.

No minor resident of Pensylvania between fourteen and sixteen years of age, may be engaged in this State in any occupation unless he has secured the employment certificate contemplated by the law.

Non-resident minors, between fourteen and sixteen years of age, who seek employment in this Commonwealth, whether regular or transient, cannot be compelled to furnish an employment certificate because they cannot be permitted, much less compelled, to attend Pennsylvania schools. To interfere with non-resident minors over fourteen years of age would be to impair their constitutional rights. No minor between fourteen and sixteen years of age may work after eight o'clock in the evening of any day.

Department of Justice,
Harrisburg, Pa., May 24, 1927.

Honorable Charles A. Waters, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: Your letter of March 31, 1927, inquires whether the Child Labor Law (Act of May 13, 1915, P. L. 286) applies to children engaged in theatrical, musical or artistic work. You also inquire whether your Department has any discretionary power in handling cases which it feels are worthy of especial consideration; in other words, whether you can suspend the operation of the law in particular cases where you feel that to apply the law strictly would work a hardship and do an injury.

As I view the law, children, under its provisions fall into three classes:

(1) Children under fourteen years of age, whether residents or non-residents of Pennsylvania, whose employment or work is within this State.

(2) Children between fourteen and sixteen years of age, who work in Pennsylvania, and who are residents of this State.

(3) Children between fourteen and sixteen years of age, who work in Pennsylvania, but are non-residents of this State.

Section 2 of the Act of May 13, 1915, P. L. 286, provides as follows:

"No minor under fourteen years of age shall be em-

> ployed or permitted to work in, about, or in connection with, any establishment or in any occupation."

For the purpose of this discussion, we shall read this section for the time being, as follows:

> "No minor under fourteen years of age shall be permitted to work in * * * any occupation."

I am aware that the argument has frequently been advanced that children engaged in theatrical, musical or artistic effort are not at work.

The Supreme Court of Massachusetts, in the case of *Commonwealth of Massachusetts* vs. *Griffith, 204 Mass. 18; 90 N. E. 394; 25 L. R. A. (New Series) 957,* had before it for construction a statute forbidding children to work after seven o'clock in the evening. That case involved children engaged in stage work. The contention was advanced that the law was limited in its application to employment in a factory, workshop or mercantile establishment, and that stage performances were not work. On this contention Chief Justice Knowlton said:

> "* * * The statute was intended to protect children from employment calling for constant attention, regular effort, and physical or mental strain, to accomplish the desired result. The word 'work' is of broad signification. One of its primary meanings, as it is defined in Webster's International Dictionary, is 'effort directed to an end,' and the author quotes, from Shakespeare, Portia's call:
>
> 'Come on, Nerissa; I have work in hand
> That you yet know not of.'
>
> "The object of the statute forbids restriction of the word to a narrow meaning."

On December 9, 1918, Honorable Francis Shunk Brown, Attorney General, rendered an opinion (Opinions, 1917-1918, page 550), in which he advised that the Child Labor Act of May 13, 1915, forbade the employment of minors under sixteen years of age in theatrical work, unless such minors had employment certificates, duly issued under the provisions of Section 8 of said Act.

That the Legislature regarded children in theatrical life as within the prohibition of Section 2 of the Act of 1915, is probably best evidenced by the action of that body in the session of 1921. At that session, House Bill No. 1320 was duly passed, the effect of which would have been to amend Section I of the Child Labor Law of 1915, by the addition of the underscored words in the proviso concluding Section 1:

> "Provided, that this Act shall not apply to children

> employed on the farm, in domestic service in private homes *or to children employed on the stage of theatres, with the approval of the Industrial Board of the Department of Labor and Industry.*"

On May 18, 1921, Governor Sproul vetoed this Bill (Vetoes, 1921, page 47), saying:

> "I think it unwise to weaken the child labor laws at any point. To give exemption therefrom to children employed on the stage would certainly impair the general efficacy of these protective statutes."

It is, therefore, my opinion that under the law as it now stands, no child under fourteen years of age may be permitted, under any circumstances, to engage in theatrical, concert or other like work in this Commonwealth. Those who claim, and with some show of reason, that this Act tends frequently to nip budding genius, must look to the Legislature and to it alone for relief from the present situation.

Nor is there any doubt in my mind that no child between fourteen and sixteen years of age, who is a resident of the Commonwealth of Pennsylvania, may engage in theatrical work in the State without procuring an employment certificate as required by the provisions of the Child Labor Law of 1915, nor may your Department set aside this provision of the law to meet the exigencies of any individual case.

A more difficult question arises in regard to non-resident minors between fourteen and sixteen years of age, when such minors are engaged in the State of Pennsylvania in theatrical work.

Article X, Section 1 of the Constitution of Pennsylvania, provides for the maintenance and support of a thorough and efficient system of public schools wherein all the children *of this Commonwealth* above the age of six years, may be educated. The privileges of our public schools accorded only to children resident within the Commonwealth.

In the case of *Commonwealth vs. Wormser, 260 Pa. 44,* the Supreme Court of Pennsylvania declared constitutional the Child Labor Law of 1915. The Court held, affirming the Superior Court (67 Super. Ct. 444) that the Child Labor Law was a reasonable exercise of the police power of the Commonwealth, and that it did not contravene the bill of rights of this State, nor the Fifth Amendment to the Constitution of the United States. At page 48, the Court said:

> "We find nothing incompatible with personal rights in the regulation that no minor shall be employed to work in any establishment unless an employment certificate has been issued as provided by the statute. This legislation has reference to the education of the boys and girls *of the Commonwealth* who are of school age, and

> education is a subject with reference to which the Commonwealth has authority to prescribe. It is intimately connected with the good order and welfare of the people and is one of the chief subjects of governmental interest and care. The State having fixed the ages within which minors can work, the right to regulate the reasonable conditions of employment necessarily follows. The general employment certificates were intended to apply to those persons whose proficiency in school had been of such a character that the supplementary education provided for in the statute could take the place of that provided for in the general school system of the State. Such a classification is not unreasonable but on the contrary is well adapted to accomplish the result intended, that is, to permit minors over fourteen years of age whose education is sufficiently advanced to work at industrial employment."

This decision recognizes the fact that the Child Labor Law and the School Code must be read together, and that the School Code provides for the education of only the children of this Commonwealth.

It is obvious that non-resident children have no right to the advantages of the Pennsylvania public school system. They cannot be admitted to the continuation schools mentioned in Section 3 of the Act, which are "part of the public school system of the school district wherein" such minors are employed. Therefore, when they come within the State for the purpose of working, they cannot procure, as a matter of right, the certificate contemplated by Sections 8 and 9 of the Act of 1915. Such certificates may be issued only by Pennsylvania school officials, and obviously cannot be issued by such officials in the case of non-resident minors. (See Section 9). The logical result is that Pennsylvania children between fourteen and sixteen may procure employment certificates and work within this State. Non-resident children between fourteen and sixteen years of age, cannot procure such a certificate as is required by the Act and, therefore, cannot work at all within the State of Pennsylvania unless it be determined that their right to do so rests upon higher ground than the Act of 1915. I believe that it does.

Article IV, Section 2 of the Constitution of the United States provides as follows:—

> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The privileges above referred to do not include, however, the right to attend school in any State other than that in which the child resides. *Ward vs. Flood, 48 Cal. 36; Wheeler vs. Burrows, 18 Ind.*

14; School District vs. Bragdon, 23 N. H. 507; Haverhill vs. Gale, 103 Mass. 104.

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * *."

In the case of *Commonwealth vs. Snyder, 182 Pa. 630,* the Supreme Court of Pennsylvania set aside an Act which imposed a heavy license fee upon peddlers in Perry County, but exempted peddlers dealing exclusively with merchants of said County and merchants residing and having a regular place of business therein.

Mr. Justice Williams delivered the opinion of the Court, saying, in part, (page 633):—

> "* * * It may be possible that under the constitution of Pennsylvania such a law could be enforced. We have no need to consider that subject. It is so evidently a violation of the constitution of the United States that it is unnecessary to consider any other question. It is a denial to citizens resident outside of Perry county of equal rights in business with those who live within the county, on the sole ground of their residence. It is a trade regulation for the protection of the merchants of that county against competition from all who live beyond the county lines. It is a barrier built by the state of Pennsylvania about a single county to exclude therefrom the citizens of the rest of the Commonwealth, and the rest of the United States, for the benefits of merchants living within the enclosure. This cannot be done. *Welton v. Missouri, 91 U. S. 275; Sayre Borough v. Phillips, 148 Pa. 482.* It is unnecessary to enlarge upon this question. It is enough to state the well-settled rule and apply it to the statute under consideration."

See also *Mechanicsburg Borough vs. Koons, 18 Superior Ct. 131.*

In *Ward vs. Maryland, 12 Wallace 418; 20 L. ed. 449;* the Supreme Court of the United States speaks thus of Article IV, Section 2 of the Constitution of the United States:—

> "The clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the

> State; and to be exempt from any higher taxes or excises than are imposed on the citizens of its own State."

The State has thus erected a barrier against non-residents from fourteen to sixteen years of age because, in the nature of things, it is impossible for such child to secure an employment certificate from the school authorities of Pennsylvania. The Act is silent as to the effect of the certificate from the school authorities of other States. No system of comity has been worked out between the States in this respect.

I am mindful of the statement in the opinion of Attorney General Brown, (January 3, 1916; 25 District Reports 79), to the effect that under the present Act it would be the proper practice for the school authorities of the district in which a non-resident minor between fourteen and sixteen years of age may be employed, to issue to him an employment certificate under which it would be lawful for him to be employed at work during such hours as are permitted by the Act, but such a non-resident minor would not be required to attend a continuation school. See also opinion of Deputy Attorney General Hargest, (37 County Court Reports 155) in which it is stated that minors residing out of the State, who seek employment in Philadelphia, should, if qualified, be furnished with employment certificates by the Superintendent of Schools of Philadelphia.

These two opinions might apply satisfactorily, for instance, to children between fourteen and sixteen years of age, who reside in Camden and who are regularly employed in Philadelphia. But who is to issue the certificate in the case of the theatrical child who may spend but two or three weeks within the borders of our State, and may divide that time among a dozen or more counties? Section 9 provides that such certificates shall be issued by certain school officials "for children residing within their respective public school districts." Section 17 requires a new certificate for each "establishment" in which the minor works. I am of the opinion that in such cases, the minor is entitled to the protection of the Constitution of the United States, as above indicated, and that no interference with his activities by your Department would be justifiable or legal.

You draw my attention to the opinion of Judge Snee, of the County Court of Allegheny County, No. 1283, 1921. This case is the only one that can be found, after very diligent search, in which a judicial opinion has been delivered in this State in regard to the application of the Act of 1915 to children engaged in theatrical work. The case involved the employment in a Pittsburgh theatre of two children, one of whom was eleven and one-half, and the other eight and one-half years of age. The facts found in the case show that their performance required but forty minutes a day, twenty minutes

in the afternoon and twenty minutes in the evening. The children traveled with their mother and were educated by a private governess in a thorough and even lavish way available only to a very small proportion of the children of this country.

Relying upon the decision of the Supreme Court of the United States in the case of *Trinity Church vs. United States, 143 U. S. 357;* 36 Lawyers Edition, 226, Judge Snee held that children practicing an art were not engaged in work within the meaning or intent of the Child Labor Law of 1915. In our judgment the decision of Judge Snee will not bear the test of the closest scrutiny. He had before him for consideration, a most unusual case, the facts of which made the provisions of the Child Labor Law seem extreme and absurd and even cruel, but, unfortunately for the unusual case, the law makes no exception.

To summarize, I beg to advise:

(1) That your Department can make no exceptions and can grant no exemptions from the application of the Act, no matter how meritorious or appealing the circumstances of any particular case might be. The law gives the Industrial Board no power or authority to suspend the operations of the law.

(2) No minor of less than fourteen years of age may be employed or engaged in any occupation within the Commonwealth of Pennsylvania, irrespective of the State of his residence.

(3) No minor resident of Pennsylvania, between fourteen and sixteen years of age, may be engaged in this State in any occupation unless he has secured the employment certificate contemplated by the law.

(4) Non-resident minors, between fourteen and sixteen years of age, who seek employment in this Commonwealth, whether regular or transient, cannot be compelled to furnish an employment certificate because they cannot be permitted, much less compelled, to attend Pennsylvania Schools. To interfere with non-resident minors over fourteen years of age would be to impair their constitutional rights.

(5) However, no minor between fourteen and sixteen years of age may work after eight o'clock in the evening of any day. Section 4 of the Act of 1915.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROSCOE R. KOCH,

Deputy Attorney General.

OPINION TO THE SECRETARY OF MINES

OPINION TO THE SECRETARY OF MINES

Bituminous Mines—Gaseous—When electric haulage locomotives may and may not be operated from a trolley wire, Rule 77, Section 6, of Act XI of Act of June 9, 1911, P. L. 756, construed,

1. Rule 77 as to electric haulage by locomotives operated from a trolley wire does not apply to non-gaseous mines.
2. That "intate air, fresh from the outside," within the meaning of Rule 77, is intake air which has not been contaminated by workings of a mine where explosive gas is being generated in quantities sufficient to be detected by an approved safety lamp.

Department of Justice,
Harrisburg, Pa., October 1, 1928.

Honorable Walter H. Glasgow, Secretary of Mines, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your inquiry requesting an interpretation of Rule 77, Section 6, of Article XI, of the Act of June 9, 1911, P. L. 756, which reads:

> "Electric haulage by locomotives operated from a trolley wire is not permissible in any gaseous portions of mines, except upon the intake air fresh from the outside."

You desire to be advised whether intake air is "fresh from the outside," within the meaning of this section, when air which has admittedly been taken fresh from the outside has passed through one or more workings and has been contaminated in some degree by the breathing of men or animals in those workings, but when such air at no time contains sufficient explosive gas to be detected by an approved safety lamp.

"Intake" and "return" as applied to air currents are old mining terms and indicate the direction of the air currents in relation to the mine as a whole or any split of the ventilating current. "Intake air" is presumed to be fresh and pure when entering the mine but as it proceeds inward, coursing the workings, it becomes contaminated by the breathing of men and animals and the admixture with noxious and explosive gases.

The Bureau of Mines, United States Department of Commerce, in Mine Safety Decision No. 8, dated February 6, 1928, defines "intake air" and the various conditions thereof as follows:

> "1. The term 'intake air' and the term 'return air' without qualifying adjectives shall be used only to define mechanical movement of the air respectively in an inward or outward direction with reference to the mine as a whole or to any one group of workings.

2. When health and safety are concerned, the term 'pure intake air' shall mean:

(a) Aair which has not passed through or by any active workinfis, and (or)

(b) Air which has not passed through or by any inactive workings unless these are effectively sealed, and

(c) Air which is free from poisonous gas and by analysis contains not less than 20 per cent oxygen (dry basis) and not over 0.05 per cent of inflammable gas."

It should be noted that Rule 77, here in question, applies only to "any *gaseous* portions of mines." Since the purpose of the Rule is to prohibit the use of electric haulage by locomotives operated from a trolley wire where sparks produced from the contact of the trolley wheel and the trolley wire might cause an explosion of gases present, we believe it is unnecessary to the determination of the particular question here involved to consider whether or not the "intake air" may at any time be somewhat contaminated by the breathing of men and animals. Men and animals inhale oxygen and exhale carbon dioxide. The result is that the carbon dioxide reduces the explosibility of methane in the gaseous atmosphere. Thus an explosion is less apt to occur in air contaminated by breathing than in pure air. In our endeavor to arrive at a proper construction of Rule 77, we are, therefore, not concerned with the contamination which may result to the "intake air" from the breathing of men and animals; Article IX of the mining law amply provides for and specifies the quality and quantity of air which must be furnished men for breathing or ventilating purposes.

While the law may not be entirely clear as to what constitutes a gaseous mine the test apparently is whether it generates explosive gas in quantities sufficient to be detected by an approved safety lamp, or whether it has done so within the period of one year immediately preceding, Article IV, Section 1, 5, 9 and 13; Article V, Sections 1 and 4; Article IX, Section 1, etc.

Section 1 of Article XXVIII specifies the circumstances under which a gaseous mine may be re-classified as non-gaseous, by providing that:

> "Should a mine, or a portion of a mine, that has at any time generated explosive gas in quantities sufficient to be detected by an approved safety lamp, after the passage of this act not so generate explosive gas during any one period of one year, then such mine, or portion of a mine shall not be govered or controlled by the provisions of this act for mines or portions of mines generating explosive gas."

If a mine or portion of a mine has never at any time generated explosive gas in quantities sufficient to be detected by an approved safety lamp, or if it has not done so for a period of one year immediately preceding, then Rule 77 does not apply and electric haulage locomotives may be operated from a trolley wire.

If the mine or portion of the mine in question is classified as gaseous according to the test provided by the Act then I am of the opinion that the "intake air" is no longer "fresh from the outside" after it has passed through any gaseous portion of the mine. This appears to be the opinion of the Supreme Court of Pennsylvania, as expressed in the case of *Jaras vs. Wright, 263 Pa. 486,* the only decision of an appellate court which has construed Rule 77. There it was said, page 488:

> "Plaintiff's statement of claim sets forth as her cause of action, inter alia, a violation of Article XI, Section 6, of the Act of June 9, 1911, P. L. 798, which provides that 'Electric Haulage by locomotives operated from a trolley wire is not permissible in any gaseous portions of mines, except upon intake air, fresh from the outside.' At the trial, evidence was produced to show that *this portion of the mine was gaseous;* that it was not supplied with intake air fresh from the outside, but *with air contaminated by being brought through other gaseous portions of the mine;* and that the explosion resulted from a spark caused by the running of the trolley pole along the trolley wire."

And continuing on page 489:

> "It follows that the proximate cause must have been the running of the trolley pole along the highly charged trolley wire, just as the evidence shows and the jury found; and as it was so run in a gaseous portion of the mine, where there was no intake air fresh from the outside, defendants violated an express statutory duty which they owed decedent, * * * "

You are, therefore, advised:

(1) That if a mine or portion of a mine has never at any time generated explosive gas in quantities sufficient to be detected by an approved safety lamp, or if it has not done so for a period of one year immediately preceding, then Rule 77 does not apply and electric haulage locomotives may be operated from a trolley wire.

(2) That "intake air, fresh from the outside," within the meaning of Rule 77, is intake air which has not been contaminated by passing

through any workings of a mine where explosive gas is being generated in quantities sufficient to be detected by an approved safety lamp.

Very truly yours,

DEPARTMENT OF JUSTICE,
LEON D. METZGER,
Deputy Attorney General.

OPINION TO THE PENNSYLVANIA ALCOHOL PERMIT BOARD

OPINION TO THE PENNSYLVANIA ALCOHOL PERMIT BOARD

Alcoholic liquids—Use of seized liquids—Distribution of liquids.

Alcoholic liquids which have been seized and have not been returned to innocent owners belong to the Commonwealth, and may be used for legal and proper purposes by State agencies which would need to procure and use similar alcoholic liquids.

Department of Justice,

Harrisburg, Pa., January 7, 1927.

Hon. Allen C. Potter, Chairman, Pennsylvania Alcohol Permit Board, Harrisburg, Pennsylvania.

Dear Doctor Potter: Answering request from the Alcohol Permit Board, I have considered and will herein answer the following question from the Alcohol Permit Board:

> *Statement:* The Alcohol Permit Board has on hand, and is likely from time to time to have on hand, some alcoholic liquid varying from that which is recognized as a beverage, such as wines, spiritous liquors and the like, to the most completely denatured forms of denatured alcohol. In many instances such alcoholic liquids upon application have been and perhaps will be returned to the owners thereof for good cause shown. However, the time for application for return having passed, and alcoholic liquids seized under authority of the Alcohol Permit Board not having been returned, the Board is confronted with the necessity of destroying such seized alcoholic liquids.
>
> *Question:* Would it be legal and proper for the Alcohol Permit Board in any way to allow such alcoholic liquids as have been seized and are not to be returned to be used and thereby destroyed by State agencies which, in the regular course of their activities, would need to procure and use similar alcoholic liquids, for good legal purposes?

Such alcoholic liquids as the Alcohol Permit Board seize and do not return to proven innocent owners thereof must, according to the law, be destroyed so that it will no longer get into illegal channels of use. That is the clear intent of the law and any use of such alcoholic liquids which would not surely bring about its destruction by its use for an undoubtedly legal purpose, or by destroying it without use, would be a material breach of the law. However, the destruction of that which is legally and advantageously usable otherwise than by such legal and advantageous use, is highly abhorrent to the entire under-

lying principle of our laws which have been adopted not to destroy but to conserve and preserve. Also the alcoholic liquid seized and not to be returned undoubtedly belongs to the Commonwealth for final disposition. It must be destroyed because the law so provides.

However, if such destruction can be brought about by legal use, without loss of the value contained in the alcoholic liquid involved and therefore without loss to the general public, destruction by such use, in my opinion, would not be contrary to the mandate of the law.

For this reason a study should be made of uses by reliable State agencies to which the seized alcoholic liquid may be subjected and, with as much precaution as is reasonably possible to insure the destruction by use as intended when the alcoholic liquid is turned over to any State agency, the alcoholic liquid seized under authority of the Alcohol Permit Board and not returned to private owners, which can be so used, may be destroyed by such use for the respective purposes for which each kind of alcoholic liquid is best adapted Completely denatured alcohol could thus be used for antifreeze purposes by those government agencies which are obliged to operate State owned automobiles, and a study might find other similar uses for completely denatured alcohol. Certain kinds of specially denatured alcohol, if seized and retained, might be used for rubbing an bathing purposes in hospitals and similar institutions of the State. Alcoholic liquids which are such stimulating beverages as are prescribed as medicine in our hospitals of various kinds, could with due precaution that they will be so used, be turned over to such hospitals, thus saving the State the expense of providing similar medicinal beverages for the treatment of the sick and injured.

In other words, a careful study of the needs of State agencies for the kind of alcoholic liquid confiscated and in the possession of the Alcohol Permit Board might lead to a legally advantageous, instead of a dead-loss destruction of most of the alcoholic liquid thus confiscated and held.

When it is reasonably evident that destruction by advantageous and legal use, is not available for any portion of any kind of alcoholic liquid confiscated and held by the Alcohol Permit Board, it can then be destroyed in the usual disadvantageous ways of pouring into the sewer and the like.

Incidentally, it is my opinion that an orderly method of disposing of this property of the Commonwealth would be through the Department of Property and Supplies providing a reasonable and safe method can be worked out; and it seems to me that it is the right and duty of the Department of Property and Supplies to take into possession and

dispose of wisely by the methods outlined above any alcoholic liquid which can be used advantageously and legally by State agencies.

Yours most sincerely,

DEPARTMENT OF JUSTICE,
GEORGE W. WOODRUFF,
Attorney General.

OPINION TO THE PENNSYLVANIA STATE ASSOCIATION OF COUNTY COMMISSIONERS

OPINION TO THE PENNSYLVANIA STATE ASSOCIATION OF COUNTY COMMISSIONERS

Pennsylvania State Association of County Comissioners—Directors of the Poor—Clearfield County.

Poor directors. Election of. Act of 1925, P. L. 762.

Department of Justice,
Harrisburg, Pa., February 16, 1927.

Mr. L. C. Norris, Secretary, Pennsylvania State Association of County Commissioners Clearfield, Clearfield County, Pennsylvania.

Sir: We have your request to be advised whether directors of the poor must be elected in and for Clearfield County at the coming municipal election pursuant to the provisions of May 14, 1925, P. L. 762.

At the time of the passage of the Act of 1925, supra, Clearfield County was a separate poor district wherein the county commissioners were ex officio directors of the poor having been under the Act of June 4, 1879, P. L. 78, substituted in authority and given the powers previously had and exercised by the overseers of the poor in the several poor districts within the county.

Previous to said Act the poor district in Clearfield County was a separate quasi municipal corporation, coterminus with the county and acting through its county commissioners merely for convenience of administration. *Commonwealth ex rel. vs. Brown 210 Pennsylvania 29.*

The purpose of the Act of May 14, 1925, P. L. 762, is to provide greater uniformity in the territorial unit for, and the administration of, poor relief within the Commonwealth.

Act of April 13, 1921, P. L. 136;
Act of July 1, 1923, P. L. 1068;
Report, etc., of the Commissioners to Revise and Codify the Poor Laws of Pennsylvania of March 2, 1925.

As a revision or codification of the Poor Relief Law within the Commonwealth it was obviously the intention of the Legislature to include all laws on the subject including the election or appointment of directors of the poor, except in certain districts. In such districts the territorial limits remained the same, and the system of relief in certain of such districts remained unchanged.

> "The provisions of this Act, so far as they are the same as those of existing laws, are intended as the continua-

> tion of such laws and not as new enactments:" Chapter 1, Article I, Section 3.
>
> "The provisions of this Act shall supersede and prevail over any previous enactments, ordinances, regulations, and rules found to be inconsistent or incompatible herewith:" Chapter 1, Article I, Section 8.

The territorial limits of the poor districts in Philadelphia, Allegheny, McKean, Carbon, Luzerne and Lackawanna Counties, and in Pittsburgh and Bradford Cities, are excepted from modification by the Act in Chapter 2, Article I, Section 200 thereof. In the same Chapter and Article, Section 202, in certain units of territory so excepted, the system of relief then in force was preserved.

> "In poor districts of the first and second classes and in the Counties of Carbon, Lackawanna, and Luzerne, the number of directors, *the manner of their election or appointment,* and the administrative system of giving poor relief shall continue as now fixed by law."

The Clearfield County Poor District is not a district "newly created under the Act," that district having already been created by acceptance of the provisions of the Act of June 4, 1879, P. L. 78; therefore, the provisions of Section 301 of that Chapter do not apply to that district.

At the present time the number of county commissioners acting as directors of the poor in that district is three and the term of office of the commissioners is four years. Under the provisions of the Act in consideration, the county becomes a district of the third class. Chapter 3, Section 300, fixes the number of directors for all districts, *without exception,* in that class at three and the term of office at four years, and it will become the duty of the electors of that county to elect three directors of the poor at the expiration of the present term of office of its county commissioners who are ex officio directors of the poor, if the office of director of the poor in the Clearfield County Poor District is an elective office.

Prior to the Act of June 4, 1879, P. L. 78, the Act of March 9, 1771 (1 Smith Laws 332), provided that the justices of the peace or any three of them in the counties of this Commonwealth, should appoint overseers of the poor in every borough and township in their jurisdiction.

When Clearfield County accepted the provisions of the Act of June 4, 1879, P. L. 78, the duties and rights theretofore exercised by the overseers of the poor within the several poor districts of that county were imposed upon the county commissioners then in office, and for the performance of such duties an extra or diem compensation for the time actually spent in their performance was fixed by law.

After the acceptance of the Act of 1879, P. L. 78, overseers of the poor, an appointive office ceased to exist in that district, and no person might exercise the powers or office of a director of the poor unless or until he was elected a county commissioner of the county. The power of appointment to that office then ceased to exist in any body or office and the right to exercise the functions of the office of a director of the poor by any officer was consequent to election by the electors of the county.

Thereafter it was held that the commissioners of the county, as directors of the poor, were public officers within the meaning of Section 13, Article III, of the Constitution; in such counties the two offices are separate entities with separate powers and duties fixed by statute.

> "Its officers, existing in the form of commissioners, are elected for a certain term:"
> Tucker's Appeal (1921) 271 Pennsylvania 462 Kephart, J.

We are, therefore, of the opinion that the office is an elective office in the Clearfield County Poor District. The phrase, "where the office is elective," in Chapter 3, Section 302, of the Act under consideration, when so interpreted makes uniform the application of the Act throughout the State, other than in the districts specifically excepted from its provisions, as to vacancies in office and salaries of incumbents.

If it were to be held that the election of the directors of the poor in Clearfield County is still governed by the provisions of the Act of 1879, and was not affected by the Act of 1925, and a vacancy should occur in such office, then the vacancy would be filled by appointment by the Court of Common Pleas of said county, in whom is lodged the power to fill vacancies in the office of county commissioner, and not by the Court of Quarter Sessions as provided in the Act under consideration, Chapter 3, Section 303.

We are further constrained to the view that it was the intention of the Legislature that the Act of 1925, supra, would apply to the election of directors of the poor in Clearfield County Poor District, by reason of the fact that the Legislature specifies in Chapter 2, Article I, Section 202, those districts where "the manner of their election or appointment,"—directors should continue as fixed by law at the time of the passage of the Act. The exception of particular districts from the provisions of the Act as to the manner of the election of directors proves that those directors in the minds of the Legislature would otherwise come within its provisions.

> "The exception of a particular thing from general words in a statute proves that in the opinion of the law giver the thing excepted would be within the general

> clause had the exception not been made." Commonwealth ex rel Summerville 204 Pennsylvania 300 (1903) Brown, J., quoting Marshall, *C. J., Brown vs. Maryland, 15 Wheaton 419.*

You are advised, therefore, that in our opinion the qualified voters of Clearfield County Poor District shall elect a director or directors under the provisions of the Act of 1925, P. L. 762, at the municipal election next preceding the expiration of the term of any present director, but that directors of the poor now holding office shall continue to hold such office until the expiration of the term for which they now hold subject to the conditions attached to such office prior to the passage of the Act.

Very truly yours,

S. M. R. O'HARA,
Deputy Attorney General.

OPINION TO THE PENNSYLVANIA STATE ATHLETIC COMMISSION

OPINION TO THE PENNSYLVANIA STATE ATHLETIC COMMISSION

Pennsylvania State Athletic Commission—Amateur Exhibitions—Admission Fee—Jurisdiction—License—Injunction—Fees Payable to Commonwealth—Act of June 14, 1923, P. L. 710.

The Pennsylvania State Athletic Commission, under the Act of June 14, 1925, P. L. 710, has jurisdiction of all boxing, sparring and wrestling matches, amateur or professional, to which an admission fee is charged. All persons holding such matches or exhibitions must pay to the Commonwealth five per cent. of the gross receipts realized from the admission fees. While the Commission cannot prosecute persons holding amateur matches or exhibitions without a license, it has the power to apply to the courts to restrain the same by injunction in case an admission fee is charged.

Department of Justice,
Harrisburg, Pa., July 14, 1927.

Mr. Frank Wiener, Chairman, Pennsylvania State Athletic Commission, Philadelphia, Pennsylvania.

Sir: We have your request to be advised whether under the Act of June 14, 1923, P. L. 710 persons conducting boxing, sparring or wrestling matches or exhibitions in which only amateurs participate are subject to the jurisdiction of your Commission and liable to pay to the Commonwealth five per centum of the gross receipts derived from admission charges to such matches or exhibitions.

Section 4 of the Act of 1923 is, in part, as follows:

> "Boxing sparring and wrestling matches, or exhibitions for purses or where an admission fee is received are hereby allowed, except on Sundays. The Commission shall have, and hereby is vested with, the sole direction, management, control, and jurisdiction over all such boxing, sparring, and wrestling matches or exhibitions to be conducted, held, or given within this Commonwealth, and it is hereby authorized to issue licenses therefor. No such boxing, sparring, or wrestling match or exhibition shall be conducted, held, or given within the Commonwealth except in accordance with the provisions of this Act * * * The Commission is hereby further given the sole control, authority, and jurisdiction over all licenses to hold boxing, sparring, or wrestling matches or exhibitions for purses or where any admission fee is received, and over all licenses to any and all persons who participate in such boxing, sparring, or wrestling matches or exhibitions, as hereinafter provided."

Section 5 of the Act provides for the granting of licenses to conduct, hold, or give boxing, sparring and wrestling matches or exhibitions.

S-4593—A. G.—11

Section 6 provides that "All corporations or persons, physicians, referees, judges, timekeepers, professional boxers, professional wrestlers, their managers, trainers, and seconds shall be licensed by the said Commission * * *."

Section 21 of the Act provides that "Every corporation or person holding any boxing, sparring, or wrestling match or exhibition under this Act for which an admission is charged and received shall pay to the State Treasurer five per centum of the total gross receipts exclusive of any Federal taxes paid thereon."

Clearly the provisions of the Act of 1923 to which we have referred subject to the jurisdiction of your Commission all boxing, sparring, and wrestling matches for which an admission fee is received, and requires the persons conducting such matches or exhibitions to be licensed and to pay to the Commonwealth five per centum of the gross receipts from the admission fees charged and received for such matches or exhibitions.

We understand that it has been urged upon you that Section 23 of the Act of 1923 indicates that the Legislature did not intend to subject to the jurisdiction of your Commission contests in which all of the participants are amateurs. Section 23 is as follows:

> "Any person or persons, association, or corporation directly or indirectly holding any boxing, sparring, or wrestling match or exhibition, except where all contestants are amateurs, without first having procured a license, as hereinbefore prescribed, shall be guilty of a misdemeanor, and, on conviction, shall be sentenced to pay a fine of not exceeding five thousand dollars."

It is argued that the Legislature by not rendering this penal section applicable to the conduct of matches or exhibitions in which all the contestants are amateurs expressed an intention not to bring such matches or exhibitions under the jurisdiction of your Commission and not to require a percentage of admission fees to such matches or exhibitions to be paid into the State Treasury.

This argument does not rest upon any substantial basis.

The Legislature might have omitted entirely all penal provisions without in any wise impairing the validity of the Act. It could and did include in the Act penal provisions rendering only certain violations thereof criminal offenses. That it did not declare certain violations of the Act to be criminal offenses punishable by fine or imprisonment cannot be taken as the basis for deleting by construction the plain, unambiguous, provisions of the Act, violations of which were not made criminal offenses.

Section 4 unquestionably renders subject to the jurisdiction of your Commission not only boxing, sparring and wrestling matches or exhibitions "for purses" but also all such exhibitions "where an ad-

mission fee is received." Whether the contestants are professionals or amateurs is immaterial if an admission fee is charged and received.

Accordingly you are advised that your Commission has jurisdiction of all boxing, sparring and wrestling matches or exhibitions to which an admission fee is charged and that all persons holding such matches or exhibitions must pay to the Commonwealth five per centum of the gross receipts realized from admission fees. While your Commission cannot prosecute persons holding amateur matches or exhibitions without a license you are not without means of compelling obedience to the Act of Assembly. You can apply for and, in our opinion, obtain injunctive relief against any person, association or corporation which proposes, without having obtained a license, to hold boxing, sparring, or wrestling matches or exhibitions for purses, or where an admission fee is to be received.

So that there may be no misunderstanding on your part we call your attention to the fact that while you can compel persons, associations or corporations holding matches or exhibitions in which the contestants are amateurs to be licensed by your Commission if admission fees are to be charged, you cannot, under Section 6 of the Act of 1923, compel amateur contestants to obtain licences from your Commission. As far as contestants are concerned, only professional contestants, as particularly defined in Section 6, need apply for and receive licences entitling them to participate in athletic contests under your supervision.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

OPINION TO THE SUPERINTENDENT, PENNSYLVANIA STATE POLICE

OPINION TO THE SUPERINTENDENT, PENNSYLVANIA STATE POLICE

Fires—Origin—Investigation by State Police—Authority to summon witnesses —Immunity from prosecution—Act of April 27, 1927.

1. A person who is compelled to testify or furnish evidence against himself under section 4 of the Act of April 27, 1927, P. L. 450, authorizing the State police to compel the attendance of witnesses in investigating the origin and circumstances of fires, cannot be prosecuted for any offense in connection with the subject-matter of inquiry.

2. However, such immunity does not extend to cases where information is given by the witness concerning the commission of offenses not connected with the subject-matter of inquiry, since they are outside the scope of the act, and the information will be considered voluntary and not given under compulsion.

Department of Justice,

Harrisburg, Pa., June 18, 1928.

Major Lynn G. Adams, Superintendent of Pennsylvania State Police, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your request to be advised upon the following points:

> 1. Whether a person called and questioned under Section 4 of the Act of April 27, 1927, P. L. 450, can be prosecuted for the offense concerning which he has been questioned.
> 2. Whether a person called and questioned under Section 4 of the Act of April 27, 1927, P. L. 450, can be prosecuted for an offense, the commission of which is admitted by that person, when such offense was not the subject of the inquiry.

The Act of April 27, 1927, P. L. 450, is entitled an Act relating to fires and fire prevention, imposing duties and conferring powers upon the State police and providing for the investigation of the cause, origin and circumstances of fires, etc. Section 4 of this Act provides that the State police, or its assistants, may at any time investigate the origin or circumstances of any fire occurring in this Commonwealth. In this investigation "the State police or its assistants shall have the power to summon witnesses and compel them to attend before them, or either of them, and to testify in relation to any matter which is by the provisons of this Act a subject of inquiry and investigation * * and shall have the power to administer oaths and affirmations to any person appearing as a witness before them." This section further provides that "no person shall be ex-

cused from attending before the State police or its assistants, when summoned so to attend, nor, when ordered so to do, shall be excused from testifying * * * before such State police upon any investigation proceeding or inquiry instituted under the provisions of this Act, upon the ground or for the reason that the testimony or the evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or forfeiture * * * ."

Article I, Section 9 of the Constitution of Pennsylvania, provides that "in all criminal prosecutions the accused hath a right to be heard by himself and his counsel * * * he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." Standing alone, the first paragraph of Section 4 of the Act of April 27, 1927, P. L. 450, would be contrary to the Constitution, for if a man is compelled to give evidence against himself the Act of Assembly requiring him to so testify must also grant him immunity from prosecution which might arise as a result of such testimony. In the present case the entire section of this Act does not violate the Constitution for the second paragraph provides that no person compelled to testify or produce evidence against himself under the provisions of this section "shall be prosecuted or subjected to a penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may have been required so to testify or produce evidence documentary or otherwise; and no testimony so given or produced shall be received against him upon any criminal investigation or proceedings."

Under the provisions of Section 4 of this Act a person does not appear voluntarily to be questioned by the State police, but is directed under the authority of this law to so appear. The statement made by such a person is not a voluntary statement and is not in the nature of a statement made by a person interrogated by the State police concerning other offenses than arson. The person to be interrogated cannot ignore the summons, for to do so would be in contempt. It can matter little whether he is sworn or not sworn, although this section does not provide that he must be sworn. The statement made under the authority of this Act is an involuntary one and, therefore, this section provides that the person so compelled to testify shall be immune from prosecution. If the person interrogated had not been compelled to appear by summons and testify against himself his statement might be considered voluntary, if he was under no compulsion to talk at the time of interrogation. We must therefore conclude that if a person is compelled to testify or furnish evidence against himself under the provisions of Section 4 of the Act of April 27, 1927, P. L. 450, he cannot be prosecuted on account of any

transaction, matter or thing concerning which he may have been required so to testify.

The Act of April 27, 1927, P. L. 450, provides a method of investigating and securing evidence concerning the cause, origin and circumstances of fires, and the provisions of this Act relate to fires and fire prevention. Under Section 4 of this Act a person shall not be prosecuted or subjected to a penalty or forfeiture for on account of any prosecution or thing concerning which he may have been required to testify. The testimony or evidence required concerns the cause, origin or circumstances of fires and is not testimony or evidence required for any other purpose. A person is not required under this Act to furnish information or evidence concerning any offense committed by him when such offense does not concern the cause, origin or circumstances of fires. Therefore, if a person interrogated under the provisions of this Act voluntarily supplies information concerning the commission of an offense not connected with the cause, origin or circumstances of fires, such information can be used against that person in any prosecution brought as a result of statements made by him. Such statements are voluntary as distinguished from involuntary statements made by a person interrogated as provided in Section 4 of the Act of April 27, 1927.

Very truly yours,

DEPARTMENT OF JUSTICE,

THOMAS G. TAYLOR,

Deputy Attorney General.

OPINIONS TO THE SUPERINTENDENT OF PUBLIC INSTRUCTION

OPINIONS TO THE SUPERINTENDENT OF PUBLIC INSTRUCTION

School Districts—Assessed valuation of taxable property—Valuation per teacher—Pittston School District.

Concerning the legal aspects of determining the true valuations per teacher in the various school districts of the State.

Department of Justice,
Harrisburg, Pa., January 17, 1927.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pa.

Sir: Referring to your letter of June 23, 1926, concerning the legal aspects of determining the true valuations per teacher in the various school districts of the State, and pursuant to conference with Messrs. Rule and Denison, I briefly give you an idea of the legal aspects of this very difficult and troublesome question.

You refer to Pittston as a concrete test case, and although it will be convenient to talk of one particular school district, it follows necessarily from the provisions of the law on this subject that you must treat such school district on its own facts and merits in conformance always with law. Most of what I say will be merely repeating facts concerning the law which you already know and are using in working out the true valuation per teacher in the respective school districts.

The question is to determine whether Pittston, which is a school district of the third class, shall fall in the thirty-five per cent. or sixty per cent. class for the biennium beginning June 1, 1925. It is evident that you should proceed as follows:

1. You determined the assessed valuation of taxable property in Pittston for the three years immediately preceding 1925 as $9,916,389. This fact should have been, and probably was, obtained from the assessment of property in Pittston, which is a matter of public record, and you should know whether it includes any per capita assessments directly for school purposes, or, I believe, any such assessments as for occupation tax.

2. You should then proceed to determine the percentage of full value employed in making this triennial assessment of property, and it was reported to you that percentage of assessments for the three years respectively was eighty per cent., one hundred per cent. and one hundred per cent., or an average of ninety-three per cent. It is entirely and practically up to the Council of Education, through such investigation and evidence as can be secured, to try to make sure

whether this percentage of assessment reported as an average of ninety-three per cent. is or is not correct; and if you should determine, as you did, that the percentage of assessment "did not exceed eighty per cent." it is up to you to use the percentage which you thus determine. Having determined it by your own methods and in the utmost good faith, you should then divide, say, $9,916,389 assessment by .80, which, of course, would give you a true total assessment value of $12,395,486.

3. You should then divide this $12,395,486, if you believe it is the correct "true valuation," by the number of full time teachers employed during 1923-24, say 109, which, if the figures are correct, would give you the true assessed valuation per teacher as $113,720.

The law now provides that for a school district of the third class having a true assessment value per teacher of more than $100,000, computed as above, the proportion of salaries payable by the State shall be thirty-five per cent. and if the facts, outlined above without prejudice, were true, the Council of Education would have no recourse except to hold the school district of Pittston to thirty-five per cent.

I deprecate the apparent reflection on the interests of Pittston School District shown by using it as an example in this opinion for the reason that I, personally, was a teacher in a suburb of Pittston in my early days and naturally would be prejudiced in favor of that community. The use of the name at your suggestion, however, is only to have something concrete to work upon and because you are in a contention with Pittston concerning the proper proportion to be paid by the State, namely, should it be thirty-five per cent. or sixty per cent.? I have no knowledge and do not pretend to have any knowledge of the actual truth of the figures quoted above, but understand that the Council of Education arrived at those figures. If the figures are correct, the law determines the answer by means of the procedure described. If the figures can be shown to the Council to be incorrect, it is, of course, your legal duty, after careful study and investigation, to recompute and whatever result you obtain from corrected figures is obligatory on you by the law.

It is evident that the change from thirty-five per cent. based on the above figures to the sixty per cent. claimed by the Pittston School District could be effected either by an increase in the average rate of assessment sufficiently high above eighty per cent. with the actual assessment standing still; or by a sufficient decrease in the actual assessed valuation of property in Pittston; or by an increase in the number of teachers; or by any combination of the above influencing factors.

It is plain to me that the difficulty of the Council of Education is not a legal one, but is due to the very great difficulty of making sure that you can determine accurately the average percentage of the true assessment value used by the assessors in assessing taxable property during the three year period next preceding the year in which the biennium begins for which you are computing. The class of evidence which you should consider is probably very wide although no amount of investigation and study could give you an undoubtedly accurate true assessing valuation for any school district. The human equation which enters into judgment concerning the true value of taxable property is one which cannot be stated so that a positively correct solution can be worked out.

However, in answer to direct inquiry it is my definite opinion that legally a decrease in values of property since the end of 1923 is not a proper consideration in determining the percentage of State money to be paid to the school district during the biennium beginning June 1, 1925. Such a decrease, however, if it exists, as probably it does, would certainly be a material factor in determining the true average assessed valuation upon which to base your computation for the biennium beginning June 1, 1927.

Yours very truly,

DEPARTMENT OF JUSTICE,
GEORGE W. WOODRUFF,
Attorney General.

Public Schools—Pupils—Tuition—Books, etc.

Under no circumstances may a pupil have his tuition, books and supplies paid for from public school district money, except because he is attending a *public* school in some other school district from that in which he resides.

Department of Justice,
Harrisburg, Pa., January 17, 1927.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

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

> "Do the provisions contained in Sections 1404, 1407, 1708, 1709, 1711, and 2806, or any part of the 'School Code' apply to payment from public funds for the attendance, tuition, books, supplies, etc., of pupils attending any but the public schools of the State."

The title of the School Code calls it "An Act to establish a public school system in the Commonwealth of Pennsylvania, etc." Hence everything in that law must apply to public schools only. Article I of the Code provides for the establishment of school districts to cover the entire area of the State. Article II provides that "*the public school system* * * * shall be administered by a board of school directors in each school district." Articles III to XIII, inclusive, and in fact the whole Code, confines its attention entirely to the public school system as established and carried on in the school districts and administered by the various boards of school directors. No private schools, however worthy, come under the purview of any part of the Act.

Therefore, when we turn to Sections 1404 and 1407 of the School Code, we find that they apply entirely to school districts and public schools, and provide, when it is advantageous and economical, for pupils to attend school in other school districts, and for the payment by the school district in which such pupils reside to the other school district the cost of tuition, text books and school supplies.

It follows irresistibly that this provision relates only to the attendance at public schools in other school districts, and not to any other school whatever except public schools.

Now turning to Sections 1707, 1708, 1709 and 1711 of the School Code, we find that Article XVII applies entirely to high schools maintained in the school districts as a part of the public school system of the State; and, therefore, that all the provisions concerning the attendance at high schools in other districts than the one in which the pupil lives, refer to public high schools and in nowise to other high schools, however praise-worthy and however maintained. A mere glance at these Sections is sufficient to show that they are thus entirely tied up to the public school system of the Commonwealth. Section 2806 is the only Section of the School Code which bears on the attendance of pupils upon schools outside the district in which such pupils reside. This Section is looking after the interests of pupils who are placed in a new district because of the annexation of the territory in which they reside, to another school district. It is entirely tied up with the public school system and specifically provides for the attendance in the old district, by such pupils, at the "public schools" of said old district. If the pupils do not thus attend a public school, the district in which they reside would not be liable for their tuition, text books and school supplies.

The above examination of the School Law as far as the question you ask is concerned, leads me to the opinion that under no circumstances may a pupil have his tuition, books and supplies paid for from public school district money, except because he is attending a

public school in some other school district from that in which he resides, in full conformity to the provisions of the School Code.

Yours very truly,

DEPARTMENT OF JUSTICE,
GEORGE W. WOODRUFF,
Attorney General.

Child Labor Law—Employment of minor.

A person employing a minor between the ages of fourteen and sixteen years, whether such minor be a resident or non-resident, must procure and keep on file an employment certificate as required by the Act of May 13, 1915, P. L. 286.

Department of Justice,
Harrisburg, Pa., September 9, 1927

Honorable John A. H. Keith, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You desire the opinion of this Department concerning the application of the Child Labor Law (Act of May 13, 1915, P. L. 286) to children under the age of sixteen years, whose residences are outside of this Commonwealth, and who are employed temporarily or permanently within this Commonwealth.

The Act of 1915, P. L. 286, was enacted under the police power of this Commonwealth to provide for the health, safety and welfare of minors, and unless it is palpably arbitrary, injurious or unreasonable beyond the occasion of its enactment, or denies equal protection to all affected thereby, it is constitutional, and, therefore, paramount to the constitutional provisions designed for the general protection of rights of individual life, liberty and property.

The police power of the Commonwealth antedated the adoption of the Federal Constitution and the amendments to that instrument, including the Fourteenth Amendment, affected no repeal of them.

Barbier vs. Commonwealth, 113 U. S. 27; Sup. Ct. R. 357;
Lawton vs. Steele, 152 U. S. 33; 38 L. Ed., 385;
Mugler vs. Kansas, 123 U. S. 623; 8 Sup. Ct. R., 273;
Dent vs. West Virginia, 129 U. S. 114; 9 Sup. Ct. R., 231;
Commonwealth vs. Brown, 8 Supr. (Pa.) 339, 353;
Commonwealth vs. Beatty, 15 Supr. (Pa.) 5, 18.

The Act of 1915, supra, is not within any of the exceptions of the Commonwealth's right to exercise its police power, and is an appropriate exercise of the power.

Commonwealth vs. Wormser, 67 Supr. (Pa.) 444, affirmed 260 Pa. 44;

Berdos vs. T. and S. Mills, Mass. 95 N. E. 876;

Commonwealth vs. Riley, Mass. 97 N. E. 367;

People vs. Ewer, N. Y. 36 N. E. 4.

There is nothing incompatible with personal rights in the regulation that no minor shall be employed to work in any establishment unless an employment certificate has been issued as provided by the statute.

Commonwealth vs. Wormser, 67 Supr. (Pa.) 444, 448.

The act makes no distinction between resident minors and non-resident minors between the ages of fourteen and sixteen years, and no employer may lawfully employ a minor under sixteen years within this Commonwealth except in accordance with the conditions imposed by the Child Labor Act.

Commonwealth vs. Wormser, supra.

The Act of 1915 in prescribing the regulations regarding the employment of minors between the ages of fourteen and sixteen years in the State requires:

(a) A certificate of employment;

(b) Attendance for a period or periods, equivalent to not less than eight years in a school approved by the State Superintendent of Public Instruction * * * provided, such schools shall be within reasonable access to said place of employment. Such employment certificate shall be issued by the school authorities of the district wherein the minor resides and it has been held by this Department that where the minor is a non-resident, it may be furnished by the school authorities of the district wherein the minor is employed.

Child Labor Certificate, 37 C. C. 155;

Child Labor Law, 25 D. R. 79, 83.

The Commonwealth does not provide schools for non-residents of the Commonwealth, and therefore may not compel a non-resident minor employe under sixteen years to attend a school approved by the State Superintendent of Public Instruction as provided in Section 3 of said Act.

Opinion of Hon. R. R. Koch, Deputy Attorney General to Secretary of Labor & Industry, May 24, 1927.

This, however. does not relieve the employer from his duty to procure and keep on file an employment certificate as provided in this Act.

The Commonwealth not only in the interest of the educational welfare of its children, but also in the interest of the general public wel-

fare and safety, may require that no minor under sixteen years shall be employed within the Commonwealth who is not physically fit and who has not acquired the mental equipment and discipline which must naturally result from a minimum educational training.

It may be inconvenient for non-resident minors temporarily employed within the State to secure the necessary certificate, but that is not a valid objection to the exercise by the Commonwealth of its police power, and the inconvenience arising in the administration of the law from this cause are matters entirely for the consideration of the Legislature and can be only remedied by the Legislature.

Barbier vs. Connolly, supra.

We are of the opinion and so advise that a person employing a minor between the ages of fourteen and sixteen years, whether such minor be a resident or a non-resident of this Commonwealth, and whether the employment be transient, temporary or permanent, must procure and keep on file an employment certificate as required by the Act of May 13, 1915, P. L. 286 though the minor may not be compelled to attend a school approved by the State Superintendent of Public Instruction within the Commonwealth, nor in the place where he resides if such school shall not be within reasonable access to said place of employment.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

Public Schools—Pupils—Closing of schools for religious instruction.

Concerning the closing of schools for religious instruction by Boards of School Directors.

Department of Justice,
Harrisburg, Pa., September 22, 1927.

Honorable John A. H. Keith, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: This Department has received your request to be advised upon the following question:

> "May the Board of School Directors of a District having two or more elementary schools under its jurisdiction, close these schools an hour earlier on separate days of the week by resolution of the Board; the purpose of

such action being to accommodate the various organizations interested in offering week-day religious instruction?"

Article I, Section 3, of the Constitution of Pennsylvania provides:

> "* * * no man can of right be compelled to attend, erect or support any place of worship, * * *"

Article X, Sections 1 and 2 of the Constitution of Pennsylvania provide:

> "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose.
>
> "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

The Act of May 18, 1911, P. L. 309 (School Code), Section 1605, provides:

> "The board of school directors of each school district shall fix the date of the beginning of the school term, and, unless otherwise determined by the board, the daily session of school shall open at nine ante meridian and close at four post meridian, with an intermission of one hour at noon, and an intermission of fifteen minutes in the forenoon and in the afternoon."
>
> "The board of school directors of a school district have no authority to excuse pupils who are between the ages of eight and sixteen years *during legal school hours* for the purpose of attending denominational schools to receive religious instruction.

Opinion by the Department of Justice, per Deputy Attorney General Brown, May 7, 1924.

Denominational religious instruction may not be given to public school pupils, and public school buildings may not be used for the purpose of holding classes for, or teaching therein, denominational or sectarian doctrines or principles. But the Commonwealth by its educational policy seeks to build the character as well as develop the intelligence of its youth. In this policy it recognizes the legitimate, and in truth imperative duty of parents to provide for the moral and religious instruction of their children. It is not thought wise that such instruction should be given in our public schools. But in following its policy to build from its youth useful citizens of intelligence and character, it should not only consider the wishes but also invite the aid of, and cooperate with, their parents.

When the wish of parents for week-day religious instruction for their children involves no interruption to school attendance for the required number of school hours, or use of school buildings or facilities, the school authorities can have no purpose to defeat it, and may cooperate with the parents in their reasonable desires by adopting a rule fixing the opening and closing hours of schools, at such hours, or on designated days, at such time or times, as will not only provide the necessary hours for compulsory attendance in school, but also permit attendance by pupils at week-day instruction in religion else where than in the school, but when the pupils are dismissed, the school authorities may not demand, coerce, direct, or supervise the attendance of the pupils at, for, or in a class, school or other place for such instruction.

A copy of the proposed rule has not been submitted for our consideration, and an opinion upon the validity or constitutionality of a rule adopted by any local board can be rendered only when presented. It may, therefore, only be stated as a general rule that reasonableness in the method or rule adopted by the board for the purpose of cooperating with the parents on this subject is the test of its legality. When genuine infractions of constitutional or statutory provisions relative to schools arise resort may be had to the courts by parties affected thereby to correct them.

Peoples vs. Graves 219 N. Y. S. 189.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

Pennsylvania Historical Commission—Archaeological research—Raising of funds.

The Pennsylvania Historical Commission cannot lawfully accept money the principal of which is to be used for archaeological research; that it cannot supervise the raising of funds for this purpose; and that it cannot join with other historical organizations in archaeological research upon a cooperative basis.

Department of Justice,
Harrisburg, Pa., December 14, 1927.

Honorable John A. H. Keith, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether, under Section 1309 of The Administrative Code (Act of June 7, 1923, P. L. 498)

as amended by the Act of April 13, 1927, P. L. 207, the Pennsylvania Historical Commission may:

1. Legally raise funds for the particular purpose mentioned in clause (1) of that Section;

2. Legally supervise the raising of funds for the purpose mentioned; and

3. Join with another historical organization in archaeological research and share the results with such organization?

Clause (1) of Section 1309 of The Administrative Code as amended is as follows:

> "Section 1309. Subject to any inconsistent provisions of this act contained, the Pennsylvania Historical Commission shall have the power:
>
> * * * * *
>
> "(1) To examine, or cause to be examined, or excavated, the sites and areas of former aboriginal or American Indian occupation within this Commonwealth, to acquire by purchase archaeological collections for the State Museum, to prepare a list of all such sites, to describe them, to report upon their specific archaeological culture, and to prepare for publication the information so obtained. All information, reports, scientific determinations, and other records, obtained by this survey, or archaeological collections acquired by purchase, shall be the property solely of the Commonwealth, to be deposited in the State Museum, but to be preserved and arranged in the said Museum with the approval of the commission. In performing its duties under this subsection, the commission may consult and procure the advice of such archaeological and anthropological experts as it shall deem it advisable to consult."

Clauses (g) and (h) of the same Section give to the Commission the power:

> "(g) To receive, for and on behalf of the Commonwealth, gifts, or bequests, or relics, or other articles of historical interest, which shall be deposited and arranged by it in the State Museum;
>
> "(h) To accept for the Commonwealth gifts and bequests of or securities for the endowment of its work in accordance with the instructions of the donors, and in conjunction with the Governor, Auditor General, and State Treasurer, who shall, together with the members of the commission, constitute a body of trustees for the care of such funds, invest the same in the bonds of this Commonwealth or of any political subdivision thereof, and to employ the interest and income from such investments for the purposes of the commission or to apply the same to such uses as may have been specified by the respective donors of such funds;"

By these provisions, the General Assembly has dealt specifically with the power of the Pennsylvania Historical Commission to accept money or other property on behalf of the Commonwealth. It may accept "gifts or bequests or relics, or other articles of historical interest, which shall be deposited and arranged by it in the State Museum," and it may receive gifts or bequests or securities for the endowment of its work. Everything received for endowment purposes must be invested by the Commission, acting with the Governor, the Auditor General and State Treasurer, as trustees, the income to be used for the purposes of the Commission or those expressly specified by the donors.

Having thus limited the powers of the Commission to receive gifts, the Legislature evidently intended that the Commission should not accept, on behalf of the Commonwealth, any money the principal of which should be employed in the current work of the Commission. Had it intended to permit the Commission to accept gifts for purposes other than endowment or display in the State Museum, it would not have used language thus restricting the use which the Commission should make of property accepted by it on behalf of the State.

Clause (1) of Section 1309 of the Code confers certain powers upon the Commission which can be exercised only if funds are available therefor; and it is expressly provided that all information, reports, scientific determinations, and other records, obtained "by this survey," or archaeological collections acquired by purchase, shall be the property "solely of the Commonwealth."

In view of this provision, and of the limited authority conferred upon the Commission in clauses (g) and (h), we are of the opinion that the Legislature intended that the Commission should exercise the powers conferred upon it by clause (1) only by the use of money appropriated to it by the General Assembly and only to the extent rendered possible by the appropriations made.

Accordingly you are advised that the Pennsylvania Historical Commission cannot lawfully accept money the principal of which is to be used for archaeological research; that it cannot supervise the raising of funds for this purpose; and that it cannot join with other historical organizations in archaeological research upon a co-operative basis.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

Pittsburgh College of Chiropractice—Eastern College of Neuropathy and Naturopathy—Right to confer degrees.

Cannot, under any circumstances, grant degrees in this Commonwealth. Act of 1895, P. L. 327.

Department of Justice,
Harrisburg, Pa., January 24, 1928.

Doctor John A. H. Kieth, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: I have your request to be advised whether or not the Pittsburgh College of Chiropractice has the right to confer the degree of Doctor of Chiropractice and whether or not the Eastern College of Neuropathy and Naturopathy of Philadelphia has the right to confer the degrees of Doctor of Neuropathy and Doctor of Naturopathy, in this Commonwealth.

Both of these colleges were incorporated under the laws of the State of Delaware and both are registered to transact business in this Commonwealth under the Act of Assembly of June 8, 1911, P. L. 710. The Pittsburgh College of Chiropractice was registered on April 30, 1913, and the Eastern College of Neuropathy and Naturopathy was registered on October 26, 1926. Assuming that a foreign corporation organized for the purpose of conducting an educational institution may register in Pennsylvania, such registration of itself would not confer the authority to grant degrees in art, pure and applied science, philosophy, literature, law, medicine and theology or any of them.

The charter of the Pittsburgh College of Chiropractice provides that the corporation may confer the degrees of Doctor of Chiropractice and Philosopher of Chiropractice, and the charter of the Eastern College of Neuropathy and Naturopathy provides that the corporation may confer the degrees of Doctor of Neuropathy and Doctor of Naturopathy. The charters of both institutions provide that they shall have the right:

> "To have one or more offices, to carry on all or any of its operations and business and without restriction or limit as to amount to purchase or otherwise acquire, hold, own, mortgage, sell, convey or otherwise dispose of real and personal property of every class and description in any of the States, Districts, Territories or Colonies of the United States, and in any and all foreign countries, subject to the laws of such state, district, territory, colony or country."

Assuming that the State of Delaware actually intended to give to these two corporations the power to grant degrees outside of Delaware, the question arises, Can a State issue a charter to a corporation

validly conferring upon the corporation power to grant degrees beyond the territory of the incorporating State?

It is well settled that a corporation has the power, through its agents, to engage in business and to do any acts or make any contracts in other states or countries which are within the powers conferred upon it by its charter, provided the other state or country does not expressly or impliedly prohibit it from so acting within its limits. See *Fletcher Cyclopedia Corporations,* Volume 8, Section 5719, Page 9323. *Thomas vs. Matthieson, 232, U. S. 221; 58 Law Ed. 577.*

It is likewise true that a corporation doing business in a state other than that of its creation is presumed to assent to its laws and regulations. A state Legislature may impose such terms, conditions and restrictions upon foreign corporations as it chooses unless it interferes with interstate commerce. See *Cook on Corporations,* Eighth Edition, Volume 3, Page 2807.

It has long been established in this Commonwealth that "every power which a corporation exercises in another state depends for its validity upon the laws of the sovereignty in which it is exercised." *Matthews vs. The Trustees of the Theological Seminary of the Reformed Presbyterian Church, 2 Brewster 541.*

The recognition of a corporation's existence by another state and the enforcement of its contracts made therein, depend solely upon the comity of the two states. This comity is never extended where the existence of the corporation or the exercise of its powers is in any way prejudicial to the interests or repugnant to the policy of the state in which it is transacting its business. *See Van Steuben vs. The Central Railroad, 178 Pa. 367. Paul vs. Virginia, 8 Wallace 181.*

It is clear that a foreign corporation can not transact business in other states or sovereignties without their consent, either expressed or implied, nor can it be doubted that a state has the right to prescribe the terms on which a foreign corporation shall be permitted to transact business within its jurisdiction, if the conditions imposed are not repugnant to the Constitution of the United States or are not a burden upon interstate commerce. *Lasher vs. Stimson, 145 Pa. 30. American Clay Manufacturing Company of Pennsylvania vs. American Clay Manufacturing Company of New Jersey, 198 Pa. 189. Lafayette Insurance Company vs. French, 18 How. 407.*

If the State of Delaware actually intended to give to these two institutions power to grant degrees beyond the territorial limits of that State, the exercise of that power in the Commonwealth of Pennsylvania will be subject to the laws, rules and regulations imposed by this Commonwealth.

Section 1 of the Act of June 26, 1895, P. L. 327, provides:

> "All institutions of learning hereafter to be incorporated as colleges, universities or theological seminaries

> with power to confer degrees in art, pure and applied science, philosophy, literature, law, medicine and theology, or any of them, shall be incorporated in the manner hereinafter set forth, * * *."

Deputy Attorney General William H. Keller, in an opinion of November 11, 1916, addressed to Doctor J. M. Baldy, advised that it was his opinion that the degrees of Doctor of Neuropathy and Doctor of Chiropractice were degrees in medicine or applied science within the contemplation of the Act, and I am in accord with this opinion. The same reasoning applies to the degree of Doctor of Naturopathy.

The Courts of this Commonwealth have held that the practice of Neuropathy, Naturopathy or Chiropractice is the practice of medicine and surgery within the meaning of the Act of June 3, 1911, P. L. 639. See *Commonwealth vs. Martindell, 82 Pa. Superior Ct. 417. Commonwealth vs. Seibert, 69 Pa. Superior Ct. 271, 262 Pa. 345. Commonwealth vs. Byrd, 64 Pa. Superior Ct. 108. Commonwealth vs. W. H. Jobe, Pa. Superior Ct. No. 139, April Term, 1927.*

I am, therefore, of the opinion, and so advise you, that the Pittsburgh College of Chiropractice and the Eastern College of Neuropathy and Naturopathy of Philadelphia, being foreign corporations, when they are exercising their corporate powers in the Commonwealth of Pennsylvania, are subject to the laws and regulations of the latter. Pennsylvania has authorized the granting of degrees only by institutions incorporated under our law. (See Act of 1895, P. L. 327). There is no Act expressly or impliedly permitting foreign corporations to grant degrees in Pennsylvania. Therefore, these institutions, even though they may be properly registered in Pennsylvania, they cannot, under any circumstances, grant degrees in this Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,
PENROSE HERTZLER,
Special Deputy Attorney General.

State Normal Schools—Classification of salaries and positions—Executive Board—State Council of Education.

Classification of salaries and positions promulgated by the Executive Board for State institutions does not apply to State Normal Schools, but, the State Council of Education has the power by rule or regulation to require salaries to be fixed in accordance with the classification adopted by the Executive Board. If Council of Education adopts such rule or regulation, then the Boards of Trustees of State Normal Schools could not lawfully fix salaries otherwise than in accordance with the Executive Board's classification.

Department of Justice,
Harrisburg, Pa., January 26, 1928.

Dr. John A. H. Keith, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the Executive Board's classification of salaries and positions in State institutions applies to the State Normal Schools, and if it does not whether the Department of Public Instruction has the power to require Boards of Trustees of State Normal Schools to fix salaries in accordance with the classification applicable to other State institutions.

The management of the State Normal Schools was not affected in any way by the passage of the Administrative Code (Act of June 7, 1923, P. L. 498, as amended by the Act of April 13, 1927, P. L. 207) which applies only to those Departments, Boards and Commissions listed in Section 201 to 203, inclusive, of the Code.

Accordingly, the classification of salaries and positions promulgated by the Executive Board for State institutions does not apply to State Normal Schools.

However, Section 2037 of the School Code (Act of May 18, 1911, P. L. 309) is as follows:

> "The Board of trustees of each State Normal School owned by this Commonwealth shall manage its pecuniary and other affairs, subject to the Constitution and laws of this Commonwealth, and the rules and regulations prescribed by the State Board of Education therefor, and may make and enforce such additional rules and regulations as may be deemed wise and expedient for the proper conduct of the institution, subject to the approval of the State Board of Education."

Under this Section the State Board of Education, the name of which was by the Act of May 20, 1921, P. L. 1014, changed to State Council of Education, has the power by rule or regulation to require the salaries of teachers and other employes of State Normal Schools to be fixed in accordance with the classification adopted by the Executive Board for other State institutions; and if the Council of Education should adopt such rule or regulation then the Boards of Trustees of State Normal Schools could not lawfully fix the salary of any employe otherwise than in accordance with the Executive Board's classification.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

School Districts—Schuylkill Haven School District—District Superintendent Validity of election. Madeira's Case.

Election of District Superintendent held invalid.

Department of Justice,
Harrisburg, Pa., February 2, 1928.

Honorable John A. H. Keith, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: I have your request to be advised as to the jurisdiction of the Superintendent of Public Instruction under, and the legal principles applicable to, the application of the Schuylkill Haven School District for a commission to Mr. Charles C. Madeira, Jr., as District Superintendent of said school district as affected by objections to his election and the evidence taken pursuant to a hearing thereon.

1. We are of opinion, and so advise that the word, "before the regular time fixed for the election of district superintendents," in Section 1140 of the School Code, mean "before the first Tuesday of April in the years 1918-1922-1926-1930 and every fourth year thereafter," and the words "in the manner herein provided" in the same Section mean "on the second Tuesday in April in an intervening year, after due notice, by viva voce vote, etc." to serve "from the first Monday of July next following his election until the date when the terms of other district superintendents end."

2. That when a written notice of the time, place and purpose of a convention of a board of a school district called for the purpose of electing a district superintendent for the district contained in an envelope properly stamped and addressed to a member of the board, is placed in the United States mail or an official receptacle therefor within the school district five days or more prior to such convention, it is a valid notice within the provisions of Section 1134 of the School Code.

3. That all of the objections filed to the election of Mr. C. C. Madeira, Jr. held on November 18, 1927 as District Superintendent for the Schuylkill Haven School District are valid objections and must be disposed of by the Superintendent of Public Instruction before he may issue a commission as provided in Section 1141 of the School Code.

4. That the attempted election of Mr. C. C. Madeira, Jr. on November 18, 1927, by the members of the Schuylkill Haven School Board as District Superintendent for the Schuylkill Haven School District was invalid, and it, and the contract made pursuant to it under date of November 19, 1927, are not binding upon their successors in office who have advised you of its rescission.

We discuss the reasons for these conclusions in a report wherein we analyze the facts to be derived from the evidence and the law

applicable thereto and which report we transmit herewith for your information.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

REPORT

Department of Justice,
Harrisburg, Pa., January 20, 1928.

Honorable John A. H. Keith, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have examined the objections filed by E. Gangloff, Esquire, and others to the election of Mr. Charles C. Madeira, Jr., by the Schuylkill Haven School District as district superintendent for that district, filed with your Department, and we have examined the evidence and exhibits submitted by all parties in interest at hearings had before you and beg to submit the following report in supplement to our formal opinion of this date.

On October 20, 1927, the School Board of Schuylkill Haven, Schuylkill County, consisted of the following members:

George M. Paxson, President,
H. H. Stager, Secretary,
Samuel I. Bast, Treasurer,
C. Harold Weiss,
E. Edward Gangloff,
Harry L. Burkert,
J. L. Stauffer.

Of these members Messrs. George M. Paxson and C. Harold Weiss failed to receive nominations at the fall primary held September 20, 1927, and on November 8, 1927, Messrs. Clinton C. Confehr and Thomas C. Tuckens were elected to the School Board.

The School Board consisting of Messrs. Burkert, Bast, Stauffer, Gangloff, Confehr and Tuckens organized on December 5, 1927.

The school district at the beginning of the school year, July 1, 1927, was under the supervision of a supervising principal and the county superintendent of schools.

During May or June the school board as constituted on July 1, 1927, by unanimous action taken at the time the teachers of the

1927-28 school year were chosen, employed Mr. Charles C. Madeira, Jr. as Supervising Principal under the authority of Section 1214, School Code, from July 1, 1927 to June 30, 1928 and fixed his salary at $3,100.00 for the year, and set aside this amount for that purpose in the budget adopted for the school year, and accepted his contract on that basis.

At a special meeting of the Board of Education for the district held on October 20, 1927, at which there were present the following, Messrs. Bast, Gangloff, Paxson, Stauffer, Stager and Weiss, without due previous notice, the board passed a motion electing Professor C. C. Madeira, Jr., district superintendent to serve until July 1930 and fixed his salary at $3,500.00 per year.

At that meeting Messrs. Bast, Paxson, Stager, and Weiss, voted for the resolution, Gangloff against the motion and Burkert was absent.

On November 6, 1927, objections were filed by Messrs. E. E. Gangloff, H. L. Burkert, J. L. Stauffer, members of the board, and others, to the regularity and legality of the board's action.

At a regular meeting of the school district held on November 12, 1927, at which there were present Messrs. Paxson, Stauffer, Weiss, Bast, Burkert, Stager and Supervising Principal, Madeira, the board by unanimous vote passed a motion, that the action of the board electing the said Charles C. Madeira, Jr., as district superintendent be rescinded and that said election be declared null and void. By reason of this fact no date was fixed for hearing upon the objections filed.

At the same meeting, November 12, 1927, passed a motion to adjourn to meet in Convention at the Schuylkill Building, Haven Street, in Schuylkill Haven, Pennsylvania, on November 18, 1927, at 7 o'clock P. M. for the purpose of electing a legally qualified person as District Superintendent of the Public Schools of Schuylkill Haven, Pennsylvania, to serve until the first Monday of July, 1930. Messrs. Weiss, Bast, Stager and Paxson voted for the motion and Messrs. Burkert and Stauffer against the motion.

On November 18, 1927, at an adjourned meeting of the board, at which there were present the following members, Messrs. Burkert, Bast, Gangloff, Paxson, Stauffer, Stager and Weiss, a motion was passed to elect a district superintendent for the schools of Schuylkill Haven to serve until July, 1930. Messrs. Bast, Weiss, Stager, Paxson voted for the motion, Stauffer against the motion, Gangloff and Burkert did not vote. The board then proceeded to elect Mr. C. C. Madeira as district superintendent, the vote being as follows, Messrs. Bast, Paxson, Stager and Weiss for C. C. Madeira; Burkert, Gangloff, Stauffer not voting. The board also adopted a motion fixing Mr. Madeira's salary at $3,500.00 per year and authorized the proper

officers to execute the necessary contract. Messrs. Bast, Weiss, Stager, Paxson voted for the motion, Gangloff, Burkert, Stauffer not voting.

The school board acted upon the creation of the school district as an independent district and the election of Mr. C. C. Madeira after certain objections (See Record, Pages 2, 3,), had been filed to the proposed action of the board by Mr. Gangloff. These objections were overruled by the Chair, Mr. Paxson presiding, and upon an appeal from the decision of the Chair the board voted as follows: Messrs. Weiss, Stager, Paxson to sustain the Chair, Gangloff, Burkert, no, Stauffer not voting.

On November 19, 1927, a contract was executed between Charles C. Madeira and the Schuylkill Haven School District, for a "term beginning from the date the said Chas. C. Madeira receives his commission as such district superintendent from the Department of Public Instruction of the Commonwealth of Pennsylvania, and terminating the first Monday of July, 1930" (See Record, Page 27).

On December 5, 1927, at a meeting of the board at which the following members were present: Messrs. Stauffer, Gangloff, Bast, Burkert, Stager and Supervising Principal, Madeira, Mr. Clinton C. Confehr and Mr. Thomas C. Tuckens qualified as school directors. At that meeting a resolution was adopted, (See Record, Page 26), calling a convention of the board to rescind the election of Mr. Madeira. This resolution was adopted upon the affirmative vote of Messrs. Burkert, Confehr, Tuckens, Gangloff and Stauffer and the negative vote of Bast and Stager. The secretary was instructed to give notice to all members five days in advance of convention to be held on December 12, 1927.

On December 12, 1927, at a meeting called pursuant to authority and notice directed by the board on December 5, 1927, the board adopted the following resolution:

> "WHEREAS it is recognized that the objections to the action of this School Board at its meeting held on November 18th, 1927, are well taken, therefore
>
> "BE IT RESOLVED by this School Board of the Borough of Schuylkill Haven, Pennsylvania, in convention assembled this 12th day of December, 1927, that the election at the said meeting of November 18th, 1927, of Mr. Charles C. Madeira, Jr., as district superintendent of the school district of the Borough of Schuylkill Haven, Pennsylvania, be and the same hereby is rescinded and declared null and void."

This resolution was adopted by the following vote: Messrs. Burkert, Confehr, Tuckens, Gangloff, Stauffer, aye; Messrs. Bast and Stager, no.

Two of the four members of the board who voted affirmatively for the election of a district superintendent on October 20, 1927 and

again on November 18, 1927 were defeated for renomination at the fall primaries held on September 20, 1927, on both the Republican and Democratic tickets. One of them was nominated on the Prohibition ticket, but was defeated at the general election on November 8, 1927.

Objections to the legality and regularity of the election of Charles C. Madeira as district superintendent held on October 20, 1927 were filed by three members of the school board as well as other taxpayers with the Department of Public Instruction at Harrisburg, Pennsylvania, within fifteen days thereafter but because of the action of the board on November 12, 1927 rescinding said election no hearing was had upon the objections.

Objections were filed to the action of the board had on November 18, 1927 by three members of the board as well as other taxpayers with the Superintendent of Public Instruction at Harrisburg, Pennsylvania, (See Record Pages 2, 3), and the Superintendent of Public Instruction fixed December 13, 1927 at 10:30 A. M. at his office in the City of Harrisburg as the time and place for hearing. Testimony was taken on that date and on December 27, 1927 before the Superintendent of Public Instruction.

The protestants claim:

1. That a district superintendent in a third class school district may only be elected on the second Tuesday of April in any year, except where a vacancy occurs during a term after an election held in any fourth year beginning with the year 1918;

2. That notice to members of the board of the time, place and purpose of the meeting means five days from delivery in due course of mail and not in five days from mailing;

3. That the election of a district superintendent in this instance was a usurpation of the power of the incoming board theretofore elected by their predecessors on the eve of leaving office and the contract dated November 19, 1927 between Mr. C. C. Maderia, Jr. and the then board was executed without power, was ultra vires, for that reason and for the further reason that it becomes effective after the dissolution of the then acting board, and is unenforceable by Mr. Maderia because he was then under contract with the school district to act as supervising principal in the district until June 30, 1928.

The school district is one of the third class, and there is no dispute that authority for the present election, if any, is to be found in Section 1140, School Code, and that the procedure for such election is as set forth in Section 1134, and 1109 School Code.

Section 1140 provides:

> "Any school district of the second or third class having no district superintendent may elect a district superintendent, before the regular time fixed for the election

of district superintendents, in the manner herein provided, and he shall serve until the date when the terms of other district superintendents end."

Section 1134 provides:

"The boards of school directors of each district of the second or third class, electing a district superintendent, shall meet in convention at its regular place of meeting, on the second Tuesday of April, one thousand nine hundred and eighteen (1918), and every four years thereafter, at an hour previously fixed by said board; and the secretary shall mail to each member thereof, at least five days beforehand, a notice of the time, place, and purpose of such convention. Such convention shall, in the same manner as a county superintendent is elected and certified, elect and certify a properly qualified district superintendent, to serve for four years from the first Monday of July next following his election: Provided, That on the second Tuesday of April, one thousand nine hundred and twenty-six (1926), such district superintendents shall be elected as herein provided, to serve from the first Monday of May, one thousand nine hundred and twenty-six, until the first Monday of July, one thousand nine hundred and thirty (1930)."

The proponents of Mr. Madeira's election contend that the words "on the second Tuesday of April" Section 1134, School Code, refer only to the years 1918 and each fourth year thereafter; that in a district where no district superintendent has been elected, a district superintendent may be elected at any time in any year at a convention of the district board, provided "the secretary shall mail to each member thereof, at least four days beforehand, a notice of the time, place and purpose of such convention;" that any other construction would prevent a district board from electing a district superintendent whenever in its judgment the proper time has arrived.

The objectors contend that the words "on the second Tuesday of April," Section 1134, supra, refer to any election of a district superintendent except an election to fill a vacany occurring after an election in the year 1918 and each fourth year thereafter.

We are led to adopt the protestants construction in this respect for the following reasons:

The Act of May 11, 1911, P. L. 309, its amendments and supplements were passed to establish a public school system in this Commonwealth, together with the provisions by which it shall be administered, etc. The sections thereof pertinent to this inquiry are: Section 1133, 1134, 1135, 1138, 1139, 1140, 1141, 1146, 1102, 1103, 1110, 1111, 1112, 1113 and 1214.

Where the language of a section is of doubtful meaning, it should be construed by reference to the whole Act.

The time unit for operation and fiscal provisions is the school year beginning the first Monday in July in each year. All other provisions in the Code for assessment and levy of taxes, for providing its teaching and operating staff center around that date, giving certainty and regularity to the adoption of its fiscal policy and provision for a proper operating force, including its supervisory force, for a period of from one to three years where supervision is by a supervising principal and of four years where it is by a district superintendent and county superintendent.

Where the language of any section of the School Code is ambiguous, that construction should be adopted which, not being in conflict with the express language of any other section, makes the system therein provided harmonious and symmetrical and prevents conflict in the exercise of valid powers therein conferred or therein authorized to be delegated to others, either officers or employes in the district.

Being constrained, as we see it, to adopt this principle of construction, we are of opinion that the words "before the regular time fixed for the election of district superintendent" in Section 1140 of the School Code mean "before the second Tuesday of April in the years 1918, 1922, 1926, 1930, and each fourth year thereafter, and the words "in the manner herein provided" in the same Section mean "on the second Tuesday in April in any intervening year after due notice, by viva voce vote, etc." to serve "from the first Monday of July next following his election until the date when the terms of other district superintendents end." We hereafter discuss more fully the effect of the interpretation of these sections as contended for by proponents of the present election.

In the light of the evidence submitted there may be some merit in the objection covering the giving of notice of the time, place and purpose of the meeting of November 18. This evidence was to the effect that though put in the mail box on Saturday evening November 12, it was after hours for collection of mail from boxes or distribution through the usual channels until Monday morning, November 14th, and in fact the envelope produced in evidence was postmarked November 14.

But the notice herein exacted is to be given by a body functioning within limited territory to its members all of whom are living within its limits and all of whom are ordinarily presumed to be cognizant of its actions or proposed actions. Further, under our interpretation of the provisions of Section 1140 and 1134 of the School Code as noted above, such notice would relate to a specific date in the school year. It is not denied here that notice was received, and that all members were notified in time to attend and did attend the meeting. The Act requires it to be given "by mailing," and under the authority of *Pearce vs. Langfit, 101 Pa. 507,* and the uncontradicted evidence that

they were placed, properly addressed and stamped in a United States mail box on November 12, 1927, we are of opinion it was a full compliance with the law. See also *Cook vs. Forker, 193 Pa. 461.*

On examination of protestants' second objection we conclude that it is a valid objection and one of which the Superintendent of Public Instruction must take cognizance before issuing a commission in this case.

The qualifications of the incumbent elected, and the validity of his election as it appears upon the certificate of election issued by the president and secretary of the district board to the Superintendent of Public Instruction must be decided by the Superintendent of Public Instruction, and if he be found qualified and regularly elected by majority of the board, the Superintendent must issue a commission. If any objections, however, are filed with the Superintendent to the election, he must give an opportunity to all parties to be heard, hear the testimony of witnesses under oath, and decide the objections, and if the objections are deemed sufficient he must refuse a commission.

"Any objections" as used in Section 1113, must be read with "valid objections" as used in Section 1111, and if objections are filed he may, and in fact, we are of opinion, must, review the election in the light of "any valid objection" filed.

The term "valid" means in law having legal strength, force, and effect, or incapable of being rightfully overthrown or set aside, *Emerson vs. Knapp, 75 Mo. App. 92, 97.*

In this view of the law, the Superintendent must not only decide any objection filed to the manner of election, i. e. notice of election, time of election, number of votes, but also he must decide any objection filed to the evercise of the power of the electing board to elect. In this case the procedure for election as well as the exercise of the power to elect by the electing board are affected by the objections filed.

The courts of this state have repeatedly held a governing body may not lawfully usurp the governmental powers or functions of a succeeding body by contracts to become effective after the demise of the contracting body. The adoption or change of the form of supervision or administration of the schools of its district was the exercise of a governmental function; the election in this case of a district superintendent after the election of two members of the district board, and within seventeen days of the demise of the acting board, to become effective by contract at an indefinite date in the future, which date is in fact after the beginning of the term of the incoming board, and to remain effective during the whole term, and beyond the life, of the incoming board, is invalid.

The fact that the board's choice is made by election does not effect the application of the rule. The position of district superintendent

partakes of the nature of office. The term is fixed by statute; the election of the incumbent is certified, he acts under the authority of a commission from the Superintendent of Public Instruction, he subscribed to an oath or is affirmed, cause for removal, method of removal are defined by statute, and his duties are in part defined by statute.

"To elect" means to choose or to select a person to fill an office or employment, but so long as the creation of the position by a district is within the discretion of its governing board, and the duties of the incumbent are in part designated by the governing board, and the salary for all services to be performed is subject to contractual engagement between the governing board and the incumbent, as is the case with a district superintendent, election is no more than a method to select an employe.

On December 5, 1927, when the new board came into existence, Mr. C. C. Maderia, Jr. had not received a commission as district superintendent from the Superintendent of Public Instruction, had not subscribed to and taken, before the Superintendent of Public Instruction or before any Judge of any Court of Common Pleas of this Commonwealth, the oath or affirmation required by Section 1146 of the School Code, had not undertaken to perform any duties as district superintendent for the school district and under the terms of the contract offered by him in evidence, dated November 19, 1927, between him and the Schuylkill Haven School District his term of service would begin "from the date that the said Charles C. Madeira receives his commission as such district superintendent from the Department of Public Instruction of the Commonwealth of Pennsylvania," and he was then acting as a supervising principal in the district under a valid and subsisting contract for a term ending July 1, 1928.

The new board on December 5, 1927, the date of its organization, followed by action on December 12, 1927, took action to and did rescind the election of Mr. Madeira on November 18. The proponents of Mr. Maderia's election contend that the action of the board on December 5, 1927 and December 12, 1927, rescinding such election may not be considered as an objection to his election. Technically that may be correct because not filed within fifteen days of the election, but it is evidence, and was properly received, that the members constituting the board after December 5, 1927, repudiated the action of the former members, did not ratify the election, and did treat it as a usurpation of its power to select the incumbent of this important position or a coercive measure to compel it to release an employe then under contract to perform important services for the district.

We have, if we accept the construction placed on Sections 1140 and 1134, School Code by the proponents of Mr. Madeira's election and the action of the members of the board on November 18, 1927, affirmed the right of a district board to bind the district under a

contract in May or June for supervision by a supervising principal until the first Monday of July, 1928 and in November, 1927, under a contract for supervision by a district superintendent from an uncertain date until the first Monday of July 1930, notwithstanding that it is the clear intention of the Code to be derived from Section 1214 that the two forms of supervision are incompatible, and such incompatibility is even admitted on argument by counsel, see Brief of J. Dress Pannell, Esquire, for Respondent, Page 15. The fact that the Mr. Madeira is the party appearing in both contracts and has indicated a willingness to waive his rights under the earlier contract if and when the later contract is declared valid, may obscure the issue but does not affect the principle involved. Those contracts might be outstanding in the hands of two different parties, and the holder of the one unwilling to surrender his rights, or the board might, as here, indicate an unwillingness to release the one.

The circumstances of this protest closley parallel those existing in the case of *McCormick v. Hanover Township, 246 Pa. 196,* where the Court held that where township supervisors by written contract December 15, 1910 engaged the plaintiff and another as counsel for the next ensuing fiscal year beginning with the first Monday of March 1911, at a salary of $2,500.00 each, the contract was ultra vires and that the contract was incapable of ratification.

In *Moore vs. Luzerne County, 262 Pa. 216,* Justice Simpson said, Moore brought suit against the County in a contract of employment entered into between him and the County Commissioners on December 23, 1911, by which he agreed to forms, plans, etc. supervise and inspect the construction of a said county road. The contract was rejected on January 25, 1912 by a later board of County Commissioners who selected another engineer in his place. The Court, Mr. Justice Simpson, said:

> "Moreover, as we cannot agree with appellee that the construction of a public road is a business as distinguished from a governmental function of the county, the decision in *McCormick v. Hanover Township, 246 Pa. 169,* is applicable and controlling. In that case the supervisors of a township employed an attorney to represent it, the employment to commence at a period subsequent to the expiration of the existing term of the board. We held that as the employment at that time was unnecessary, evidently intended to tie the hands of the incoming board of supervisors, it was ultra vires and void. In the present case the lack of necessity and the purpose to tie the hands of the incoming board of county commissioners, are each expressly averred in affidavits of defense; and those averments, on a rule for judgment for want of a sufficient affidavit of defense, must be taken as true."

> "Moreover, the court cannot blind its eyes to the fact that, in public and private life alike, an official or agent, whose term of service is about to expire, might be tempted to favor his friends and retainers at the expense of his principal. Because thereof, public policy requires that the courts in furtherance of public and private honesty and fair dealing, shall apply such procedural rules as will prevent or limit summary recovery upon agreements which possibly may result from yielding to such temptation. . .
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> * * * * *
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> "* * * The contract was made by the county commissioners but a few days preceding their retirement from office and the induction of their successors, and related to work, all of which was to be performed after they had ceased to be public officials. As the record now is, it is barren of any explanation of that material fact. It is a mistake to suppose that, because a public official, or indeed any other agent for a known limited term, has power to make a contract, he is authorized thereby to make one for an indefinite or long extended term. If the agency itself does not expressly limit the extent of the agent's power, then the facts and circumstances of each case must be considered in determining it. Ordinarily it is limited in time to the term of the agent who makes it. * * *"

and the court further held in that case that the Act of May 11, 1909, P. L. 506 authorizing the county commissioners to employ or appoint proper persons to prepare such surveys, plans, did not affect the rule as stated. See *Murray vs. School Dist., 32 Superior 373; Davis vs. Public Schools, 175 Mich. 105; 140 N. W. 1001.*

For the reasons herein discussed we transmit herewith the opinion of the Department of Justice on the points in issue.

Respectfully,

S. M. R. O'HARA,
Deputy Attorney General.

Public Schools—Tuition and maintenance.

The phrase "tuition and maintenance" as used in Section 1413, Act of May 18, 1911, P. L. 309, defined.

Department of Justice,
Harrisburg, Pa., May 10, 1928.

Dr. John A. H. Keith, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

My dear Dr. Keith: Your request to be advised as to the proper definition of the phrase "tuition and maintenance" as this occurs in Section 1413 of the Act of May 18, 1911, P. L. 309 (School Code), has been referred to me for reply.

Article XIV of the School Code deals with pupils and their attendance in the schools of this Commonwealth.

Section 1413 of that Act provides for the instruction of children who because of apparent exceptional physical or mental condition need special education and training.

That Section provides, inter alia:

> ". . . When any child between the ages of six (6) and twenty-one (21) years of age resident in this Commonwealth, who is blind or deaf, is enrolled, with the approval of the Department of Public Instruction, as a pupil in any of the schools or institutions for the blind or deaf, under the supervision of and approval by the Department of Public Instruction, the school district in which such child is resident shall pay twenty-five per centum (25%) of the cost of tuition and maintenance of such child in such school or institution, as determined by the Department of Public Instruction; and for the tuition and maintenance of such children the Commonwealth shall pay, out of funds appropriated to the department for special education, seventy-five per centum (75%) of the *cost of their tuition and maintenance,* as determined by the department. . . ."

Section 1441 of the same Act defines the term "cost of tuition" as used in Article XIV of said Act to include the cost of the following items:

1. Instruction, including salaries of members of the teaching and supervisory staff, and attendance of teachers at institutes;
2. Text books and school supplies; and
3. Fuel, light, water and janitor service; and shall also include ten per centum (10%) of the total cost of said items. Calculation of the cost of tuition in any district shall be made separately for elementary and high school pupils respectively. This definition applies to Section 1413.

Section 1412 of the same Article provides homes for the instruction of children in orphan asylums, homes for the friendless, children's homes, or other institutions for the care or training of orphans or other children; that the cost of tuition where it shall be necessary to provide a separate school or to erect additional school buildings shall, in addition to tuition costs as is now provided by law, include a proportionate cost of the operating expenses, rental and interest on any investment required to be made in erecting such new school buildings. The only bearing which this section has upon the

question before us is to define the policy of the Commonwealth in cases where buildings must be erected to accommodate special pupils.

By opinion of Attorney General W. U. Hensel, under date of December 14, 1893, maintenance in any eleemosynary institution, supported wholly or in part by the State, including such institutions as the Pennsylvania Institution for the Instruction of the Blind which is not supported entirely by the Commonwealth and in which pupils are maintained by other States and by private individuals, is to be determined by calculating "from a comparison of their receipts and expenses and from the application of the whole number of pupils maintained to the expenses of maintaining them all, the cost of maintaining each inmate."

Maintenance has likewise been defined to comprehend expenses to be incurred for food, clothing, and care of inmates, and for repairs to buildings and equipment such as are necessary to keep the institution up to its original condition.

The Commonwealth has long ceased to make appropriations for capital investments to institutions not owned, controlled and supervised by the State, and in line with that policy items of capital investment including new construction, replacements or depreciation are not to be considered in determining the cost of maintenance.

For these reasons we are of the opinion and so advise that the cost of maintenance and tuition may comprehend expenditures for (1) food, clothing, (2) for necessary maintenance of grounds, and ordinary repairs to the buildings and equipment such as may be necessary to keep the institution in proper condition and to preserve and insure against loss, (3) instruction, including salaries of members of the teaching and supervisory staff, (4) text books and school supplies (5) fuel, light, water and janitor service and to the last three items there may be added ten per centum (10%) of the total cost of those items.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION TO SCHOOL EMPLOYES' RETIREMENT BOARD

OPINION TO SCHOOL EMPLOYES' RETIREMENT BOARD

Act of July 18, 1917, P. L. 1043, Section 12 (3). School Employes' Retirement Association. Designation of beneficiary in writing vests no present interest.

Where the beneficiary designated by a contributor to the School Employes' Retirement Association under the provisions of Section 12 (3), of the Act of July 18, 1917, P. L. 1043, dies before the contributor and no change in the beneficiary is thereafter made by the contributor, his or her accumulated deductions are payable to the contributor's estate.

Department of Justice,
Harrisburg, Pa., February 23, 1928.

H. H. Baish, Secretary, School Employes' Retirement Board, Harrisburg, Pennsylvania.

Sir:

We have the request of the School Employes' Retirement Board for an opinion on the following question:

Where a contributor has nominated by written designation a beneficiary to whom shall be paid his or her accumulated deductions, if the contributor dies before retirement and the beneficiary named dies before the contributor, to whom shall such accumulated deductions be paid?

The Act of July 18, 1917, P. L. 1043 is 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."

Section 12 provides:

> "Should a contributor, by resignation or dismissal, or in any other way than 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.

* * * * * * *

> "3. Should a contributor die before retirement, his or her accumulated deductions shall be paid to his or her estate or to such person as he or she shall have nominated by written designation duly executed and filed with the retirement board."

The Retirement System is in the nature of a mutual benefit association. Principles and rules deducted from cases of ordinary life insurance, or the construction of powers of appointment in deeds or wills, have no application to cases of this kind: *Arthars vs. Baird, 8 C. C. 67.*

> ". . . The designation of a beneficiary by a member of a benefit society is, in a sense, an act testamentary in character: *Burst v. Weisenborn, 1 Pa. Superior Ct. 276.* The claim of the beneficiary in such case is not based on a contract with him, but upon the appointment made by the member, or the direction given by him for the payment of the money: Niblack on Benefit Societies, sec. 229. . . .":
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> Rice, P. J. in Thomeuf vs. Knights, etc. 12 Superior Ct.
>
> ". . . 'It is a general principle of mutual benefit insurance, that the beneficiary named in a certificate acquires no vested rights in the benefit fund, until the death of the member. It follows from this, that when a designated beneficiary dies, prior to the death of the member, the benefit fund does not, on the subsequent death of the member, go to the administrator, nor descend to the heirs of such beneficiary:' Niblack on Mutual Benefit Societies, Section 262, citing Given v. The Wisconsin Odd Fellows' Life Ins. Co., 71 Wis. 547." 8 C. C. 67 at 70, supra.

The interest of the beneficiary named is not vested, and may be changed by the contributor in his or her lifetime. If the beneficiary pre-deceases the contributor, he or she may designate another; but we are of opinion and so advise that where the beneficiary designated by a contributor to the School Employes' Retirement Association under the provisions of Section 12 (3), of the Act of July 18, 1917, P. L. 1043, dies before the contributor, and the contributor has not designated another beneficiary, the contributor's accumulated deductions are payable to the contributor's estate.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINIONS TO SCRANTON STATE HOSPITAL

OPINIONS TO SCRANTON STATE HOSPITAL

Eminent Domain—State Hospital—Necessary Land—Failure to Agree on Price —Condemnation—Act of June 6, 1907, P. L. 417.

The Board of Trustees of a State Hospital has the legal right to acquire land on behalf of the Commonwealth necessary for hospital uses and purposes by entry and condemnation under the Act of June 6, 1907, P. L. 417.

Department of Justice,
Harrisburg, Pa., October 27, 1927.

Mr. P. Silas Walter, Secretary Board of Trustees, Scranton State Hospital, Scranton, Pennsylvania.

Sir: You request to be advised whether the Board of Trustees of the Scranton State Hospital has the legal right to acquire land by condemnation under the Act of June 6, 1907, P. L. 417.

The Act of June 6, 1907, P. L. 417, provides:

> "Section 1. That when the board of trustees of any State hospital for injured persons, or directors of any incorporated district having a hospital for the care and treatment of the insane, supported in whole or in part by this Commonwealth, shall desire more land for the erection of necessary buildings or other necessary hospital uses and purposes, or shall desire a supply of pure water for hospital purposes, and shall be unable to procure the same by purchase from the owner or owners thereof, it shall and may be lawful for said board of trustees or directors of such district, by themselves, their engineer, surveyors, agents, artisans, and workmen, to survey, ascertain, locate, fix, mark, determine, enter upon, occupy, and use such lands, waters, streams, property, and materials as said board of trustees or directors may deem necessary for the purpose of supplying said hospitals with an adequate supply of pure water, and for other hospital purposes."

This act also prescribes the procedure for ascertaining compensation due the owner thereof for such taking.

The Act of June 16, 1919, P. L. 482, created a Board of Commissioners of Public Grounds and Buildings and defined its functions as follows:

> ". . . The board shall have entire control and supervision of the State Capitol building and the public grounds and buildings connected with the State Capitol, including the State Arsenal and Executive Mansion, and all the repairs, alterations, and improvements made, and all work done, or expenses incurred, in and about such grounds and buildings, including the furnishing and re-

> furnishing of the same, and shall also have general supervision over repairs, alterations, and improvements to all other buildings, lands, and property of the State."

The Act of July 15, 1919, P. L. 976, authorized the Board of Commissioners of Public Grounds and Buildings to acquire property for the Commonwealth by proceedings in eminent domain, and, Section 1 of that act provides:

> "That whenever in the judgment of the Board of Commissioners of Public Grounds and Buildings it becomes necessary to purchase additional land for the purpose of adding the same to any of the public lands, parks, arsenals, hospitals, or other public institutions of the Commonwealth, or when such purchase has been authorized by law for new institutions, and an appropriation has been made for such purpose, the said Board of Public Grounds and Buildings shall have the right to purchase or condemn such lands as hereinafter provided",

and this act also provides the procedure for ascertaining compensation due the owner thereof.

The Act of June 7, 1923, P. L. 498, (Administrative Code), abolished the Board of Trustees of the Scranton State Hospital and also the Board of Commissioners of Public Grounds and Buildings: Article I, Section 2; placed and made the Board of Trustees of the Scranton State Hospital a departmental administrative body within the Department of Welfare: Article II, Section 202; created the Board of Trustees for the Scranton State Hospital: Article II, Section 201; provided for the formation of the Board of Trustees of the Hospital: Article IV, Section 434; and prescribed the nature and extent of its authority and duties: Article XX, Section 2019.

The same act created the Department of Property and Supplies as one of the executive and administrative departments of the Commonwealth: Article II, Section 201.

Article XXI, Section 2101 transferred subject to any inconsistent provisions in the act contained, the powers and duties theretofore exercised and performed by the Board of Commissioners of Public Grounds and Buildings to the Department of Property and Supplies.

Article XXI, Section 2102, sub-section (f) provides:

> "The Department of Property and Supplies shall have the power, and its duty shall be:
>
> * * * * *
>
> "(f) To purchase or condemn lands for the purpose of adding the same to any of the public lands, parks, arsenals, hospitals, or other institutions of the Commonwealth whenever, in the judgment of the Secretary of Property and Supplies and of the Governor, the purchase

> of such additional land is necessary, or whenever such purchases shall have been authorized by law for new institutions and an appropriation has been made therefor. The condemnation of lands hereunder shall be in the manner provided in the act, approved the fifteenth day of July, one thousand nine hundred and nineteen (Pamphlet Laws, nine hundred seventy-six), entitled 'An act to authorize the Board of Commissioners of Public Grounds and Buildings to acquire property for the Commonwealth by proceedings in eminent domain, where the purchase of such property has either been authorized by law or determined by the Board of Commissioners of Public Grounds and Buildings under existing laws, and an appropriation made therefor.' ''

Article XXIX, Section 2901 cites certain acts for repeal but does not include therein the Act of 1907, P. L. 417, supra, nor the Act of July 15, 1919, P. L. 976, supra, but does repeal the Act of June 16, 1919, P. L. 482, supra.

Section 2902 provides that all other acts or parts of acts inconsistent herewith are hereby repealed.

The Act of May 4, 1927, No. 69-A, made an appropriation to the Board of Trustees of the Scranton State Hospital, inter alia, ''for the purchase and improvement of property adjoining the hospital grounds on which to erect said addition or annex to nurses' home.''

(a) Is the Act of June 6, 1907, P. L. 417 repealed by the Act of July 15, 1919, P. L. 976, and if not:

(b) Is it repealed by the Act of June 7, 1923, P. L. 498?

Discussing (a) first:

The Act of 1919, P. L. 976, supra, does not repeal the Act of 1907, P. L. 417 by designation and unless repealed by implication the Act of 1907 was in existence when the Act of 1923, P. L. 498 was enacted.

To effect a repeal by implication we must find that there is such a positive repugnancy between the two acts that they cannot stand together.

> ''. . . The general rule however is that there must be such a positive repugnancy between the provisions of the new statute and the old, that they cannot stand together or be consistently reconciled. . . . If it be possible that both can stand by construction, then the proper inquiry is, what was the intention of the legislature? Did it mean to repeal the former law, or was the new law intended to be merely cumulative? . . .''

Sifred vs. Commonwealth, 104 Pa. 179.

> ''It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute, to say that a general act is to be construed as not repealing a particular one, that

> is, one directed towards a special object or a special class of objects, . . . Having already given its attention to the particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language. . . . The general statute is read as silently excluding from its operation the cases which have been provided for by the special one. . . ."

Endlich on Interpretation of Statutes, Section 223.

Tested by this principle we conclude that the Act of 1907 was not repealed by the Act of 1919.

The Act of 1907 authorizes the Board of Trustees of any State hospital, etc. to acquire land by condemnation for the erection of necessary buildings or other necessary hospital uses or purposes, or for the supply of pure water for hospital purposes, where it is unable to procure the same from the owner by purchase.

The Act of 1919, P. L. 976 authorizes the Board of Commissioners of Public Grounds and Buildings to acquire property for the Commonwealth by proceedings in eminent domain, whenever (a) in the judgment of the Board of Commissioners of Public Grounds and Buildings it becomes necessary to purchase additional land for hospitals, and (b) when an appropriation has been made for such purpose.

The exclusive right to decide when lands are necessary for hospital purposes is not given to the Board of Commissioners of Public Grounds and Buildings and under no circumstances is the right to purchase given unless "an appropriation has been made for such purpose."

Either agency has the power of eminent domain when the authority to purchase has been conferred by legislative appropriation, and we find no inconsistency between the two acts. That agency to whom the Legislature delegates the right to purchase may exercise its power to enter and condemn if the purchase price cannot be determined by mutual agreement.

If the Act of 1907, P. L. 417, was not repealed by the Act of 1919, P. L. 976, (and we are of opinion it was not), and was in force when the Act of 1923, P. L. 498, was enacted, then was it repealed by the Act of 1923, P. L. 498?

Under the Administrative Code, the Board of Trustees of the Scranton State Hospital has the "general direction and control of the property and management" of the institution.

The right of eminent domain conferred by the Act of 1907, supra, was not affected by Section 2, abolishing the Board of Trustees as then constituted since the power conferred by that act was incident to the Board of Trustees of the Hospital however constituted or

organized and was not transferred by the Code to any other body or department.

The powers conferred on the Department of Property and Supplies under the Administrative Code of Section 2102 (f) are no greater than those exercised by the former Board of Commissioners of Public Grounds and Buildings, nor is the scope of its authority any wider.

Both the Board of Trustees and the Department of Property and Supplies are administrative agencies of the State but neither may acquire lands in behalf of the Commonwealth without express authority, and unless "an appropriation has been made for such purpose."

Title for lands taken for the Scranton State Hospital vests in the Commonwealth whether the purchase be negotiated by the Board of Trustees of the Hospital or the Department of Property and Supplies of the State and we are of the opinion that the legislature may select either governmental agency to negotiate and supervise the purchase thereof.

The right to purchase the land in question may be exercised by the Board of Trustees under the Appropriation Act of 1927, No. 69-A, and the right to purchase having been conferred upon the Board by the Legislature the failure of the Board and the owner to agree upon a fair price cannot nullify the legislative authority. In that event the Board has the power, and may exercise it, under the Act of 1907, supra, of entry upon the land and the price may be determined by condemnation proceedings in accordance with its provisions.

The Appropriation Act of 1927, No. 69-A, was a designation by the Legislature of the Scranton State Hospital as the agency to negotiate the purchase in this instance, and pursuant to the Act of May 4, 1927, No. 69-A, the Board of Trustees of the Scranton State Hospital undertook to purchase property adjoining the hospital grounds for hospital purposes. We are now advised that they are unable to procure the same from the owner by purchase because the parties are unable to agree upon the price.

Under these circumstances we are of the opinion and so advise that the Board of Trustees of the Scranton State Hospital has the legal right to acquire land on behalf of the Commonwealth necessary for hospital uses and purposes by entry and condemnation under the Act of June 6, 1907, P. L. 417.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

Scranton State Hospital—Board of Trustees.

State Institutions may not accept bids from corporations or firms in which a member of the board is a stockholder.

Department of Justice,
Harrisburg, Pa., February 1, 1928.

P. Silas Walter, Secretary, Board of Trustees, Scranton State Hospital, Scranton, Pennsylvania.

Sir: We have your request under date of August 23, 1927 to be advised whether stockholders in certain corporations may be members of the board of trustees of a State-owned hospital and whether firms or persons may compete for the business of a State-owned institution where a member of the firm or person interested in the business is a member of the board of trustees of such institution.

The Act of March 31, 1860, P. L. 382, Section 66 provides:

> "It shall not be lawful for any councilman, burgess, trustee, manager or director of any corporation, municipality or public institution, to be at the same time a treasurer, secretary or other officer, subordinate to the president and directors, who shall receive a salary therefrom, or be the surety of such officer, nor shall any member of any corporation or public institution, or any officer or agent thereof, be in anywise interested in any contract for the sale or furnishing of any supplies, or materials to be furnished to, or for the use of any corporation, municipality or public institution of which he shall be a member or officer, or for which he shall be an agent, nor directly nor indirectly interested therein, nor receive any reward or gratuity from any person interested in such contract or sale; and any person violating these provisions, or either of them, shall forfeit his membership in such corporation, municipality or institution, and his office or appointment thereunder, and shall be held guilty of a misdemeanor, and on conviction thereof be sentenced to pay a fine not exceeding five hundred dollars: Provided, That nothing in this section contained, shall prevent a vice president of any bank from being a director of such bank, or of receiving a salary as vice president."

The Act of April 23, 1903, P. L. 285, provides:

> "That it shall not hereafter be lawful for any officer or member of the board of managers of an institution, at a time when said institution is receiving State moneys from legislative appropriations, to furnish supplies to such institutions, either by direct sale or sale through an agent or firm, or to act as an agent for another in so furnishing supplies."

The Act of 1860 is highly penal in its terms and it can not be extended by implication beyond its precise meaning; and what we here say with reference to the Act of 1860 applies with equal force to the Act of 1903, supra.

The Act of 1860, P. L. 382, Section 66 forbids a trustee from being interested in any contract for the sale or furnishing of any supplies or materials to be furnished to or for the use of a public institution or directly or indirectly to be interested therein or to receive any reward or gratuity from any person interested in any contract or sale and further forbids the furnishing of supplies to such institution either by direct sale or sale through an agent or firm or as an agent for another in furnishing the same.

It has been held that materials and supplies as used in these Acts can not be extended by implication to cover money: *Long vs. Lemoyne Borough, 222 Pa. 311*; nor to include real estate: *Trainer vs. Wolfe, 140 Pa. 279*; nor to include an employe of a corporation furnishing supplies or materials to the institution: *Commonwealth vs. Wineman, 21 Dist. 911.*

It was, however, held in *Kennett Electric Light Company vs. The Borough of Kennett Square, 4 D. R. 707,* in 1895, that where a stockholder of an electric light company was also a member of a borough council the borough might not contract with the corporation and the fact that such member voted against the contract had no bearing upon its validity. In that Case the Court found that the members in question together with their co-members established and agreed upon the terms under which the light should be supplied to the borough.

It is needless to say that if the contract consummated be within the spirit or letter of the Act of 1860 or the Act of 1903 it is not necessary that it be entered into with a corrupt or dishonest intent or that the prices charged for the materials or supplies be unfair: *Commonwealth vs. Miller, 31 Supr. 309.*

The Acts noted above are plainly intended to prohibit persons from occupying a position in which they will be virtually contracting with themselves.

With these general observations we turn to the specific instances cited in your letter wherein you ask if a stockholder of a water company furnishing water within the municipality where a State-owned hospital is located (such water company being the only source for water supply to the institution) may be a member of the board of trustees of such State-owned hospital?

Here we find a public service corporation that must furnish a commodity of public necessity to all who apply within a designated territory upon such terms of service and for such rates as are fixed or are subject to revision by the Public Service Commission of the

Commonwealth. Neither the stockholder nor the trustee may vary the terms under which such service is furnished to the public generally and to the hospital in particular and we are of the opinion that the case of *Kennett Electric Light Company vs. The Borough of Kennett Square, 4 D. R. 707,* does not apply; and that such a case is not within the spirit or intendment of the Act of 1860 and that it does not apply.

The case of *Kennett Electric Light Company vs. The Borough of Kennett Square* was decided in 1895 prior to the creation of the Public Service Commission of the Commonwealth.

Again you ask if a person is interested in a department store, which prior to his appointment as a member of the board of trustees of a hospital, successfully competed to sell materials or supplies to the hospital, may the department store after he becomes a member of the board of trustees of such hospital continue to compete for the hospital business?

You do not state whether the department store is owned by a corporation or the nature of his interest in the business, but I assume that it is either a partnership or a proprietary interest.

However, whether the interest of the trustee be that of an owner or a partner in a firm or a stockholder of a corporation which owns and operates the store, we are of the opinion that such store may not sell materials or supplies to such hospital. Such trustee would have a right to participate on both sides of the contractual negotiations in prescribing the specifications for materials, the terms of sale, the acceptance or rejection of the bidders' proposals, etc. It cannot be conceded, because the interest of such trustee in the store may be small or because he refrains from participating in the negotiations for the sale, that such transaction would not be within the inhibition of the law. Where the right to so participate exists, and whether exercised or not, the law does not resort to a scale or adopt a yardstick to measure the interest in a transaction of this character.

For these reasons we are of the opinion that such case is within the letter and spirit of the Acts of 1860 and 1903, supra.

In the third case you cite you ask whether an officer of the International Salt Company which sells its products to wholesale grocers throughout the country, may also be a member of the board of trustees of a State-owned hospital where the products of such salt company are sold by wholesalers or jobbers to the hospital.

We understand the question to mean that the International Salt Company does not sell to the hospital but that products of the International Salt Company are bought by the hospital through the usual channels of trade from persons or corporations; that neither the International Salt Company nor the officer of the International

Salt Company in question has any interest in the selling corporation, and does not act as the agent of the seller.

Under the circumstances we are of the opinion that the Act of 1860 does not apply.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION TO STATE BOARD OF MEDICAL EDUCATION AND LICENSURE

OPINION TO STATE BOARD OF MEDICAL EDUCATION AND LICENSURE

Physician's license—Revocation—Violation of liquor laws—Conviction—Plea of guilty—"Moral turpitude"—Words and phrases—Acts of June 3, 1911, July 25, 1913, May 24, 1917, and April 20, 1921.

1. Under section 12 of the Act of June 3, 1911, P. L. 639, as amended by the Acts of July 25, 1913, P. L. 1220, May 24, 1917, P. L. 271, and April 20, 1921, P. L. 158, the State Board of Medical Education and Licensure has no authority to revoke the license of a physician who has pleaded guilty to a crime, but who has never been sentenced.

2. A physician who has been convicted of a violation of the Federal Prohibition Law is not guilty of "a crime involving moral turpitude" within the meaning of the Act of June 3, 1911, P. L. 639, as amended; and his license canot be revoked because of such conviction.

3. Such violation of the act is merely *malum prohibitum*, and is not an act inherently immoral.

Department of Justice,
Harrisburg, Pa., March 31, 1927.

Dr. Irvin T. Metzger, President, State Board of Medical Education and Licensure, Harrisburg, Pennsylvania.

Sir: I have your request to be advised (1) whether or not your Board has authority to revoke the license of Dr. J. J. Schill, of the Schenley Apartments, Pittsburgh, Pennsylvania, because he pleaded guilty to the charge of having knowingly issued six prescriptions for liquor for beverage purposes, and (2) whether the Board would be justified in summoning Dr. Schill to show cause why his license should not be suspended or revoked, and (3) if the summons is issued to Dr. Schill, what charge should be made against him.

The authority of the State Board of Medical Education and Licensure to revoke or suspend a physician's right to practice medicine and surgery in this State is based upon Section 12 of the Act of June 3, 1911, P. L. 639, as amended by the Acts of July 25, 1913, P. L. 1220, May 24, 1917, P. L. 271, and April 20, 1921, P. L. 158, which provides that:

> "The State Board of Medical Education and Licensure may refuse, revoke or suspend the right to practice medicine and surgery in this State for any or all of the following reasons, to wit: The conviction of a crime involving moral turpitude, habitual intemperance in the use of ardent spirits or stimulants, narcotics, or any other substance or any condition which impairs intellect and judgment to such extent as to incapacitate for the performance of professional duties."

From your inquiry, it is not clear whether or not Dr. Schill has been convicted of any crime. You say he "plead guilty," but do not state that a sentence has been imposed upon him. Section 12 of the Act referred to states that the person whose license the Board may suspend or revoke must be convicted of a crime involving moral turpitude. The word "conviction" has a popular as well as a legal meaning. In common parlance, the verdict of a court is deemed a conviction, but, "when the law speaks of conviction, it means judgment, and not merely a verdict, which in common parlance is called a conviction," Tilghman, C. J., in *Smith vs. Commonwealth, 14 S. & R. 69 (1826),* and "* * * when conviction is made the ground of some disability or special penalty, a final adjudication by judgment is essential, "*Commonwealth vs. Miller, 6 Pa. Superior Ct. 35 (1897).*

The Supreme Court of this Commonwealth, in the case of *Commonwealth vs. Minnich, 250 Pa. 363 (1915),* stated, "A verdict of a jury, without more, is but the expression of the collective opinion of twelve men, which concludes nothing and supports nothing, except as it is followed by a judgment; and then it is the judgment, and not the verdict, that marks the conclusion of the issue and gives it efficiency." Deputy Attorney General McNees, on June 26, 1922, rendered an opinion to your board in the case of Dr. W. H. Theel, of Philadelphia, whose license had been revoked on the ground of his conviction of illegal advertising. Dr. Theel had raised the question as to the authority of your Board to revoke his license when no sentence was ever imposed upon him. You were advised that a mere plea of guilty without the imposition of a sentence was not a conviction and, therefore, you had not the right to suspend or revoke the license in question. See 2 Pa. D. & C. Rep. 339 (1923).

Assuming that a sentence has been imposed in this case, your request resolves itself into the question whether a conviction of a crime in violation of the Federal Prohibition Law is of such gravity as to constitute moral turpitude. The word "moral" when used with the word "turpitude" does not seem to add anything to the meaning of the latter term other than that emphasis which results from tautological expression, 41 Corpus Juris 212.

The term "moral turpitude" has a positive meaning at common law. It is defined to be, "An act of baseness, vileness, or depravity in the private or social duties which a man owes to his fellow men or to society in general," 2-American and English Encyclopedia of Law, 872. Bouvier's Law Dictionary, third edition, volume 2, page 247, defines "moral turpitude" as "An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man." A distinction is often made, in that the act must be *mala in se* and not merely *mala prohibitia*; i. e., the act must be inherently immoral.

"Moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by law. It must not be merely *mala prohibitia,* but the act itself must be inherently immoral. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude," 41 Corpus Juris 212.

The sole question, therefore, to be determined is whether or not a conviction for the violation of the Federal Prohibition Law is a crime involving moral turpitude, assuming that Dr. Schill has been convicted of violating the Federal Prohibition Law.

This question has not arisen in this Commonwealth, but has risen under similar circumstances in other jurisdictions. The Supreme Court of Alabama decided that the Lower Court erred when it permitted the District Attorney to show that a witness had been convicted for making liquor in order to attack the credibility of the witness' testimony. The Court stated that a conviction for making liquor does not involve 'moral turpitude.' Chief Justice Anderson in delivering the opinion of the Court states, "This Court has several times defined the words 'moral turpitude,' as used in this provision, as meaning something immoral in itself, regardless of the fact that it is punished by law. It must not merely be *mala prohibitia,* but the act itself must be inherently immoral. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude." *Marshall vs. State, 207 Alabama, 566 (1922).* The Court of Appeals of Alabama affirmed the decision of the Lower Court sustaining an objection made by the State's counsel where a witness was asked if he had not been charged with selling liquor, the Court stating that proof of conviction of illegal sale of intoxicating liquors cannot be offered to impeach the witness' credibility, for the crime does not show moral turpitude, *Swope vs. State, Alabama App. 83, 58 So. 809 (1912).*

The Supreme Court of Vermont, in passing on the question as to the credibility of a witness where the statute provided that a witness would be disqualified when he was shown to have been convicted of a crime involving moral turpitude, stated that, "The offense of selling intoxicating liquor does not, in legal sense, involve moral turpitude. It ranks, rather, with breaches of the peace by assaults and otherwise. See *75 McGovern vs. Hayes and Smith, 75 Ver. 104 (1902).*

The Court of Criminal Appeals of Texas stated that evidence presented to show that the accused had been charged with, and convicted in Federal Court of, the transportation and possession of intoxicating liquor is inadmissable to impeach his credibility as a witness, the crime not involving moral turpitude and not being a felony under the Federal Law. See *Carter vs. State, 271 S. W., 629 (1925).* A violation of the local opinion law and of gaming was not

an offense involving moral turpitude, *Holmes vs. State, 68 Texas Cr. R., 17.*

The Court of Appeals of Georgia, where the question was raised as to the impeachment of a witness' testimony because he was convicted of a violation of the liquor law, decided that the offense of selling intoxicating liquor is not one of those offenses involving moral turpitude and a witness cannot be impeached by proof that he has violated this law. *Eddenfield vs. State, 14 Ga. App., 401, 81 S. E., 253 (1914).*

The courts do not make a distinction as to whether the crime is a misdemeanor or a felony, because moral turpitude may be involved in the commission of a misdemeanor as well as in a higher grade of crime. The Court of Appeals in the District of Columbia, in a case where a doctor had been convicted for sending through the mail a letter giving information as to where, by whom, and by what means an abortion might be performed and procured, and whose license had been revoked by the Board of Medical Supervisors of the District of Columbia, held that he was guilty of a crime involving moral turpitude. The Court stated "Abortion is an immoral, base crime; and he who aids and abets in its commission by an unlawful use of the mails is guilty of an act involving moral turpitude," *Kemp vs. Board of Medical Advisers, 46 App. Cases, D. of C., 173 (1917).*

Since the adoption of the Eighteenth Amendment, two courts have decided that a violation of the prohibition laws shows an attitude directly opposed to the moral tone of the people. In a recent decision of the Supreme Court of Kansas, the Court held that an attorney was guilty of a crime involving moral turpitude and was properly disbarred because he was found guilty of violating the National Prohibition Act, *State vs. Bieber, 274 Pac., 875 (1926).* Likewise, in a recent decision in the District of Columbia, the court sustained the disallowance of a policeman's pension upon proof of his having been convicted of trafficking in liquor, where a statute permitted the commissioners of the District of Columbia to reduce or suspend the allowance of a retired police officer upon proof of a conviction of a crime involving moral turpitude, *Rudolph vs. United States, 6 Feb. (2d), 487 (Ct. of App. D .C. 1925).*

It is to be noted that both these cases involved the conviction of a public or quasi-public officer, one being an attorney and the other a policeman. Both courts considered that the offense was aggravated by the official character of the offenders, as both referred to the sanctity of the oath administered.

The Supreme Court of Kansas, Supra, stated:

> "In view of the fact that an attorney-at-law holds a position of a quasi-public character, as an officer of the court and enjoying important privileges not accorded to

> people in general, it is not unreasonable to exact a higher standard of better conduct from him than that expected from the rank and file of our citizenry."

These decisions do not represent the weight of authority nor are they in accord with the better reasoned opinions of the other cases referred to.

As stated above, the courts of this Commonwealth, have not defined the meaning of the term "moral turpitude". The term "infamous" however, has been defined, and the question of what is and what is not an infamous crime is very closely related to the question of what is and what is not a crime involving moral turpitude. The courts have frequently used these terms synonymously.

It has been decided that burglarly is not an infamous crime within the meaning of the Divorce Statute of May 8, 1854, P. L. 644, as amended by the Act of June 1, 1891, P. L. 142, *Nevergold vs. Nevergold, 20 Pa. C. C., 108 (1898);* that larceny from a person is not an infamous crime within the meaning of the same statute, *Bailey vs. Bailey, 26 Pa. C. C. 553 (1902);* and that a conviction of an assault with intent to rape, accompanied by a sentence to the penitentiary for a period of two years and six months, is not a conviction of an infamous crime within the meaning of the Divorce Statute, *Wheeler vs. Wheeler, 13 Pa. C. C., 396 (1893).* It was held that a witness who had been convicted of the crime of embezzlement, which carried with it a punishment of five years' imprisonment and a fine equal to the amount of the sum embezzled, was not disqualified from testifying, as the crime of embezzlement was not an infamous crime, *County of Schuylkill vs. Copley, 67 Pa. 386 (1871).* It was held that a conviction of bribery of voters was not an infamous crime which would disqualify a sheriff from the right to hold office, *Commonwealth vs. Shaver, 3 W. & S., 338 (1842);* and that the crime of receiving stolen goods was not an infamous crime, *Commonwealth vs. Murphy, 3 Pa. L. J., 290 (1845).* In the case of *Andres vs. Koppenhaefer, 3 S. & R., 255 (1817),* Gibson, J., in stating the rule in the case of libel, that words to be objectionable *per se* must "subject the party to an indictment for a crime involving moral turpitude or that would draw after it an infamous punishment." said: "I think it unreasonable that a charge of having committed a nuisance, assault and battery, and the like should be held actionable". It seems, therefore, that this distinguished jurist considered that such crimes, even though they are indictable, were not crimes involving moral turpitude.

It seems clear, therefore, that the offenses under the Federal Prohibition Act, such as illegal manufacture, sale or transportation or intoxicating liquor are statutory crimes not punishable at common law. They are classed as *mala prohibitia.* There being no inherent im-

morality in such acts, according to the great authority of decisions, their illegality results only from the fact of their being positively prohibited by statute. Inasmuch as this is the first offense, and as there are no aggravating circumstances connected therewith, you are, therefore, advised that the Board of Medical Education and Licensure has no authority under the law to revoke the license of Dr. Schill, because he pleaded guilty to having knowingly issued six prescriptions for liquor beverage purposes. Therefore, it follows that you are not justified in summoning Dr. Schill to show cause why his license should not be suspended or revoked. There is no charge that you can prefer against him, as the acts complained of do not entitle you to suspend or revoke his license for the conviction of a crime involving moral turpitude.

Very truly yours,

DEPARTMENT OF JUSTICE,
PENROSE HERTZLER,
Special Deputy Attorney General.

OPINION TO STATE BOARD OF OPTOMETRICAL EXAMINERS

S-4593—A. G.—13

OPINION TO STATE BOARD OF OPTOMETRICAL EXAMINERS

Pennsylvania State Board of Optometrical Examiners—Candidates from Other States—Requirements—Reciprocity—Discretion of the Board.

The State Board of Optometrical Examiners of Pennsylvania can reciprocate with the State of Ohio if the board is satisfied that the requirements of the State of Ohio are equal to those of the Commonwealth of Pennsylvania, and that the State of Ohio grants reciprocity to the Commonwealth of Pennsylvania. It can accept reciprocal candidates on the basis of the requirements at the time the candidates or applicants became licensed in the State from which they apply, provided they present satisfactory proof to their board that the requirements at the time of their admission were equal to or greater than those then in existence in this Commonwealth and that the State which licensed them grants reciprocity to holders of certificates issued by the Pennsylvania Board.

Department of Justice,
Harrisburg, Pa., December 9, 1927.

Dr. Arthur M. Peters, Secretary and Treasurer, State Board of Optometrical Examiners, Danville, Pennsylvania.

Sir: Your request for an opinion relative to:

(1) The right of the State Board of Optometrical Examiners of Pennsylvania to reciprocate with the State of Ohio, and

(2) Whether or not your Board should accept reciprocal candidates on the basis of the requirements at the time the candidates became licensed in another State, is at hand.

Section 10 of the Act of March 30, 1917, P. L. 21, as amended by the Act of May 19, 1923, P. L. 260, provides:

> "An applicant for a certificate of licensure who has been examined by the State Board of Optometrical Examiners of another State, which through reciprocity similarly accredits the holder of a certificate issued by the Board of Optometrical Education, Examination and Licensure of this Commonwealth to the full privileges or practice within such State, *shall,* on the payment of a fee of twenty-five dollars to the said board, and on filing in the office of the board a true and attested copy of the said license, certified by the president or secretary of the State board issuing the same, and *showing that the standard of requirements adopted and enforced by said board is equal to that provided for by this act, shall,* without further examination, *receive a certificate of licensure* * * *"

It is clear, therefore, that it is incumbent upon your Board to grant reciprocity where the applicant has been licensed by a State that has a standard of requirements equal to that provided by the Commonwealth of Pennsylvania.

The State Board of Optometrical Examiners of this Commonwealth is the sole judge of the question of whether or not the State from which the applicant applies for admission to practice in this Commonwealth on the basis of reciprocity has a standard of requirements equal to those laid down by this Commonwealth.

The requirements laid down in this Commonwealth in Section 5 of the Act of March 30, 1917, P. L. 21, as amended by Section 4 of the Act of May 19, 1923, P. L. 260, as amended by Section 1 of the Act of May 13, 1925, P. L. 659, provide that after January first, 1925, the applicant, in order to be entitled to take a standard examination, must have "graduated from a school or college of optometry approved by the Department of Public Instruction as recommended by the State Board of Optometry on satisfactory completion of a course in optometry of not less than three years."

It is apparent that the requirements laid down by the State of Ohio are not as high as those provided by this Commonwealth, but as your Board must judge this question it is essential that you examine the standard of requirements enforced in the State of Ohio both as to preliminary and secondary education and determine whether or not they meet the requirements of this Commonwealth.

The principle of reciprocity is based on the assumption that the reciprocal candidate or applicant must meet the requirements of the Pennsylvania Act at the time the applicant becomes licensed in the State from which he or she applies for admission on the basis of reciprocity. If the candidate in question applies from the State of Ohio it is necessary for him to show your Board that at the time he was admitted to practice in the State of Ohio, that that State had requirements equal to those in existence at that time in Pennsylvania.

You are therefore advised:

(1) That the State Board of Optometrical Examiners of Pennsylvania can reciprocate with the State of Ohio if the Board is satisfied that the requirements of the State of Ohio are equal to those of the Commonwealth of Pennsylvania and that the State of Ohio grants reciprocity to the Commonwealth of Pennsylvania.

(2) That the State Board of Optometrical Examiners can accept reciprocal candidates on the basis of the requirements at the time the candidates or applicants became licensed in the State from which they apply, provided they present satisfactory proof to your Board that the requirements at the time of their admission were equal to or greater than those then in existence in this Commonwealth and that

the State which licensed them grants reciprocity to holders of certificates issued by your Board.

Very truly yours,

DEPARTMENT OF JUSTICE,
PENROSE HERTZLER,
Special Deputy Attorney General.

OPINION TO STATE BOARD OF PHARMACY

OPINION TO STATE BOARD OF PHARMACY

Drug stores—Registration—Operation by one not a pharmacist—Acts of 1917 and 1927.

Under section 1 of the Act of May 13, 1927 (No. 491), supplementing the Act of May 17, 1917, P. L. 208, requiring that every pharmacy or drug store shall be owned by a licensed pharmacist, any person or partnership owning and conducting a drug store at the time the act was passed may continue to so own and operate it, even though not a registered pharmacist.

Department of Justice,
Harrisburg, Pa., July 14, 1927.

Mr. Charles F. Kramer, Director, Division of Drug Store Registration, State Board of Pharmacy, Harrisburg, Pennsylvania.

Sir: I beg to acknowledge receipt of your communication of July 13th enclosing the application of Philip Walther and W. W. Davison of Franklin, Pennsylvania, for the registration of and permit to conduct a pharmacy under the name or title of Curtis Drug Company, said application having been made in accordance with the provisions of the Act of May 26, 1921, P. L. 1178, being a supplemental act to the Act of May 17, 1917, P. L. 208, together with your file in this connection. You have requested that you be advised of the proper action to be taken upon this application.

The facts of the case, as I understand them, are the following:

Prior to April 30, 1927, a pharmacy, properly licensed by the State Board of Pharmacy, was conducted at 1209 Liberty Street, Franklin, Pennsylvania, by Guy H. Curtis under his own name. On April 30, 1927, Guy H. Curtis, by bill of sale, conveyed his pharmacy and drug store business at the above location to W. W. Davison. Immediately thereafter and prior to May 13, 1927, Mr. Davison sold an interest in the pharmacy to Philip Walther, and the business has since been conducted by Messrs. Walther and Davison under the name of Curtis Drug Company. Mr. Davison is not a registered pharmacist. Mr. Walther is a registered pharmacist as is also Mr. Albert J. P. Shafer who is employed in the pharmacy. The application which you have submitted to me is dated May 30, 1927, and is for a permit to conduct the above pharmacy for the period from July 1, 1927 to June 30, 1928.

No application has ever been made by, or permit granted to Messrs. Walther and Davison to conduct this pharmacy for the period from May 1, 1927 to June 30, 1927.

The question which arises is whether this application should be granted in view of the approval on May 13, 1927, of Act No. 491 of 1927, which is a supplement to the Act of May 17, 1917, P. L. 208. The relevant portion of the Supplemental Act is as follows:

> "Section 1. Be it enacted, etc., That every pharmacy or drug store shall be owned only by a licensed pharmacist and no corporation, association or co-partnership shall own a pharmacy or drug store unless all the partners or members thereof are licensed pharmacists except that * * * any association or co-partnership which, at the time of the passage of this Act still owns and conducts a registered pharmacy or pharmacies, or a drug store or drug stores in the Commonwealth, may continue to own and conduct the same * * * and except that any person not a licensed pharmacist who at the time of the passage of this Act owns a pharmacy or a drug store in the Commonwealth may continue to own and conduct the same * * *"

The exceptions quoted above clearly show that it was the intention of the Legislature that any partnership or person owning and conducting a pharmacy or drug store on May 13, 1927, should be permitted to continue to own and conduct the same whether or not all of the partners of said partnership are registered pharmacists and whether or not said person is a registered pharmacist. In view of the fact that Messrs. Walther and Davison owned and conducted the pharmacy, above referred to, before May 13, 1927, you are advised that their application for registration and permit should be granted.

Your attention is called, however, to the fact that the applicants are conducting a business under a fictitious name, i. e. Curtis Drug Company. This necessitates their being registered in accordance with the provisions of the Act of June 28, 1917, P. L. 645, as supplemented by the Act of June 20, 1919, P. L. 542, and amended by the Act of June 29, 1923, P. L. 979. In order that your records may show that this Act has been complied with, it is suggested that you require for your files properly certified copy of the certificate filed as required by Section 1 of the said Act.

Your attention is likewise called to the fact that it appears that this business has been conducted by Messrs. Walther and Davison from May 1, 1927 to June 30, 1927 without a permit. Your Board is therefore in a position to take any action which it may deem advisable to secure the payment of the fine provided for in Section 4 of the Supplemental Act of May 26, 1921, referred to above.

Very truly yours,

DEPARTMENT OF JUSTICE,
PAUL C. WAGNER,
Deputy Attorney General.

OPINION TO STATE COUNCIL OF EDUCATION

OPINION TO STATE COUNCIL OF EDUCATION

Municipalities—Townships—Annexation—Consent of State Council of Education—Acts of April 28, 1903, May 31, 1923, July 11, 1923, and April 7, 1927.

1. There is nothing in the Acts of April 28, 1903, P. L. 332, July 11, 1923, P. L. 1047, May 31, 1923, P. L. 473, and April 7, 1927, P. L. 161, which requires the consent of the State Council of Education as a prerequisite to a decree for annexation of a township to a city of the third class.

2. Nor is such consent necessary where cities of the second class annex by ordinance portions of townships not exceeding one hundred acres and totally surrounded by the annexing city.

Department of Justice,
Harrisburg, Pa., January 24, 1928.

Honorable James N. Rule, Secretary, State Council of Education, Harrisburg, Pennsylvania.

Sir: We acknowledge receipt of the request of the State Council of Education to be advised on the following question:

In proceedings for annexation of part of a township to a third class city is the approval of the State Council of Education a prerequisite to a decree of annexation?

The Act of April 28, 1903, P. L. 332, is an Act "For the annexation of any city, borough, township, or part of a township, to a contiguous city, and providing for the indebtedness of the same."

The Act of July 11, 1923, P. L. 1047, is an Act "Providing a method of annexation of boroughs, townships, or parts of townships, to cities of the third class; regulating the proceedings pertaining thereto; and repealing inconsistent legislation."

Section 10 of that Act expressly repeals, so far as it relates to annexations to third class cities the Act of April 28, 1903, P. L. 332, supra.

The Act of May 31, 1923, P. L. 473, is an Act "Authorizing the annexation to cities of the second class of portions of townships not exceeding one hundred acres in area and totally surrounded by said cities; and providing for the division of the assets and liabilities of said townships," and by Section 4 of that Act all acts and portions of acts conflicting with the provisions of this Act are repealed.

The Act of April 7, 1927, P. L. 161, is an Act "To amend section five of the act, approved the twenty-eighth day of April, one thousand nine hundred and three (Pamphlet Laws, three hundred and thirty-two), entitled 'An act for the annexation of any city, borough, township, or part of a township, to a contiguous city, and providing for the indebtedness of the same,' by requiring approval by the State Council of Education as a prerequisite to the annexation of part of a township to a contiguous city."

The title of the Act of 1927, P. L. 161, supra, gives no notice of an intention to amend the Act of 1923, P. L. 1047, supra, and only undertakes to amend Section 5 of the Act of 1903.

The Act of 1903, supra, is not in effect as to third class cities and it follows that no amendment thereof or supplement thereto, can affect proceedings for annexation to cities of the third class. If it were the legislative intention to affect proceedings for annexation to cities of the third class notice to that effect would have to be given in the title to the Act of 1927.

Article III, Section 3 of the Constitution provides:

> "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title."

The Act of May 31, 1923, P. L. 473, supra, also provides a new procedure for the annexation by cities of the second class of portions of a township not exceeding one hundred acres in area and which are totally surrounded by said city, and no reference is made in the Act of 1927, P. L. 161, supra.

We are of the opinion, and so advise that the consent of the State Council of Education is not a prerequisite to a decree for annexation to cities of the third class, and is not necessary where cities of the second class annex by ordinance portions of townships not exceeding one hundred acres in area and totally surrounded by the annexing city.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION TO STATE EMPLOYES' RETIREMENT BOARD

OPINION TO STATE EMPLOYES' RETIREMENT BOARD

Banking Department—Employe of—Eligible for retirement. Morrison's case. Acts of 1923, P. L. 436; 1923, P. L. 858.

Department of Justice,
Harrisburg, Pa., May 11, 1927.

Honorable Charles Johnson, Chairman, State Employes' Retirement Board, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your letter of May 9th, with file attached, asking whether Mr. John W. Morrison, a former employe of the Department of Banking, was properly retired in accordance with the laws relating to the retirement of State employes. Your question put more specifically is, as we understand it, substantially this: Is Mr. Morrison now eligible for retirement under the Act of May 24th, 1923, P. L. 436, or is he bound by his formal election to become a member of the State Employes' Retirement Association and his subsequent retirement in pursuance thereof under the Act of June 27, 1923, P. L. 858?

The said Act of May 24, 1923 provides that:

> "Section 2. Any State employe who has served as such for twenty-five years or more, or who has served as such for twenty years or more and has reached the age of sixty-five years, shall be eligible to retirement, under the provisions of this act, if he or she is, in the opinion of the Governor, incapacitated or disabled from performing his or her regular official duties.
>
> "Section 3. Any State employes desiring to take advantage of the provisions of this act may express to the Governor his or her desire to do so. * * *"

The State Employes' Retirement Act of June 27, 1923, provides in Section 20:

> "* * * that any State employe, who before the thirty-first day of December, one thousand nine hundred and twenty-four, shall have become eligible for retirement under the provisions of an act, entitled 'An act relating to the retirement of certain officers and employes heretofore retired,' approved the twenty-fourth day of May, one thousand nine hundred and twenty-three, shall have the option of retirement thereunder or under the provisions of this act."

Mr. Morrison was born February 15, 1841 and had been a State employe continuously since the year 1895. There is no evidence that he ever applied directly to the Governor for retirement under the Act of May 24, 1923, but he did make such an application on Sep-

tember 8th, 1924 to Honorable Clyde L. King, Chairman of the State Employes' Retirement Board and was advised by him, that the appropriation provided by the 1923 Legislature for retirements, under said Act, would be more than exhausted by the payments to employes already retired, and that the Governor, therefore, was refusing to make further retirements under such Act. Mr. Morrison was further advised by the Chairman that if he would make application for membership in the State Employes' Retirement Association, he would be both eligible and entitled, upon making one payment as a member, to immediate superannuation retirement under the said Act of June 27, 1923.

On September 18, 1924, Mr. Morrison made written application for superannuation retirement, to begin October 1st, 1924, under the provisions of the said Act of June 27, 1923 and on October 9, 1924 his application was accepted by the State Employes' Retirement Board. He was accordingly retired as of October 1st, 1924 upon a retirement allowance of $228.73 per month, representing one-half of his average monthly earnings for the last 5 years; had he been retired under the Act of May 24, 1923, his monthly allowance would have been $270.83 or exactly one-half of his monthly salary during his final year of employment.

We are of the opinion that it is now too late for Mr. Morrison to protest that he should have been retired, or to contend that he is still eligible for retirement, under the Act of May 24, 1923. Had he, at the time he was actually retired, felt that he was entitled to retirement under this Act, he should have taken up and exhausted this possibility directly with the Governor before formally exercising the option to be retired under the Act of June 27, 1923. In the opinion of Governor Pinchot, he might or might not, at that time, have been considered "incapacitated or disabled from performing his * * * regular official duties." When, on the other hand, he became a member of the State Employes' Retirement Association, his right, to be retired on a superannuation allowance became absolute.

Having exercised the option provided by law by formally electing to become a member of the State Employes' Retirement Association and, in pursuance thereof, having been retired under the Act of June 27, 1923, we advise you that such retirement was properly made and that Mr. Morrison is bound by his election.

Very truly yours,

DEPARTMENT OF JUSTICE,
LEON D. METZGER,
Deputy Attorney General.

Cresson Sanatorium for Tuberculosis—Employes of—Credit for prior service. Ahles' case.

Department of Justice,
Harrisburg, Pa., January 16, 1928.

Honorable Wilmer Johnson, Secretary, State Employes' Retirement Board, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your letter of December 8th, in which you ask to be advised whether credit for "prior service" rendered to the State upon an hourly compensation basis prior to January 1st, 1924, may be allowed to Wilfred Ahles and Edward Ahles, two men who were admitted to membership in the State Retirement Association of September 10th, 1926.

Your records show that Wilfred Ahles served the Cresson Sanatorium from 1915 to 1923, inclusive, in the various capacities of laborer, fireman, carpenter, and electrician, all upon an hourly wage basis; that Edward Ahles served the same institution from 1913 to 1923, inclusive, first in the capacity of a truck driver, then as a chauffeur, upon an hourly wage basis. Each man was engaged in full-time and regular employment. It was continuous except for a break caused by service with the federal government during the War period 1917 to 1919.

The question of prior service allowance, as provided for by Section 10 of the State Employes' Retirement Act of June 27, 1923, P. L. 858, can arise only in the case of "original" members. Section 10 reads 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 1, paragraph 6 and 13 of this Act."

Paragraph 9 of Section 1 of the Act, as amended by the Act of March 29, 1927, P. L. 77, defines an "original" member as follows:

> " 'Original member' of the retirement association shall mean a State employe who was at any time a *State employe* prior to January first, one thousand nine hundred and twenty-five, whether or not such employment has been continuous, and who shall have become a member of the retirement association on or before December thirty-first, one thousand nine hundred and twenty-eight."

Thus, in order to be an "original" member, one must have been, prior to January 1, 1925, a "State employe." Paragraph 6 of Section

1 of the Act, as amended by the Act of April 25, 1927, P. L. 387, defines the term "State employe" 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; * * *"

If then, the service in question was such as to constitute these men "State employes," they would be entitled to prior service credit for, while paragraph 13 of Section 1 of the Act provides that " 'prior service' shall mean all service completed not later than the thirty-first day of December, one thousand nine hundred and twenty-three," Section 10 of the Act clearly shows that it must be "prior service as a State employe" in order to establish the right to prior service credit.

To be a "State employe" one must have been "*employed* by the year or by the month." In all cases of employment, in theory at least, a contract relationship exists between the employer and the employe. This need not be evidenced by an express contract; in fact in most fields of endeavor it is to be implied from the conduct and actions of the parties immediately concerned. When a State employe enters State service, the contract of employment, in the ordinary case, is almost entirely theoretical. The term of employment is usually indefinite and, with few exceptions, is subject to termination at any time at the pleasure of the appointing or employing power.

The contract feature of the employment will, therefore, be of little assistance to us in the absence of a statement by the appointing or employing official that an employe was in fact "*employed* by the year or by the month." Obviously, an employe could, in fact, be *employed* by the year or by the month and still have his compensation *computed* upon a per diem or hourly basis, *payable* in lump sums at regular intervals, as for instance, semi-monthly or monthly.

Since the period for which an employe is engaged for State service is largely a question of fact, all information available relative to such employment should be obtained from the employer. Dr. W. G. Turnbull was Medical Director of the State Sanatorium for Tuberculosis at Cresson from October ,1912 to February, 1923 and he has, since the date of your request for this opinion, certified to your Board that both of these employes were in fact employed by the month.

In view of this certification by Dr. Turnbull you are advised that credit for prior service may be allowed to Edward Ahles and Wilfred

Ahles for the years during which they were employed at the State Sanatorium for Tuberculosis at Cresson prior to January 1, 1924.

Very truly yours,

DEPARTMENT OF JUSTICE,
LEON D. METZGER,
Deputy Attorney General.

State Employes' Retirement Act—Enforcement.
Case of Augusta G. Raymond.

Department of Justice,
Harrisburg, Pa., February 3, 1928.

Honorable Wilmer Johnson, Secretary, State Employes' Retirement Board, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your letter of January 23rd, in which you ask us to define the duties of the Heads of the various Departments and of your Board with respect to enforcing the provision of Section 3 of the State Employes' Retirement Act of June 27, 1923, P. L. 858, as amended by the Act of April 6, 1925, P. L. 148, which provides for the compulsory membership of certain State employes in the State Employes' Retirement Association, and which reads as follows:

> "Any State employe who becomes a State employe subsequent to the thirty-first day of December, nineteen hundred twenty-four, 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."

Your inquiry is occasioned by the case of Augusta G. Raymond. Miss Raymond first entered State employment December 22, 1925, as a stenographer in the Department of Highways. On January 18, 1927, she was transferred to the Governor's Office as Head File Clerk. On January 17, 1928, Miss Raymond, for the first time, made formal application for membership in the State Employes' Retirement Association.

During the first year of Miss Raymond's employment with the Highway Department, membership in the Association was optional with her and she did not join. At the end of her first twelve months of employment, to wit, on December 22, 1926, membership became compulsory. The question arises as to who was responsible for enforc-

ing the compulsory membership provision of Section 3 of the Act as to Miss Raymond.

Section 7 of the Act which carries the heading, "Duties of Heads of Departments," provides, inter alia:

> "(2) The head of each Department shall, upon the employment or entering into office of any State employe, inform such person of the retirement system hereby established and of his opportunity to become a member of the retirement association.
>
> "(3) The head of each department shall, on the first day of each calendar month, notify *the retirement board* of the employment or the entering into office of new State employes, and shall submit *to the board* a statement showing the name, sex, title, compensation, duties, and date of birth of each of such new State employes.
> * * *
>
> "(4) Under the direction of the retirement board, the head of each department shall furnish such other information, and shall keep such records, as the board may require in the discharge of its duties.
>
> "(5) 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.
> * * *"

Section 4, paragraph (12) provides that:

> "The retirement board shall perform such other functions as are required for the execution of the provisions of this act."

It is clearly the duty of the head of each Department to inform new employes entering his office of the existence of the Retirement system and of their opportunity to become members of the Retirement Association. The Act seems silent however as to who shall take the initiative in *enforcing* the provision of Section 3 as to compulsory membership after twelve months of service. Under such circumstances we must decide from a consideration of the provisions of the Act above quoted, which appear to be the only ones pertinent to this question, how the Legislature intended the compulsory membership feature to be enforced.

Two things are clear: (1) the head of each department, on the first of each month, is required to notify the *Retirement Board* of the employment or entering into office of new employes and this notification is to be accompanied by a statement showing the name, sex, title,

compensation, duties, and date of birth of each such new employe; (2) the Department head must cause to be deducted on each and every pay-roll of a contributor, for each pay-roll period subsequent to December 31, 1923, 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." An employe first entering state service in 1925 would, of course, not need to be a "contributor" during the first year of service, but at the end of that period he or she would automatically become a member of the Retirement Association and hence a "contributor" within the meaning of that word as used in this Section whether deductions are immediately commenced as contemplated by the Act, or whether due to some administrative failure they are delayed indefinitely.

The Act being clear as to the compulsory membership feature, I am of the opinion that you should insist upon the heads of all departments notifying you of the engagement of new employes, exactly as is required by Section 7, paragraph (3). While the Act is not clear as to whose duty it is to enforce the compulsory feature of membership after twelve months of employment, I feel that your Board is probably in the best position to take the initiative in this respect. The duties of the average department head relative to the Retirement System are a mere incident and may possibly be neglected when more primary responsibilities press. While I am of the opinion that he should do so, he is apt not to keep an accurate check on employes who have not, during their first year of employment, elected to join the Association.

Your Board, the duties of which pertain to retirement matters exclusively, can, from the information furnished it by department heads, when new employes are engaged, keep records and notify the various department heads when the compulsory feature of membership will become operative as to any of their employes, advising also, at the same time, the amount of deduction to be made each pay-roll period. As provided in Section 7, paragraph (4), you may also require Department heads to keep such records and furnish such information as the Board may deem necessary in the dicharge of its duties.

This would centralize in one Board, rather than spread among numerous department heads, the duty of taking the initiative in the enforcement of the compulsory membership provision. It would seem to be the most practicable method of solving this difficulty since the department heads concerned would have no means of knowing the amount of deductions to be made except upon the advice of your Board even though they did, or should, know the date when compulsory membership becomes effective.

I would also suggest that your Board make a systematic effort to ascertain from the various department heads whether there may be other cases existing where the compulsory provision as to membership has not been enforced.

Returning now to the particular situation with respect to Miss Raymond. It is a condition incident to State employment that every person who first becomes a State employe after December 31, 1924, shall, at the very latest, become a member of the Retirement Association after the first twelve months of such employment. Employment as a State employe cannot be accepted and continued free from this condition. It is inconceivable that the clear provision of the Act with respect to conpulsory membership might be defeated by an administrative failure or inadvertence. There has, however, in the past been some excuse for this administrative failure since the Act is far from clear as to what administrative agency should take the initiative in the enforcement of the compulsory membership provision.

You are accordingly advised that Miss Raymond's deductions must be computed from December 22, 1926, but that under your approved practice in such cases her back payments may be so spread as to create as little hardship as possible.

Very truly yours,

DEPARTMENT OF JUSTICE,
LEON D. METZGER,
Deputy Attorney General.

Public officers—Retirement—Appointive officers—Elective officers—"Voluntary"—Words and phrases—Acts of June 27, 1923, P. L. 858, and April 22, 1927, P. L. 349.

1. Elective officers who may not succeed themselves discontinue their State service not voluntarily when their term expires.
2. When elective officers who may succeed themselves run again and are defeated, their discontinuance from State service is not voluntary; when they fail to run again, their discontinuance from State service is voluntary.
3. When appointive State officers are not reappointed, their discontinuance from State service is not voluntary.
4. When appointive officers resign, their discontinuance from State service is voluntary.

Department of Justice,
Harrisburg, Pa., December 27, 1928.

Honorable Charles Johnson, Chairman, State Employes' Retirement Board, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your letter of December nineteenth in which you ask to be advised whether elective State officers and appointive State officers, commissioned for a definite term, may when their terms of office expire, be considered as having "discontinued from service, not voluntarily" within the meaning of Section 11, paragragh 3 (b) of the State Employes' Retirement Act of June 27, 1923, P. L. 858, which provides:

> "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:
> "(b) An annuity of equivalent actuarial value to his accumulated contributions, and, in addition, a 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 multipled by the number of his years of service as a member."

Let us consider first the case of elective officers, by which, in this opinion, we mean the Governor, the Auditor General, the State Treasurer and the Secretary of Internal Affairs. If any doubt ever existed as to the eligibility of these officers to membership in the State Employes' Retirement Association, it was removed by the Act of April 22, 1927, P. L. 349, amending Section 3 of the Retirement Act of June 27, 1923, P. L. 858.

Clearly, therefore, the four electice officers under discussion are "State employes" within the meaning of Section 1, paragraph 6 of the Retirement Act. Upon first impression the expression "discontinued from service, not voluntarily" would seem scarcely to be applicable to the case of an elective officer, especially one who cannot under the Constitution succeed himself. When elected he knows that so far as that office is concerned his State service will be discontinued automatically at the expiration of his term. Still the Legislature also knew this when it used the words "Should a member be discontinued from service, not voluntarily" to apply generally to all State employes who had joined the Retirement Association. It might have made a special classification of elective officers but it did not. Therefore, any construction of Section 11, paragraph 3 (b) which would ignore entirely the case of an elective officer would of necessity be inadequate.

We are then faced with a more or less simple question when we seek to determine whether an elective officer who cannot succeed himself, discontinues his State service voluntarily, or involuntarily when his term of office expires. It must be one or the other and the ques-

tion is which designation would seem more nearly to fit, "voluntary" or "not voluntary." The officer may be, and frequently is, a man with many years of service as a State employe before he is called upon to run for an elective office. Such a man would have very valuable vested rights by virtue of his past services as a State employe, and, if we should hold that he is to be deprived of these rights when he accepts an elective office, it might have the effect of preventing old employes with experience well qualifying them to fill such offices from running.

Can we say that a man's discontinuance from State service is voluntary when he has absolutely no volition to exercise in the matter except such as may have been involved when he consented or chose to run for an office with a definite term? In the Century Dictionary and Cyclopedia "voluntary" is defined as follows:

> "Proceeding from the will; done of or due to one's own accord or free choice; unconstrained by external interference, force, or influence; not compelled, prompted, or suggested by another; spontaneous; of one's or its own accord; free."

In giving effect to the language which the Legislature used with the manifest intention of embracing all persons in the Retirement Association it seems reasonable to conclude that when the term of an elective officer, who may not succeed himself, expires, his discontinuance from service must be considered as not voluntary. It is interesting to note that the New York authorities have given to the expression discontinued from service "through no fault of his own, etc.," a similar interpretation.

The same reasoning applies and the same conclusion must follow in the case of an officer appointed for a definite term. He may not continue on in service of his own accord; the appointive power at the date of the expiration of such an officer's term may alone determine whether he is to be continued in his position. The conclusion would be otherwise, of course, if such appointive officer should choose to tender his resignation at the end of his term or prior thereto. That action however formally taken would be evidence of a voluntary discontinuance.

There is also, we believe, a difference in the case of the elective officer who may succeed himself and the one who may not. If the former runs again for office and is defeated, his discontinuance from State service is, of course, involuntary. If he declines or fails to run again his discontinuance from service would be voluntary.

You are therefore advised:

1. That elective State officers who may not succeed themselves, discontinue their State service not voluntarily when their terms expire.

2. That when elective officers who may succeed themselves run again and are defeated, their discontinuance from State service is not voluntary; that when they fail to run again, their discontinuance from State service is voluntary.

3. That when appointive State officers are not reappointed, their discontinuance from State service is not voluntary.

4. That when appointive officers resign, their discontinuance from State service is voluntary.

Very truly yours,

DEPARTMENT OF JUSTICE,
LEON D. METZGER,
Deputy Attorney General.

OPINION TO STATE REGISTRATION BOARD FOR PROFESSIONAL ENGINEERS

OPINION TO STATE REGISTRATION BOARD FOR PROFESSIONAL ENGINEERS

Engineers—Land surveyors—Registration—Fees—Act of May 6, 1927.

1. The State Board for Registration of Professional Engineers must require an applicant to show that he is qualified for registration as provided by the Act of May 6, 1927, P. L. 820, and this is the case whether or not he holds a registration certificate issued by the former board under the unconstitutional Act of May 25, 1921, P. L. 1131.

2. The applicant is not required to take out a new certificate and pay again the fee of $20, which he paid for his old certificate. He may, if he prefers, and is shown to be qualified, be registered and receive as evidence thereof a registration card, upon payment of the nominal fee of one dollar.

Department of Justice,

Harrisburg, Pa., September 13, 1927.

Honorable Richard L. Humphrey, President, State Registration Board for Professional Engineers, Philadelphia, Pa.

Sir: We have your request to be advised with regard to the interpretation to be placed upon that part of Section 4 of the Act of May 6, 1927 (No. 415) which is as follows:

> "Provided further, That the board shall register, upon the payment of the renewal fee provided in this act, and shall issue a registration card for the year 1927, to each person surrendering to it an authentic registration card for 1927 or 1926 issued by the State Board for Registration of Professional Engineers and of Land Surveyors created by the act, approved the twenty-fifth day of May, one thousand nine hundred and twenty-one (Pamphlet Laws, eleven hundred and thirty-one), entitled 'An act to regulate the practice of the profession of engineering and of land surveying; creating a State Board for the Registration of Professional Engineers and Land Surveyors; defining its powers and duties; imposing certain duties upon the Commonwealth and political subdivisions thereof in connection with public work; and providing penalties,' which act was declared unconstitutional by the Supreme Court of the Commonwealth of Pennsylvania."

We understand that you desire to be advised particularly whether under the language quoted your Board can register professional engineers and surveyors without requiring them to satisfy you that they are qualified for registration under the Act of 1927.

It is necessary for us in order to see clearly the Legislature's purpose

in inserting this proviso in the Act of 1927 to refer briefly to the history of prior similar legislation in this State.

By the Act of May 25, 1921, P. L. 1131 the Legislature required all persons practicing the professions of engineering and of land surveying to register with the State Board for the Registration of Professional Engineers and of Land Surveyors. In order to be registered it was necessary for applicants to pay to the Commonwealth fees of twenty dollars ($20.00) for registration either as an engineer or as a land surveyor or thirty dollars ($30.00) for registration as both an engineer and land surveyor. In the case of *Commonwealth vs. Humphrey, 288 Pa. 280* the Supreme Court declared the Act of 1921 unconstitutional. The Act of May 6, 1927 was enacted to accomplish the same purpose which the Legislature ineffectually evidenced by the Act of 1921. The new Act seeks to avoid the constitutional pitfalls encountered by the Act of 1921.

The Legislature in 1927 did not appropriate money to refund to those engineers and land surveyors who had registered under the Act of 1921 the fees which they had paid into the State Treasury for their registrations. This fact is important in connection with the interpretation of the language quoted in your inquiry.

It is our opinion that the language quoted was intended by the Legislature merely to relieve those persons who had paid fees into the State Treasury in an amount equal to or greater than the fees required by the Act of 1927 from the necessity of again paying into the State Treasury fees for obtaining registration under the new act; and in our opinion this is the only effect which can be given to the language quoted.

In our opinion every person registered under the Act of 1927 must satisfy your Board that he is qualified for registration. We understand that the old files and records of the State Board for the Registration of Professional Engineers and of Land Surveyors have been turned over to your Board. These you may consult in investigating the qualifications of any particular applicant, but you cannot escape the duty in every instance of requiring an applicant for registration, whether he held a registration certificate issued by the former Board or not, to satisfy you that he is qualified for registration as provided by the Act of May 6, 1927.

We call your attention to the fact that the language of the Act of 1921 was not the same as the language of the new Act. The Act of 1927 specifically requires that in order to be registered a professional engineer must satisfy your Board that he "is competent to be placed in responsible charge of" engineering work; and a surveyor must satisfy you that he "is competent to be placed in responsible charge of" surveying work. These expressions did not appear in the Act of 1921 and it would, therefore, not be permissible to register any one

under the Act of 1927 merely on the presentation of evidence that he was previously registered under the Act which the Supreme Court declared to be unconstitutional.

All that the language quoted in your request for an opinion really means is that an applicant for registration may by paying a fee of twenty dollars ($20.00) receive a certificate of registration from your Board, but that if he was previously registered by the old Board and paid a fee for a certificate of registration, he shall not be obliged to take out a certificate of registration and pay the fee for it under the Act of 1927. He may, if he prefers, be registered and receive as evidence of his registration only a registration card, upon payment of the nominal fee of one dollar ($1.00). The requirements for the issuance of a certificate and for the issuance of a card are in all other respects identical.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

OPINIONS TO THE STATE TREASURER

OPINIONS TO THE STATE TREASURER

State Treasurer—Responsibility for sums collected but not remitted—Highway Department.

The State Treasurer is not liable to account for sums of money not received by him, not at any time under his care or in his custody.

Department of Justice,
Harrisburg, Pa., May 17, 1927.

Honorable Samuel S. Lewis, State Treasurer, Harrisburg, Pa.

Sir: I am in receipt of your request of May fifth, for an opinion as to your responsibility for the sum of four hundred twenty dollars and sixty cents ($420.60) collected by the Department of Highways and not remitted to you. It appears from the facts submitted to me that in the receipts from the Department of Highways for December 24, 1924 there was a shortage of four hundred twenty dollars and sixty cents ($420.60) being a part of a deposit which should have amounted to five hundred dollars and forty cents ($500.40).

When the deficit was discovered a thorough investigation was made by the Pennsylvania State Police. On January 9, 1925 a report was made that it was impossible to determine the manner in which the money disappeared and the individual responsible therefor. The loss was discovered by an employe in the Department of Highways who is now dead, and the employe in immediate charge of the fund has since been dismissed.

The investigation revealed also that there was no bond covering a loss or of a theft by an employe. As the responsibility was not definitely attached to any employe there could not be instituted any criminal or civil action.

As State Treasurer you are required to furnish a bond conditioned for the true and faithful performance of the trusts and duties of your office. Included in your duties is the requirement to keep a correct and accurate account of all moneys received and expended. You are not responsible, however, for losses occurring in another Department as the result of a failure to deliver the moneys to you.

I, therefore, advise you that under the facts submitted you are not liable to account for this money which was not received by you nor was it at any time under your care or in your custody.

Very truly yours,

DEPARTMENT OF JUSTICE,
THOS. J. BALDRIGE,
Attorney General.

State Treasurer—Securities—Evidences of indebtednesses—

Responsibility as State Treasurer and custodian of securities and evidences of indebtednesses placed in his hands by the various departments, boards and commissions of the State Government. Act of April 13, 1927, Act No. 164.

Department of Justice,

Harrisburg, Pa., August 11, 1927.

Honorable Samuel S. Lewis, State Treasurer, Harrisburg, Pa.

Sir: We have your request to be advised with respect to your responsibility as State Treasurer and custodian of the securities and evidences of indebtednesses placed in your hands by the various departments, boards and commissions of the State Government.

You desire particularly to be advised whether it is your duty to investigate the character of such securities and evidences of indebtednesses in view of the fact that under Section 701 (b) of the Administrative Code of 1923, (Act of June 7, 1923, P. L. 498) as amended by the Act of April 13, 1927 (Act No. 164) the Governor is empowered and required, "To approve and disapprove all investments by departments, boards or commissions, of funds administered by such departments, boards or commissions."

As State Treasurer you are ex officio a member of a number of State boards whose duty it is to invest funds administered by them. You are a member of the Public School Employes' Retirement Board, the State Employes' Retirement Board and the State Workmen's Insurance Board.

As a member of these boards it is, of course, your duty to investigate the value of any investments which these boards propose to make, to the same extent to which it is the duty of the other members of these boards to make such investigations. In this respect, your duty is neither greater nor less than that of other members of the boards mentioned.

In this connection it is pertinent to advise you that in our opinion the amendment to Section 701 of the Administrative Code, which we have quoted above, does not in any wise relieve any department, board or commission of the primary responsibility for investing funds which are administered by such department, board or commission. The Governor has not been substituted for any department, board or commission in the matter of exercising careful discretion in making investments. The Legislature has merely given to the Governor, through his power and duty to approve or disapprove investments, a veto power oevr the exercise of their discretion by the several departments boards and commissions having investments to make.

Your responsibility as "custodian" of securities or evidences of indebtedness which departments, boards or commissions, with the ap-

proval of the Governor, have determined to purchase does not, like your responsibility as a member of certain boards, require you to investigate the value of such securities or evidences of indebtedness.

It is, however, you duty:

1. To withhold payment for any securities which any department, board or commission has undertaken to purchase if such securities are not within the classes of investments which such department, board or commission may lawfully make. We have recently forwarded to you a copy of an opinion rendered to the Budget Secretary advising him in detail classes of securities may lawfully be purchased by the several departments, boards, commissions and officers having funds to invest, and we now advise you that you may make payment for any investments which are held to be lawful in that opinion:

2. To see to it that any securities for which, as custodian of the funds administered by any department, board or commission, you are requested to make payment, are in fact the securities or other evidences of indebtedness in which such department, board or commission has agreed to invest funds. To enable you to satisfy yourself on this point you are entitled to demand in each instance a certified copy of the agreement or resolution under which you are requested to make payment for securities or other evidences of indebtedness;

3. To pay for such securities or other evidences of indebtedness the price or amount which the department, board or commission has agreed to pay for or invest in them. Ordinarily the securities or evideness of indebtedness should be delivered to you at your office in the State Capitol before you pay for them; but to this general rule an exception must be made when any department, board or commission has determined to take a mortgage on real estate or a ground rent as an investment.

We have recently advised the Budget Secretary that in our opinion departments, boards and commissions of the Commonwealth ought not to invest moneys in ground rents or mortgages unless such investments are fully covered by policies of title insurance, written by financially sound title insurance companies. If this salutary practice be followed settlements for ground rents and mortgages must necessarily be made at the establishments of the title companies which are going to insure the titles. This will render it necessary for your representative to be present at such settlements so that you may be assured directly that the ground rent or mortgage for which settlement is being made will have the lien which the department, board or commission investing in it intends it to have, and that title to the securities will be insured as per the terms of the Governor's approval of the investment. In our opinion if your representative is present at the settlement, is satisfied that there are no prior liens except those represented as existing, to the department, board or commission on making the investment, and

sees the owner of the property execute the ground rent or mortgage, you can without the risk of personal liability, forthwith deliver your check as custodian of the fund out of which the investment is being made, for the amount of the ground rent or mortgage; but your representative should, in addition, personally see to it that the ground rent or mortgage is delivered to the recorder of deeds of the poper county for the purpose of having it immediately recorded;

4. Finally it is your duty carefully to preserve all securities or evidences of indebtedness coming into your possession as "custodian," using such facilities for this purpose as the Commonwealth has afforded, until such time as you are duly directed to dispose of them by the department, board or commission having authority to give you such directions. In disposing of negotiable securities, you should require payment to be made at your office before delivery, and delivery to be accepted at your office.

To summarize, we advise you that Section 701 (b) of the Administrative Code as amended by the Act of April 13, 1927, neither enlarges nor diminishes your responsibility either as a member of certain boards whose duties require them to invest certain funds, or as "custodian" of such funds and the securities or evidences of indebtedness in which they are invested; and that as "custodian" of such securities and evidences of indebtedness, your responsibility is limited to the duties specifically enumerated in this opinion.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

Appropriations—Hospitals—Merger.

Authority of State Treasurer to pay appropriations made by Acts Nos. 182A and 207A of the 1927 Session, to the Medico-Chirurgical Hospital and to the Polyclinic Hospital of the University of Pennsylvania.

Department of Justice,
Harrisburg, Pa., November 14, 1927.

Honorable S. S. Lewis, State Treasurer, Harrisburg, Pennsylvania.

Sir: We have your request to be advised with regard to the appropriations made by Acts Nos. 182A and 207A of the 1927 Session. The former of these Acts appropriates to the "Medico-Chirurgical Hospital of the University of Pennsylvania" $61,000 for the purpose

of maintenance, the same to be paid as all other similar appropriations made by the 1927 Session are to be paid, namely, at the rate of $3.00 per day for medical and surgical service rendered to indigent persons. The other Act makes an appropriation of $104,000 to the "Polyclinic Hospital of the University of Pennsylvania," the purpose of the appropriation being identical with that of the appropriation to the Medico-Chirurgical Hospital.

Your inquiry arises out of the following facts:

Originally the Medico-Chirurgical and Polyclinic Hospitals were separate institutions in Philadelphia. However on July 31, 1916 the Medico-Chirurgical Hospital was merged with the University of Pennsylvania by decree of Court of Common Pleas No. 5 of Philadelphia County; and on January 28, 1918 the Philadelphia Polyclinic and College for Graduates in Medicine which owned the Polyclinic Hospital was merged with the University of Pennsylvania by decree of the same Court.

On August 16, 1926 by decree of the same Court the Diagnostic Hospital of Philadelphia was merged with the University of Pennsylvania.

Since the merger of the Medico-Chirurgical Hospital with the University of Pennsylvania the "Medico-Chirurgical Hospital of the University of Pennsylvania" has been conducted as a separate institution in the city of Philadelphia; and since the merger of the Philadelphia Polyclinic College for Graduates in Medicine with the University of Pennsylvania the "Polyclinic Hospital of the University of Pennsylvania" has been conducted as a separate institution.

Upon its merger with the University of Pennsylvania the Diagnostic Hospital ceased to function.

From the facts already stated is it obvious that the University of Pennsylvania owned both the Medico-Chirurgical Hospital and the Polyclinic Hospital on the date of the approval of Acts Nos. 182A and 207A of the 1927 Session; and we are informed that while the two institutions were operated by the University as separate institutions there were as far as possible a co-ordination of the work they were doing so as to avoid an unnecessary duplication of expense. The same staff of physicians and nurses served both institutions, and patients were freely transferred from one hospital to the other both for the purpose of avoiding duplication of services in the two hospitals and for the purposes of better serving the patients in each.

At the time of the merger with the University of Pennsylvania of the three institutions we have mentioned, it was understood that the University of Pennsylvania would erect a new hospital to be conducted under the auspices of the Graduate School of Medicine of the University of Pennsylvania and to be known as the Medico-Chirurgical-Polyclinic-Diagnostic Combined Hospitals of the University of

Pennsylvania; and on or about October 1st of this year the new hospital building was completed and both the Medico-Chirurgical and Polyclinic Hospitals moved into the new building.

The questions you propound are:

1. Can the appropriations made by Acts Nos. 182A and 207A be paid if in the new buildings erected by the University of Pennsylvania the Medico-Chirurgical and Polyclinic Hospitals, respectively, are maintained as seperate and distinct institutions although housed within the same building; and

2. If the identity of these institutions disappears and each of them becomes part and parcel of the Medico-Chirurgical-Polyclinic-Diagnostic Combined Hospitals of the University of Pennsylvania, can the appropriations be paid?

There are a number of opinions of former Attorneys General which have a bearing upon the answer to your questions.

On August 23, 1909 Assistant Deputy Attorney General William M. Hargest advised Auditor General Robert K. Young that if two institutions merged after appropriations had been made to each of them the consolidated corporation could not receive the appropriations made to the seperate institutions. In his opinion he said:

> "If one of these institution consolidates or so merges with the other as to lose its identity, there is no authority of law to take the money which the State appropriated to it, and give it to another institution, and you are therefore advised that if the merger is made in the manner proposed, to wit, a corporation formed as successor to the two institutions, the appropriation of the institution which goes out of existence could not be paid to any other charitable institution."

However, Judge Hargest continued:

> "Without expressing any positive opinion on the subject, I suggest that it may be possible * * * to effect a consolidation of these schools by a method by which neithed will lose its identity, and under circumstances which might save the appropriation to both."

On July 7, 1910 Assistant Deputy Attorney General Hargest advised the Auditor General that an appropriation to the Pennsylvania Industrial School of Chester County would not be available to a new corporation of the same name to be created in Montgomery County.

On July 25, 1911 Attorney General John C. Bell advised Auditor General A. E. Sisson that by reason of the merger of the Christian Home, York, Pennsylvania, with the York Society to Protect Children into a new corporation known as "York Society to Protect Children and Aged Persons" the Legislature's appropriation to the Christian

Home had been lost as it could not be paid to the new institution.

The circumstances out of which your inquiry arises are somewhat different from the cases cited in that there has been no change in the ownership of the institutions or in their general location since the Legislature made the 1927 appropriations. Both institutions were owned by the University of Pennsylvania and both were located in Philadelphia when the appropriations were approved. Both institutions are still owned by the University and are still in Philadelphia although not in the identical location in which they were when the appropriations were made. Both appropriations were really made to the University of Pennsylvania to be expended by it in connection with the maintenance of the hospitals mentioned.

Under these circumstances we are of the opinion that the University will still be entitled to the moneys appropriated notwithstanding the re-location of both hospitals if it continues to operate them in such a way as to preserve their identity as separate branches of the University's work. This view is not in conflict with any of the opinions to which we have referred and is entirely consistent with the suggestion made by Judge Hargest in his opinion of August 23, 1909.

On the other hand, it is our opinion that if the identity of these hospitals were completely submerged in the Medico-Chirurgical-Polyclinic-Diagnostic Combined Hospitals of the University of Pennsylvania it would not be lawful to pay the appropriations to the University. When the Legislature made the appropriations it made one for the Medico-Chirurgical Hospital and the other for the Polyclinic Hospital. It did not appropriate anything to a new and different institution to be formed by the combination of three hospitals under a new name; and were we to sanction the payment of both appropriations for the use of the new institution we would, in effect, be re-writing the appropriation Acts.

Accordingly you are advised that if the Medico-Chirurgical and Polyclinic Hospitals be continued as distinct hospitals even though they are housed in the same building, the appropriations made by the Legislature to them may be paid; but that if the identity of these two institutions has been completely lost the appropriations will not be available to the larger institution of which they have become parts.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

Special Deputy Attorney General.

Appropriations—North Office Building—

The Act of May 4, 1927, Act No. 387, authorizes the Department of Property and Supplies to "erect, construct and conplete ready for furnishing an office building" in Capitol Park. The appropriation could not be used for the payment of a contractor or contractors to whom a part of the work of erecting the building was awarded, unless the total cost of the building were not to exceed one million dollars.

Department of Justice,

Harrisburg, Pa., November 15, 1927.

Honorable Samuel S. Lewis, State Treasurer, Harrisburg, Pa.

Sir: We have your letter of October 27 making certain inquiries with regard to the validity and interpretation of the Act of May 4, 1927 (Act No. 387) for the erection of what is known as the "North Office Building." You inquire:

1. Whether the Act is constitutional under Article III, Section 3 of the Constitution which requires that every bill relate to but one subject, which shall be clearly expressed in the title;

2. Whether properly interpreted the Act requires the construction of a building which when complete and ready for furnishing shall have cost not more than one million dollars ($1,000,000); and

3. Whether under the Act a contract could be awarded for a part of the building if the entire building cannot be constructed for one million dollars ($1,000,000).

Before answering your inquiries we desire to call your attention to the fact that this Act in all of its essential features is identical with the Act of July 18, 1919, P. L. 1053 under which the South Office Building was constructed.

The title of the Act of 1919 was exactly the same as the title of the Act of 1927 except that the agency designated to administer the Act of 1919 was the Board of Commissioners of Public Grounds and Buildings, whereas the agency designated to administer the Act of 1927 is the Department of Property and Supplies.

The Act of 1919 provided that the Board of Commissioners of Public Grounds and Buildings "is hereby authorized and empowered, to erect, construct, and complete, ready for furnishing, an office building in the Capitol Park, and to provide for the necessary filling, grading, and terracing, in connection with the said building."

Section 6 of the Act appropriated one million two hundred and fifty thousand dollars ($1,250,000) or as much thereof as may be necessary "for the purpose of carrying out the provisions of this Act."

The Act of 1927 uses identical language with regard to the authorization confererd upon the Department of Property and Supplies

and Section 5 appropriates one million dollars ($1,000,000) or as much thereof as may be necessary "for the purpose of carrying out the provisions of this Act."

Under the Act of 1919 a contract was awarded for the partial construction of the South Office Building. Subsequent sessions of the Legislature made additional appropriations and when these appropriations had been made additional contracts were awarded. The total cost of the biulding was approximately three million one hundred thousand dollars ($3,100,000).

If the interpretation of the Act of 1919 by the executive officers of the Commonwealth could be accepted as a precedent, it is quite clear that under the Act of 1927 it would be possible to award a contract or contracts obligating the Commonwealth in an aggregate amount of one million dollars or less, for the partial construction of the North Office Building.

However, administrative interpretation of one Act of Assembly does not furnish a precedent for the construction of other Acts, and we cannot, therefore, answer your inquiries by merely referring to the administrative interpretation of the Act of 1919 which served as a model for the Act of 1927.

Referring now to your specific inquiries:

First: In our opinion this Act of May 4, 1927 is constitutional. It is not necessary for the title of an Act to be an index of its contents, and the fact that the body of the Act contains provisions not mentioned in the title is not fatal to the Act's validity unless the title is so phrased as to mislead the reader into believing that the substance of the Act is something other than it actually happens to be. The title of the Act of 1927 indicates that the Act authorizes the Department of Property and Supplies to "erect, construct and complete an office building in the capitol park." The Act itself provides that the Department is authorized "to erect, construct and complete ready for furnishing an office building" in Capitol Park. There is not such a difference between the substance and the title of the Act as to justify any one in saying that the title does not clearly express the subject of the Act.

Second: In our opinion the Act as drawn requires any office building erected under its provisions to be completed ready for furnishing by the expenditure of not more than one million dollars ($1,000,000). The appropriation of one million dollars ($1,000,000) "or so much thereof as may be necessary" was specifically made "for the purpose of carrying out the provisions of this Act." If the appropriation had been made "towards" or "on account of" the accomplishment of the purpose of the Act it would be quite clear that the Legislature did not intend to limit the cost of the building to one million dollars ($1,000,000). On the other hand we are obliged to say that we can-

not, under the language used, advise that it would be lawful to undertake the erection of a building which will cost more than one million dollars ($1,000,000).

Third: In view of the opinion we have just expressed in answer to your second inquiry, it is quite evident that the answer to your third inquiry must be that the appropriation made by the Act could not be used for the payment of a contractor or contractors to whom a part of the work of erecting the building was awarded, unless the total cost of the building were not to exceed one million dollars ($1,000,000).

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

State Workmen's Insurance Board—Employes.

Employes assigned to the State Workmen's Insurance Board by the Secretary of Labor and Industry, are subject exclusively to the direction of the Board.

Department of Justice,
Harrisburg, Pa., December 23, 1927.

Honorable Samuel S. Lewis, State Treasurer, Harrisburg, Pa.

Sir: We have your request to be advised with regard to the extent of the control exercisable by the State Workmen's Insurance Board over employes appointed to do its work under the provisions of the Administrative Code (Act of June 7, 1923, P. L. 498) as amended by the Act of April 13, 1927, P. L. 207.

You state that "obviously no control can be maintained by any body acting in an administrative and directorate capacity unless it has at least a disciplinary power over employes."

Section 214 of the Administrative Code as amended provides that:

> "* * * Except as otherwise provided in this Act, the heads of the respective administrative departments shall appoint and fix the compensation of such clerks, stenographers and other assistants as may be required for the proper conduct of the work of any departmental administrative * * * boards * * *."

Section 503 provides:

> "Except as otherwise provided in this Act departmental administrative * * * boards * * * within the several administrative departments shall exercise their powers

> and perform their duties independently of the heads or any other officers of the respective administrative departments with which they are connected; but in all matters involving the expenditure of money all such departmental administrative boards and commissions shall be subject and responsible to the departments with which they are respectively connected."

Section 1711 provides:

> "Subject to any inconsistent provisions in this Act contained, the State Workmen's Insurance Board shall continue to exercise the powers and perform the duties by law vested in and imposed upon said Board."

The powers and duties of the State Workmen's Insurance Board are enumerated in the Act of June 2, 1915, P. L. 762. Briefly they involve the collecting of premiums from individuals, associations and corporations insuring in the State Fund against their liability under the Workmen's Compensation Act, making such payments as the law requires to injured employes or relatives of deceased employes of persons insuring in the Fund, contesting disputed claims, creating a surplus and investing the same in securities in which savings banks may lawfully invest their funds, and periodically distributing among the policyholders in the Fund unexpended balances of premiums collected.

Under the Act of 1915 payments of compensation out of the Workmen's Insurance Fund were to be made "upon vouchers authorized by the Board and signed by any two members thereof." However, by the Act of April 27, 1927, P. L. 416, Sections 4, 12, 23 and 24 of the Act of 1915 were amended so as to make them conform with Section 503 of the Administrative Code. As amended these sections provide that all payments out of the Workmen's Insurance Fund shall be made by the State Treasurer (who is custodian of the Fund) by check upon requisition of the Secretary of Labor and Industry. This is consistent with the provision of Section 503 of the Code, that in all matters involving the expenditure of money departmental administrative boards shall be subject and responsible to the Departments with which they are connected.

While it is true that all clerks, stenographers and other assistants required for the work of the State Workmen's Insurance Board are appointed by the Secretary of Labor and Industry it is equally true that such employes when assigned to the State Workmen's Insurance Board by the Secretary of Labor and Industry are subject exclusively to the directions of the Board.

Accordingly, if any employe assigned to the State Workmen's Insurance Board by the Secretary of Labor and Industry disregards or disobeys the instructions of the Board, the Board is the proper au-

thority to determine what disciplinary action should be taken. Should the offense be so serious as to satisfy the Board that the employe can no longer be entrusted with its work the Board should forthwith request the Secretary of Labor and Industry to assign to its work another employe in lieu of the one whose usefulness has come to an end; and in this event it would be the clear duty of the Department head to comply with the request of the Board.

Any other conclusion would render meaningless that part of Section 503 of the Administrative Code which provides that departmental administrative boards shall, except only in matters involving the expenditure of money, exercise their powers and perform their duties independently of the heads or any other officers of the respective administrative departments with which they are connected.

The responsibility for the administration of the Workmen's Insurance Fund rests squarely upon the State Workmen's Insurance Board of which you are a member. There is nothing in the Administrative Code or in the Act of April 27, 1927, P. L. 416, which in any wise shifts from the Board to the Department of Labor and Industry the responsibility for this work. That being so the conclusion is inevitable that it is the duty of the Secretary of Labor and Industry to provide the Board with such clerks, stenographers and other assistants as in the judgment of the Board are able and willing to cooperate with it in accomplishing the work for which it is responsible.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Special Deputy Attorney General.

Taxation—Corporations—Resettlement—Acts of April 12, 1923, and March 31, 1927.

1. The Act of April 12, 1923, P. L. 66, relating to tax resettlements, is not enforceable in cases in which resettlements were not completed within the time from April 12, 1923, to March 31, 1927, the date when the Act of March 31, 1927, P. L. 94, was approved.

2. If the resettlement was not completed until after such date, it will be stricken off.

Department of Justice,
Harrisburg, Pa., July 27, 1928.

Honorable Samuel S. Lewis, State Treasurer, Harrisburg, Pa.

Sir: You have advised this department that on October 23, 1925

Capital Stock Tax amounting to $304,696.37 was settled against the Lehigh Valley Railroad Company, on account of which a payment was made December 18, 1925 in the amount of $134,713.16, and on November 18, 1926 a subsequent payment on account was made by this company in the amount of $125,000; that pursuant to the second payment on account, an interest settlement was made November 29, 1926, imposing 12% interest on said sum of $125,000 from sixty days after October 23, 1925, or December 22, 1925, to the date of said payment, to wit, November 18, 1926, a period of 331 days, in the amount of $13,791.74; and that on March 15, 1928 a resettlement of said Capital Stock Tax was made by the fiscal officers for said year (1924) reducing the amount of the tax imposed from $304,696.37 to $187,690.35.

You refer to the fact that by the Act of April 12, 1923, P. L. 66, it was provided that where one or more resettlements of taxes have been made, the balance finally found to be due the Commonwealth bear interest at the rate of 12% per annum from sixty days after the first or original settlement, and that this Act of 1923 was repealed by the Act of March 31, 1927, P. L. 94. You inquire, therefore, whether said Act of 1923 is enforceable in cases in which resettlements were not completed within the time from April 12, 1923, the date of said Act, and March 31, 1927, the date of approval of the particular Act in question, or whether said Act of 1927 puts cases in which resettlements have been made subsequent to March 31, 1927 in the same position as if there had never been any such Act of April 12, 1923.

The Act of March 31, 1927, P. L. 94 further amends Section 30 of the Act of June 1, 1889, P. L. 420, as amended by the Act of April 12, 1923, P. L. 66. It further amends said Act of 1889 as amended by the Act of 1923 by striking out the provision:

> "* * * and where one or more resettlements have been made the balances finally found to be due the Commonwealth on such accounts shall bear interest at the rate of twelve per centum per annum from sixty days after the first or original settlement."

and also striking out the provision:

> "* * * And provided further, That the amendments herein made shall only apply to those cases where the first or original settlements are made after the passage of this act."

In said Act of 1927, we find no saving clause or any indication of legislative intent to make any reservation for the period between April 12, 1923, the date of the approval of said Act of 1923 and March 31, 1927, the date of approval of the particular Act we are now con-

sidering. Consequently, when the Legislature on March 31, 1927 further amended Section 30 of the Act of June 1, 1889, as amended by the Act of April 12, 1923, by striking out the provision which had to do with the imposition of interest at the rate of 12% per annum for sixty days after the date of the first or original settlement upon the balances finally found to be due the Commonwealth on accounts therein referred to where one or more resettlements had been made, this provision was no longer enforceable in cases in which resettlements were not made until some time subsequent to March 31, 1927.

The resettlement in the case before us was not made until March 15, 1928. This date is subsequent to the approval of the said Act of 1927. It is also to be noted from the facts as you have stated them that in the resettlement which was duly made and approved on March 15, 1928, the Capital Stock Tax imposed against the company in question was reduced from $304,696.37 to $187,690.35. The company had already paid on December 18, 1925 the sum of $134,-713.16 and on November 18, 1926 the further sum of $125,000., making a total of $259,713.16. In accordance, therefore, with the resettlement made on March 15, 1928, the company would appear to have paid into the State Treasury an amount of tax considerably in excess of that which was found to be due. For this reason the company in question is entitled to a resettlement of the interest settlement previously made and approved on November 29, 1926 which was based on the erroneous settlement of November 23, 1925, and in light of the fact that the resettlement of the Capital Stock Tax of this company for the year 1924 made on March 15, 1928, shows an amount less than that which was already paid by the company, in making the resettlement of said interest settlement of November 29, 1926, the interest imposed should be stricken off.

You are, therefore, advised that the Act of April 12, 1923, P. L. 66 is not enforceable in cases in which resettlements were not completed within the time from April 12, 1923 to March 31, 1927, the date when the Act of March 31, 1927, P. L. 94 was approved; and that, under the facts as you have stated them in the case at issue, the interest settlement made November 29, 1926 imposing 12% interest on $125,000. from sixty days after the date of the original settlement to the date of payment, to wit, November 18, 1926 in the amount of $13,791.74, should be resettled and stricken off.

Very truly yours,

DEPARTMENT OF JUSTICE,
PHILIP S. MOYER,
Deputy Attorney General.

OPINION TO THE WATER AND POWER RESOURCES BOARD

OPINION TO THE WATER AND POWER RESOURCES BOARD

Water and Power Resources Board—Dam Permits.

Application for dam permits made by the Penelec Water Company and the Luzerne County Gas and Electric Corporation, respectively. Act of June 14, 1923, P. L. 700.

Department of Justice,

Harrisburg, Pa., January 15, 1927.

Hon. R. Y. Stuart, Chairman, Water and Power Resources Board, Harrisburg, Pennsylvania.

Dear Major Stuart: In reply to your two separate requests for opinion relative to the applications for dam permits made by the Penelec Water Company and the Luzerne County Gas and Electric Corporation respectively.

The relevant parts of the Act of June 14, 1923, P. L. 700 read as follows:

> The term "dam" means an obstruction, dam, wall, wing wall, wharf, embankment, abutment, projection, or similar analogous structure, or any other obstruction whatever in, along, across, or projecting into any stream or body of water wholly or partly within, or forming part of the boundary of, this Commonwealth, except the tidal waters of the Delaware River and of its navigable tributaries.
>
> The term "dam to develop water power" means a dam for the purpose of developing water power only, or a dam for said purpose and for any other purpose.
>
> The term "dam to supply water for steam power" means a dam for the main purpose of storing, cooling, diverting, and using, or any of them, water for steam raising or steam condensation, or both, in the generation of electric energy for use in public service, which is not a dam to develop water power as hereinbefore defined.
>
> The term "water supply dam" means a dam for the purpose of supplying water, which is not a dam to develop water power nor a dam to supply water for steam power as hereinbefore defined.
>
> The term "power dam" includes dams to develop water power and dams to supply water for steam power.
>
> The term "power project" means a complete unit of improvement or development for the supply of water power, or for the procuring or supply, or both, of light, heat, and power, or any of them, by electricity, consisting of a power dam or change in stream to develop power, or both, for which a limited power permit at any time is being sought or has been granted, a power house, water

conduits, all dams and appurtenant works, which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power from the power house to the point of junction with the distribution system or with an interconnected primary transmission system, all miscellaneous structures used and useful in connections with such unit, or any part thereof, and all water rights, rights of way, ditches, dams, reservoirs, lands or interest in lands, the use and occupancy of which are necessary or appropriate in the construction, maintenance, and operation of such unit.

The term "permittee" means a holder of a limited power permit or a limited water supply permit, and his heirs, successors, and assigns.

The term "navigable waters of the United States" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which, either in their natural or improved conditions, notwithstanding interruptions between the navigable parts of such streams or water by falls, shallows, or rapids, compelling land carriage, are used, or suitable for use, for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States, or shall have been recommended to Congress for such improvement after investigation under its authority.

Section 2. A power dam or change in stream to develop power shall be deemed to be within the jurisdiction of the United States, within the meaning of this section, whenever (1) such dam or change is constructed or made, or to be constructed or made, in or upon navigable waters of the United States, or (2) the Federal Power Commission shall have found that the interests of interstate or foreign commerce would be affected by the construction of such dam or the making of such change.

Every permit hereafter granted by the commission for the construction of a power dam or for a change in stream to develop power, not within the jurisdiction of the United States, shall be limited to such periods not exceeding fifty years as the said commission shall determine and set forth therein: Provided, That the permittee shall be entitled to extension and renewal of such permit upon the terms thereof until the permittee shall have received through recapture or purchase by the Commonwealth, or by a duly authorized subsequent permittee, repayment of the capital prudently invested in the power project upon the faith of the permit, plus such reasonable damages, if any, to property of the permittee valuable,

serviceable, and dependent for its usefulness upon the continuance of such permit, but not recaptured or purchased, as may be caused by the severence therefrom of property taken.

Every permit hereafter granted by the commission for the construction of a power dam or for a change in stream to develop power, within the jurisdiction of the United States, shall be on the following conditions, which shall be expressed in such permit, namely: (a) That the permit shall become null and void unless, within the time specified therein, the permittee (or as to a change in stream within the Commonwealth effected or to be effected by a dam or other means without the Commonwealth, those constructing or purposing to construct, maintain, or operate such dam or other means) shall secure from the Federal Power Commission a license for such dam or change; and (b) that if and to the extent that any of the rights or powers set forth or reserved as rights or powers of the United States in or purusant to the provisions of such license shall be waived by the United States or be unenforceable by the United States, then and to that extent such rights and powers (including, if so waived or unenforceable, any rights of recapture, extension or renewal so set forth or reserved) may be exercised and enforced by the Commonwealth of Pennsylvania, subject to such alterations in plans, specifications, or structures, any such extensions of time for commencing or completing construction, as may be made or granted by the Federal Power Commission.

Every permit granted under this section shall be subject to such reasonable annual charge, specified therein, as the commission shall fix, for the purpose of reimbursing the Commonwealth for the costs of administration of this act, and may, in the discretion of the commission, embody such other terms, conditions, and stipulations as the commission shall deem necessary to protect the present and future interests of the Commonwealth and its people in the construction, maintenance, and operation of the project and in the water and power resources to be utilized thereby, and suitable to secure to the permittee a reasonable opportunity for a fair return on the actual investment prudently made in the project.

Section 3. The commission in granting every limited water supply permit shall specify a reasonable annual charge, in an amount fixed by the commission, to be paid by the permittee for the purpose of reimbursing the Commonwealth for the cost of administration of this act, and the commission shall embody therein such other terms, conditions, and stipulations as the commission shall deem necessary and proper to protect the present and future interests of the Commonwealth and its people in the construction, maintenance, and operation of the project and in the water resources to be utilized thereby.

> Section 4. It shall be unlawful for any corporation or natural person to use for the development of water power, or for the main purpose of storing, cooling, diverting and using or any of them, water for steam raising or steam condensation, or both, in the generation of electric energy for use in public service, any dam constructed under any permit hereafter issued otherwise than under section two of this act, or to divert or use for said purposes, of for said main purpose, any stream or body of water the course, current, or cross-section of which shall have been changed or diminished at the point of diversion, or use, under any permit hereafter granted, otherwise than under section two of this act.
>
> This statute was carefully considered in repeated conferences and before enactment agreed upon by this office and representatives of an organized committee of the power industry.

The Penelec Water Company is a subsidiary of the Penn Public Service Corporation. It was incorporated under the eighteenth clause of section two of the Corporation Act of April 29, 1874 for the purpose of storing, transporting and furnishing water in a portion of East Wheatfield Township in said county. It now applies for permission to construct a dam across Hice's Run in West Wheatfield Township, Indiana County, Pennsylvania, for the main purpose of creating a reserve supply of water for the steam power plant of its parent company.

It is assumed that a dam in Hice's Run would not be "within the jurisdiction of the United States" as this term is defined by the first paragraph of section two of the act.

Your first question as to the application of the Penelec Water Company's application ("whether the proposed construction will constitute a 'power dam' as deferred by the act") is answered in the affirmative.

Your questions as to this application are concerned with the effect, fifty years after the granting of a permit, of the recapture provisions which, under second paragraph of Section two attach to the permit. Answer to these questions does not seem necessary for your guidance in the performance of your duties at this time.

The Luzerne County Gas and Electric Corporation seeks permission. "to construct a steam power station of about Two Hundred Thousand (200,000) Kilowatts ultimate capacity, and appurtenant structures, including a fill or protecting embankment around the station yard, along the North Branch of the Susquehanna River, at a point on the west bank of said river, about Two Thousand (2,000) feet below the mouth of Hunlock Creek, Four (4) miles below Nanticoke, Pennsylvania, and Five (5) miles above Shickshinny, Pennsylvania."

With respect to this project you say: This steam power station is to be used in the generation of electric energy for use in public service. This project appears to be within the jurisdiction of the United States, under the first clause of Section 2 of the Act of June 4, 1923, P. L. 704, as the Susquehanna River has been included in the navigable waters of the United States, as defined in the last paragraph of Section 1 of the said Act. The project appears to be a "dam" as defined by Section 1 of said Act, and to include a "change in stream to develop power" as defined in the same Section.

Your questions with respect to this project are: Should a permit for this project be issued under the Act of June 14th, 1923, P. L. 704, or should it be issued under the Act of June 25th, 1913, P. L. 555? If a permit be issued under the Act of June 14th, 1923, is the last paragraph of Section 2 broad enough to allow the insertion in the permit of conditions for a fifty year limit with provision for extension, renewal, or recapture substantially as provided for in the second paragraph of Section 2?

The proposed construction is a "dam" within the meaning of the act but not a "dam to develop water power". Since its *main* purpose is the generation of electric energy and the supplying of water for steam raising or steam condensation is only subsidiary it is not a "dam to supply water for steam power" and therefore not a "power dam."

Merely as a "dam" permit for it should therefore be issued, not under the act of June 14, 1923 P. L. 704, but under the act of June 25, 1913, P. L. 555, which defines "dam" in the same words.

This conclusion is not affected by the fact that the operation of the plan will involve a "change in stream to supply water for steam power" which is apparently forbidden by Section 4 otherwise than by permit under Section 2. This follows from the fact that the condition imposed by the third paragraph of section 2 on permits issued thereunder (that the permittee "shall secure from the Federal Power Commission a license for such change" in stream) is impossible of performance by the applicant because the jurisdiction of the Federal Power Commission is limited to "dams to develop water power" and does not include "changes in stream to supply water for steam power" such as that now in question.

This impossible requirement was obviously included in the third paragraph of Section 2, by inadvertence: It should not be construed to defeat the dominating purpose of the statute the encouragement of power development by water power and by supplying water for steam raising and steam condensation.

You are therefore advised that permit for this project should be issued under the Act of June 25, 1913.

Very sincerely yours,

DEPARTMENT OF JUSTICE,

PHILIP P. WELLS,

Deputy Attorney General.

OPINIONS TO THE SECRETARY OF WELFARE

OPINIONS TO THE SECRETARY OF WELFARE

Department of Welfare—Western Penitentiary—Convict Labor.

Convicts assigned for construction labor on the new Western Penitentiary at Rockview by the Board of Trustees of the Western Penitentiary, cannot be compensated for such services except through and by arrangement with the Department of Welfare. Payment for such labor shall be made from the Manufacturing Fund.

Department of Justice,

Harrisburg, Pa., November 22, 1927.

Honorable E. Grace McCauley, Secretary of Welfare, Harrisburg, Pennsylvania.

Madam: This Department has received your request to be advised as to the right and duty of the Department of Welfare where the employment of prison labor is contemplated, (a) for maintenance of the institution or its inmates, (b) for purposes other than such maintenance or in the manufacturing industries established by the Department of Welfare in the several penitentiaries and other correctional institutions.

The Act of June 1, 1915, P. L. 656 and its amendement of April 6, 1921, P. L. 101, were passed to provide "a system of employment and compensation for the inmates of the Eastern Penitentiary, Western Penitentiary, and the Pennsylvania Industrial Reformatory at Huntingdon, and for such other correctional institutions thereafter established by the Commonwealth."

This act created a Prison Labor Commission to perform the duties therein specified with reference to the regulation and supervision of the labor of the inmates of the penitentiaries, the reformatory, and other correctional institutions thereafter established by the Commonwealth, and for the disposal of the products of the labor of such inmates.

It also provided that an account should be kept by the several institutions of the labor performed by the prisoners, and that the rate of wage and the amount to be credited to each prisoner should be regulated at the discretion of the Prison Labor Commission, and it further provided (Section 10) that all wages paid under the provisions of the act should be charged to the Manufacturing Fund provided in Section 5 of the Act.

The Act of April 6, 1921, P. L. 101, amending the Act of 1915, supra, included the State Industrial Home for Women at Muncy as one of the institutions to be included within the provisions of the act and made certain modifications with respect to the payment of wages to prisoners and their dependents.

The Department of Welfare was created by the Act of May 25, 1921, P. L. 1144 and by Section 33 of that Act the Prison Labor Commission created by the Act of June 1, 1915, P. L. 656 was abolished, and all powers conferred upon the Prison Labor Commission were vested in the Department of Welfare.

Section 21 of the Act of 1921, supra, re-enacted in practically the same language Sections 1, 3, 4, part of 6, 7, 8, 9, of the Act of 1915, supra, and made the further provision:

> "The department shall have the power, and it shall be its duty:
>
> * * * * *
>
> "(g) To have and exercise supervision over the labor employed in the aforesaid industries, and to make rules and regulations for carrying on such industries.
>
> "(h) To make a full quarterly report to the Auditor General of the products, sales, receipts, and disbursements of the industries established under the provisions hereof."

The Act of June 7, 1923, P. L. 498 (Administrative Code), Section 2012 re-enacted the provisions of the Act of May 25, 1921, P. L. 1144, Section 21.

Section 2012, of the Administrative Code provides:

> 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 to the Eastern or Western Penitentiary, or to the Pennsylvania Industrial Reformatory at Huntingdon, or to such other correctional institutions of the Commonwealth, who are physically capable of such labor, may be employed at labor for not to exceed eight hours each day other than Sundays and public holidays. . . "

The term "industries," is very broad. An "industry" has been variously defined as "habitual diligence in any employment, either bodily or mental; productive labor, etc." The power delegated to the Department of Welfare "to establish, maintain, and carry on industries" includes all necessary agreements for the employment of inmate labor, as well as the sale of products manufactured in industries established, maintained and carried on, by the Department of Welfare in such institutions, to the restricted classes of purchasers enumerated in the several Acts of Assembly governing prison labor,

limited only by the further provision, Section 2012 (a), which, as amended by the Act of April 13, 1927, No. 164, provides:

> " . . . Such labor shall be for the purpose of doing printing, or of manufacturing and producing 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 instruction, or partly for one and partly for the other of such purposes, or in the manufacture and production of crushed stone, brick, tile, and culvert pipe or other material suitable for draining roads of the State, or in preparation of road building and ballasting material."

The provision of Section 2012 (c) does not limit the Department of Welfare to arranging only for the sale of manufactured products, but is in the furtherance of the general powers conferred upon the Department by Section 2012 (a) to provide a system of employment and compensation for the inmates of such institutions. That Department is the only agency which has authority to employ inmate labor, and the institution may use such labor only by arrangement with the Department.

Until the passage of the Act of April 27, 1925, P. L. 304, there was no provision for the employment of inmates in unproductive labor such as the maintenance of penitentiaries and correctional institutions and the maintenance and care of inmates; such labor not being within the purpose for which inmate labor might be used as defined in Section 1 of the Act of 1915, Section 21 (a) of the Act of 1921, P. L. 1144, or Section 2012 (a) of the Act of 1923, supra.

The Act of 1925, P. L. 304, provides that "in addition to payments made, as provided by law, to inmates directly laboring on industries," in the State's correctional institutions the Department of Welfare:

> ". . . is hereby authorized and directed to pay out of the manufacturing fund arising from the sale of the products of the industries established by said department in said State institutions, wages at not more than twenty cents per day (20c) per day to inmates in said State institutions performing labor of any kind necessary to the proper maintenance of such institutions and the inmates thereof: Provided, That the inmates directly laboring on industries shall first be paid in full as provided by law: and provided further, That the total paid to the said inmates directly laboring on in-

> dustries, and to inmates performing labor of any kind necessary to the proper maintenance of said institutions and the inmates thereof, shall not exceed eighty per cent (80%) of the total net revenue from said industries established by the Department of Welfare."

The Act of 1923 (Administrative Code), Section 2012 (e) provides that the rate of wage shall be regulated at the discretion of the Department of Welfare or such persons as it may designate where the labor is for the purposes set forth in Section 2012 (a) of that Act, supra: in no case, however, to be less than ten cents for each day of labor actually performed; and the Act of April 27, 1925, P. L. 304, provides the rate of wage for inmates performing labor of any kind necessary to the proper maintenance of such institutions and the inmates thereof shall not exceed twenty cents per day. Such wage can be paid only after all wages due the inmates otherwise employed have been paid in full, and provided that the total wage disbursement shall never exceed eighty per centum of the total net revenue of all of the industries established by the Department of Welfare under authority of Section 2012 of the Administrative Code.

Coming to a consideration of the specific classes of labor referred to in your inquiry and upon conference, we are of the opinion and so advise that the Department of Welfare has the power, and the duty is imposed upon it, where labor is employed in the maintenance of either the Eastern State Penitentiary, the Western State Penitentiary, the Pennsylvania Industrial Reformatory at Huntingdon, or other correctional institutions of the Commonwealth in which the Department of Welfare has established industries, and the inmates thereof, to arrange by agreement with the Board of Trustees of the institution or its duly authorized officer the rate of wage to be paid for such labor not to exceed twenty cents per each day subject to the provisions of the Act of April 27, 1925, P. L. 304, noted above, and to require the proper officer of the institution to keep an account of the labor performed for that purpose.

Such item is properly chargeable to and payable by the counties as a part of the cost of maintaining inmates. Payments must be made by the institutions to the Department of Welfare:

Act of April 28, 1887, P. L. 63, Section 17;

Act of April 23, 1829, P. L. 341, Section 9;

Act of February 27, 1883, P. L. 55, Section 5;

Act of July 25, 1913, P. L. 1311, Section 25, and when received by the Department of Welfare credited to the Manufacturing Fund as provided in Section 2012 (d) as follows:

> "(d) To maintain a fund, known as the manufacturing fund, . . . into which all the receipts from the sale, as aforesaid, of the products of such industries shall be paid, . . ."

Where inmate labor is employed in such institutions for purposes other than the maintenance of the institution or its inmates or other than in the manufacturing industries established by the Department of Welfare, as for instance, where labor is employed in the work of construction or repair of any State institution, the Department of Welfare has the power, and the duty is imposed upon it, to arrange with the Board of Trustees of such State institution, by contract, to furnish such labor at a rate of wage to be therein agreed upon, based upon both the pecuniary value of the work performed and also on the willingness, industry, and good conduct of the inmate, but in no event less than ten cents per each day of labor actually performed, and the item therefor is chargeable by the institution against and payable from any appropriation made to the institution for the specific purpose of such construction or repair work, to the Department of Welfare to be credited to the Manufacturing Fund as provided in Section 2012 (d) of the Act of 1923. The Department shall require the proper officer to keep an account of the labor performed.

While Section 2012 (d) of the Act of 1923, supra, designates the Fund as a Manufacturing Fund, the nomenclature used in no way affects the provision made, that into that fund shall be paid the receipts from the sale of the products of the industries, it being clear that the product of the industry, as we have seen upon an examination of the term "industries," covers the value of habitual diligence in any employment, bodily or mentally, as well as the value of any article manufactured under the direction of the Department.

We are asked to include in this opinion answers to the following specific questions:

1. Is the Board of Trustees of the Eastern Penitentiary restricted to a maximum of twenty cents per day in paying inmates who serve as clerks in the penitentiary?

Clerical services is custodial labor which can only be classified within the terms of labor employed in the maintenance of the institution and its inmates. The only authority for payment of such services is to be found in the Act of April 27, 1925, P. L. 304, supra, and the wage which may be paid for that labor may not exceed twenty cents per day, and is subject to the provision:

> ". . . That the inmates directly laboring on industries shall first be paid in full as provided by law: and provided further, That the total paid to the said inmates directly laboring on industries, and to inmates performing labor of any kind necessary to the proper maintenance of said institutions and the inmates thereof, shall not exceed eighty per cent (80%) of the total net revenue from said industries established by the Department of Welfare."

2. Are convicts employed in construction work on the new Western Penitentiary entitled to compensation for their labor, and, if yes, from what funds shall the same be paid?

The act of March 30, 1911, P. L. 32, authorizing the acquisition of a site and the erection of the new Western Penitentiary, provides, in Section 4:

> "Upon the acquisition of the tract aforesaid the Board shall transfer as many able-bodied male convicts from said penitentiary as they may deem necessary and advisable, to assist in any work connected with the improvement of the said tract, or the construction of the said buildings and improvements appurtenant thereto, with the necessary guards, and shall provide temporary quarters for the safe-keeping and accommodation of the said convicts."

In the Act no provision was made for the payment of convict labor so employed.

Since the passage of the Act of 1915 and subsequent legislation, supra, the Prison Labor Commission, and subsequently the Department of Welfare, has had sole power to make arrangements for the compensation of prisoners employed for labor authorized by the Department. Though the Board of Trustees of the Western Penitentiary shall assign the convicts for construction labor on the new Western Penitentiary, at Rockview, it cannot compensate them for such services except through and by arrangement with the Department of Welfare.

We are of the opinion and so advise that the Department of Welfare has power to arrange with the Board of Trustees of the Western Penitentiary, by contract for the rate or rates of wage to be paid for such labor, based upon both the pecuniary value of the work to be performed, and also on the willingness, industry, and good conduct of the inmate, but in no event less than ten cents per day of labor actually performed; the item therefor is chargeable by the Board against and payable from the appropriation made to the Board for the specific purpose of such construction, to the Department of Welfare to be credited to the Manufacturing Fund as provided in Section 2012 (d) of the Act of 1923. The Department of Welfare shall require the proper officers of the Western Penitentiary to keep an account of the labor performed and payment for such labor shall be made from the Manufacturing Fund as above noted.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA,
Deputy Attorney General.

Department of Welfare—Philadelphia County Board of Mothers' Assistance Fund for Mothers' Assistance—Rosanna Looker case.

Eligibility for assistance.

Department of Justice,

Harrisburg, Pa., January 24, 1928.

Honorable E. Grace MacCauley, Secretary of Welfare, Harrisburg, Pennsylvania.

Madam: You submit for our consideration an affidavit made by Rosanna Looker under date of November 29, 1927, a letter addressed to Mrs. Looker by Edith I. Hunt, Clerk for Attorney Robert Kendrick, dated June 29, 1927 and a copy of receipt to the American Relief Society of 38 Strand London W. C, 2 signed by Rosanna Looker, under date of June 30, 1927.

These exhibits disclose the following averments by Mrs. Looker who is an applicant to the Philadelphia County Board of Mothers' Assistance Fund for Mothers' Assistance:

Mrs. Looker was born in Ireland and came to Philadelphia, Philadelphia County, Pennsylvania, in 1909. William Looker was born in England and was a resident of Philadelphia County, Pennsylvania, on May 9, 1909 when he married Rosanna Dunn Looker, the applicant. Three children were born of the marriage in Philadelphia County and in 1921 William Looker became an American citizen.

William Looker was an osteopath by profession and in April 1925, with their youngest child returned to England to open an office for the practise of his profession there.

Mrs. Looker and her two children remained in Philadelphia until July 7, 1926, when she with their two remaining children sailed on the S. S. Aquitania landing in Southampton on July 13, 1926.

On July 27, 1926, the husband died in Chelsea, London.

The wife was a beneficiary named in a certain policy of insurance carried by the Law Union and Rock Company of London for five thousand pounds. The Company refused to pay the insurance and Mrs. Looker remained in England for the purpose of prosecuting a suit to recover the amount of the insurance.

Meantime Mrs. Looker stored her household goods, clothing and trunks with the Cunard Line Office at Southampton in November 1926.

In February 1927 she sent her two children, John and Mary, back to Philadelphia to the home of her sister at 1229 North Sixtieth Street, Philadelphia, Pennsylvania.

On June 30, 1927, she learned that she had lost her suit against the Law Union and Rock Company of London.

On June 30, 1927 she received from the American Relief Society the sum of twenty-eight pounds, seventeen shillings, five pence for

passage from London to New York and a free voucher for transportation from New York to Philadelphia.

On July 5, 1927 she sailed from Southampton on the S. S. President Harding and arrived in New York City on July 13, 1927.

The Act of July 10, 1919, P. L. 893, Section 7, provides:

> "In order to prevent the alienation of the citizenship of those who may receive the benefits of this act, no family shall be a beneficiary thereunder unless the *mother* has been a *resident,* continuously, of the State for a period of two years, and of the county in which she applies for assistance for a period of one year. No *family* entitled to receive the benefits of this act in any county shall be deemed to have lost *its residence* in such county within one year after removal therefrom, but *any such family* shall, if *it* returns to the county in which *it* was entitled to receive assistance within said year, be immediately entitled to assistance in such county." (Italics ours)

You desire to be advised upon the following questions:

1. Does the question of intent enter into the eligibility status of a mother who has been out of the State and county for over a year?

2. Should Mrs. Looker's time of residence away from Philadelphia be considered from the date she sailed, or from the date she landed in England and extending until the date she left England or the date she arrived back in the county?

In other words, what is considered her residence when she is enroute on the sea?

Before considering either of these questions it may be well to review the purpose of the Mothers' Assistance Law.

In an Opinion of Deputy Attorney General J. W. Brown, under date of December 19, 1923, it is stated:

> "The real purpose of this legislation was undoubtedly to alleviate the condition of want and dependence of families which have permanently lost the usual and natural support furnished by the father and husband. The law was passed as much for the benefit of the dependent children as for the mother, and to hold that a mother, under the facts as given in this case, is not entitled to assistance would be to deprive the children of that aid to their support intended by the act."
> 4 D. & C. 280.

The Mothers' Assistance Law expresses the conviction of the people of Pennsylvania that dependent, fatherless children are a responsibility of the State and can best be protected and safeguarded under the influence of a home environment and the supervision of their mothers.

The monthly payments made under the Act are based upon the number of children (Section 9), and the children are undoubtedly the primary object of the State's beneficience under this Act.

> ". . . 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."
>
> Opinion of Attorney General George W. Woodruff, under date of March 12, 1925, 6 D. & C. 78.

By Section 7, quoted above, eligibility for such assistance is made to depend upon certain requirements as to residence, (a) by the mother, (b) by the family.

> "'Residence' as used in various statutes has been considered synonymous with 'domicile,' but of course this depends upon the intent of the particular statute as ascertained by construction of its provisions. The terms are not necessarily synonymous. Generally, where a statute prescribes residence as a qualification for the enjoyment of a privilege, or the exercise of a franchise, and whenever the terms are used in connection with subjects of domestic policy, domicile and residence are equivalent. . ."
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> 19 C. J. Page 397, Section 3.
>
> *In People vs. Platt, 117 N. Y. 159; 22 N. E. 937, at 938, Court says:*
>
> "The office is a statutory one, and the act which created the patronage or power to confer the trust prescribes particular circumstances without which a person is not eligible to its enjoyment. He must be 'a citizen of the state,' and he must also be 'a resident of the metropolitan police district,' a well-defined, but comparatively small, portion of the state. A person so situated is put in a certain relation to the district, and, as a resident, is distinguished from a stranger. The relation is one which has a legal sanction, and in some cases secures its possessor a settlement and pauper privileges under the poor-laws, or under the election laws a right to vote; and, in all cases where a statute prescribes 'residence' as a qualification for the enjoyment of a privilege or the exercise of a franchise, the word is equivalent to the place of domicile of the person who claims its benefit."
>
> In *Fry's Election Case, 71 Pa. 302, 309*, it was said:
>
> ". . . 'residence' in the Constitution means home, fixed abode, domicil of the elector, as distinguished from a place of temporary sojourning.
>
> "Undoubtedly, residence is a question of intention. In cases involving it, the inquiry is quo animo the party

> either moved to or from the state. And upon the solution of this question, depends the fact, whether the petitioner has gained or lost a residence. But before this question can arise an actual removal must have taken place. A mere intention to remove not consummated, can neither forfeit the party's old domicil nor enable him to acquire a new one. Removal out of the State, without an intention permanently to reside elsewhere, will not lose residence, nor will a mere intention to remove permanently, not followed by actual removal, acquire it: Case of James Casey, an insolvent debtor, 1 Ashmead 126.
>
> ". . . It (residence as used in third Article of the Constitution) means that place where the elector makes his permanent or true home, his principal place of business, and his family residence, if he have one; where he intends to remain indefinitely, and without a present intention to depart; when he leaves it he intends to return to it, and after his return he deems himself at home . . ."

The domicile of the husband is prima facie at least the wife's legal domicile wheresoever she may be personally resident but she may in fact acquire an actual domicile separate and distant from the legal domicile of the husband: *McPherson vs. Housel, 13 N. J. E. 35.*

Upon due consideration of the language and purpose of the Act we conclude that the term "residence" as used in Section 7, supra, is synonymous with "actual domicile" of the wife and "actual domicile" of the family as distinguished from actual residence or domicile of the husband.

For the purpose of passing on Mrs. Looker's application we are of the opinion that the intention with which her husband went to England in 1925 taking with him one of their children, whether it was to change his residence or domicile temporarily or permanently is not material, but his act in so doing is an element to be considered in determining whether her subsequent conduct in leaving Philadelphia County on July 7, 1926 with their remaining children to join him in London, England, was with the intention of changing her residence or actual domicile.

But even if the Mothers' Assistance Board concludes that she left Philadelphia on July 7, 1926, with the intention of changing her residence or actual domicile nevertheless the *family* did not lose its residence in Philadelphia County for the period of one year after removal therefrom, and if the family returned to the county, within one year after removal therefrom, the family became immediately entitled to assistance in the county.

In this instance her children and her furniture were returned to Philadelphia County within seven months after removal therefrom

and she remained outside of said county for one purpose only, to conclude the litigation pending England, and within the period of one year initiated her actual return to the county and arrived in Philadelphia July 13, 1927, one year from the date of her arrival in Southampton, England, and presumably of her arrival in London, England, her destination.

It becomes necessary therefore to determine whether the date of embarkation of her children and shipment of her furniture, to wit, February 16, 1927, or the date of her embarkation, to wit, July 5, 1927, after which she was continuously enroute to Philadelphia County, constitutes such return to the county as would make her eligible for assistance.

> "Where a person abandons his former domicile of choice and, with intent to take up a new domicile of choice, starts toward the new, the change of domicile takes place the moment he puts himself in motion, though, if the domicile left is the domicile of origin, proof of arrival at the new domicile must be made in order to constitute a change."
>
> *In Re: Grant's Estate, 83 Misc. 257; 144 N. Y. S. 567.*

Having in mind that the welfare of the children is the primary purpose of this legislation and the Act fixes the return of the "family" as distinguished from the "mother" as the condition for eligibility after absence from the county, we are of opinion that you may with propriety adopt the principle of *Grant's Case,* supra, and conclude as a matter of law that on July the fifth, 1927, the return of the "family" was consummated and that therefore the applicant is eligible for assistance.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

Mothers' assistance fund—Residence—Temporary absence from State—Act of July 10, 1919.

Under section 7 of the Mothers' Assistance Fund Act of July 10, 1919, P. L. 893, the residence by the applicant for relief of one year in the county and two years in the State must immediately precede the date of application; but if, on application, the board cannot grant immediate relief and the applicant is compelled in the meantime to live outside the county or State in order to maintain herself and family, such absence, if without intent to abandon her residence, does not make her ineligible for relief.

Department of Justice,

Harrisburg, Pa., October 30, 1928.

Honorable E. Grace McCauley, Secretary of Welfare, Harrisburg, Pennsylvania.

My dear Mrs. McCauley: We have your request for an opinion by this Department upon the eligibility of Mrs. Albert H. Walker for assistance from the Mothers' Assistance Fund.

You submit the following statement of facts:

Albert H. Walker resided with his family in Lancaster County upwards of two years and died in December, 1925. The widow and her family remained in Lancaster County until April, 1926, when she and her children went to Franklin County, the residence of her father, where she remained until May, 1926, when she returned to Lancaster County. There she filed an application with the Mothers' Assistance Fund in June, 1926, for relief. Immediately after filing the application she returned to Franklin County. The following month she came back to Lancaster and in July and August conducted a rooming house. This venture was not successful and in August, 1926, she was compelled to return to her father's home in Franklin County. Finding it impossible to obtain work there, in August, 1926, she went to Hagerstown, Maryland, for the purpose of keeping house for her brother.

No action was taken by the Lancaster County Board until April, 1927, when it was dismissed by the Board because, as it concluded, she had lost her residence in Lancaster County by absence from the county for a period of a year. Her application had not been considered by the Board until April, 1927, because of prior applications pending before the Board.

In November, 1926, she made application to the Mothers' Assistance Board of Franklin County. That Board did not consider her eligible for relief in that county at that time because she had not been a resident of Franklin County for one year.

One year from the date of filing her application with the Franklin County Board, the Franklin County trustees investigated her claim and found that she had been living in Hagerstown, Maryland, since August, 1926, and thereupon the Franklin County Board dismissed her application.

You submit the following question: -

Is she no longer eligible in Lancaster County for relief and will it be necessary for her to live twelve consecutive months in Franklin County in order to qualify for assistance there, or has she lost her State residence and by reason of that fact is it necessary for her to reside in Pennsylvania continuously for two years before she may again be considered in any county of this Commonwealth?

There can be no question that in June, 1926, when she filed her application in Lancaster County she was eligible for relief there. Her application was not considered because of pending applications having priority. While it is not so stated in your letter, I am informed verbally that she left Lancaster County at that time because of her inability to provide for herself and her children and thereafter continued to reside temporarily with either her father or her brother, pending the granting of her application; that when she left Lancaster County it was with the intention to return to it, and she deemed Lancaster her home.

Under such state of facts, if so found by the Board, we are of the opinion that the period of one year's residence within the county and two years' residence within the State mean one year and two years, respectively, immediately preceding the date of application. If on the date of application the local board is unable to grant immediate relief, and as a result thereof, the applicant is compelled to temporarily sojourn outside the county or State in order to live and maintain her children pending action upon her application, she does not by reason of her absence from the county lose her eligibility or her priority on the list of applicants. Under the circumstances, her application may be reinstated by the Lancaster County Board as of June, 1926, for immediate or preferred action.

If on the other hand, after investigation, the Board concludes that when Mrs. Walker left Lancaster County in August, 1926, it was her intention to abandon her residence in Lancaster County and take up her residence in Hagerstown, Maryland, permanently, then her application fell and might have been treated as if withdrawn.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION TO THE WORKMEN'S COMPENSATION BUREAU

OPINION TO THE WORKMEN'S COMPENSATION BUREAU

Workmen's Compensation Bureau—State Workmen's Insurance Board—Employes—Dependents of employes.

Authority of the Compensation Bureau to pay compensation to employes or dependents of deceased employes of the State Workmen's Insurance Board. Act of 1927, No. 347 A, Page 28.

Department of Justice,

Harrisburg, Pa., October 17, 1927.

M. G. Lehman, Assistant Director, Workmen's Compensation Bureau, Harrisburg, Pennsylvania.

Sir: Your request to be advised whether, under the appropriation to the Department of Labor and Industry as contained in the General Appropriation Act of 1927, (Act No. 347 A, Page 28) you are required to pay Workmen's Compensation Insurance to injured employes and dependents of deceased employes of the State Workmen's Insurance Board, was duly received.

That Section of the Act making the appropriation to your Department which is pertinent in the consideration of this case reads as follows:

> "* * * 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 1, 1927, and ending May 31, 1929, to insured 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 1915, its amendments and supplements and for the payment of expenses incurred by the Bureau of Workmen's Compensation in investigation and adjustment of claims of such employes and dependents * * *"

The State Workmen's Insurance Board is placed in and made a part of the Department of Labor and Industry by virtue of Section 202 of the Administration Code, (Act No. 274, 1923, P. L. 498) and it is designated as a "Departmental Administrative Board." Section 1711 of the Administrative Code provides that:

> "Subject to any inconsistent provision in this Act contained, the State Workmen's Insurance Board shall continue to exercise the powers by law vested in and imposed upon the said Board."

The State Workmen's Insurance Board was created "for the purpose of administering the State Workmen's Insurance Fund. * * * There is nothing in the Administrative Code which in any way modifies the status of the Fund." (See opinion of Special Deputy Attorney General Wm. A. Schnader to Dr. Royal Meeker, Secretary of Labor and Industry, February 4, 1924.)

Section 214 of the Code provides that:

> "The heads of the respective administrative departments shall appoint and fix the compensation of such clerks, stenographers and other assistants as may be required for the proper conduct of the work of any administrative bodies, boards, commissions or officers * * * established in their respective departments."

"The only exceptions to this provision are contained in Sections 1311 and 2019 of the Code." (See opinion of Special Deputy Attorney General Wm. A. Schnader to Dr. Royal Meeker, January 28, 1924.) The first section referred to (1311) relates to the Boards of Trustees managing the Home for Training in Speech of Deaf Children Before They Are of School Age, the Pennsylvania Soldiers' Orphan School, and the State Oral School for the Deaf. The other section (2019) relates to the Board of Trustees managing twenty-nine State penal reformatories, institutions and State hospitals.

The Secretary of Labor and Industry by virtue of Section 214 of the Administrative Code, referred to above, selects the employes of the State Workmen's Insurance Board, fixes their compensation subject to the classification of the Executive Board, directs and controls the action of the employes and the duration of their employment. Under the Administrative Code there is no question but that the members of the State Workmen's Insurance Board are employes of the Commonwealth entitled to the benefits of the Compensation Law. Previous to the passage of the Administrative Code, the Legislature made the same provisions for employes of the State Workmen's Insurance Board by virtue of the Act of April 20, 1921, P. L. 195.

It is true as you suggest, that employes of the State Workmen's Insurance Board are paid out of the Workmen's Insurance Fund which is self sustaining, that is, the employes are paid out of funds derived from premiums collected on policies of insurance. On November 8, 1926, we advised the Secretary of Labor and Industry that members of the National Guard of Pennsylvania, while participating in armory drills under the supervision of their officers, were State employes entitled to receive compensation from the above appropriation although they were paid from funds allocated for that purpose by the United States Government.

The Supreme Court has decided that:

> "While the fact as to who pays the wages is an element that may be considered in determining the presence of the employer-employee relation, it is by no means controlling. * * Section 104, in defining an employee as one who performs services for another 'for a valuable consideration,' does not specify that any particular person shall pay this consideration and its language is not to be construed as conditioning liability to meet a claim for compensation on payment of wages by the person against whom the claim is made, or on the existence of an obligation to so pay wages." *Atherhold vs. Wm. Stoddart Co., 286 Pa., 278.*

You are therefore, accordingly advised that the provision of the Appropriation Act of 1927 permits your Department to pay compensation to employes, or dependents of deceased employes, of the State Workmen's Insurance Board. This opinion conforms with the opinion of the Special Deputy Attorney General Wm. A. Schnader rendered to the Secretary of Labor and Industry on January 28, 1924.

Very truly yours,

DEPARTMENT OF JUSTICE,
PENROSE HERTZLER,
Special Deputy Attorney General.

INDEX

A.

C.

D.

E.

G.

H.

I.

O.

P.

S.