

Commonwealth of Pennsylvania

OFFICIAL OPINIONS

OF THE

**ATTORNEY GENERAL**

OF

**PENNSYLVANIA**

FOR THE YEARS

**1929 and 1930**

---

**Cyrus E. Woods**  
*Attorney General*

---

TABLE OF OPINIONS  
 rendered to the  
 DEPARTMENTS, BOARDS AND COMMISSIONS  
 of the  
 STATE GOVERNMENT  
 1929-1930

—oOo—

Animal Industry, Bureau of .....	7
Architects, Board of Examiners of .....	15
Auditor General .....	19
Banking. ....	35
Budget Secretary .....	65
Commonwealth, Secretary of .....	71
Finance and Revenue, Board of .....	101
Forests and Waters .....	127
Game Commission .....	133
Governor .....	87
Highways .....	137
Insurance .....	151
Labor and Industry .....	157
Property and Supplies .....	171
Public Instruction .....	177
Quo Warranto, Opinion in re petition for writ of .....	213
Revenue, Secretary of .....	223
State Employees' Retirement Board .....	259
State Industrial Home for Women at Muncy .....	263
Township Law Revision Commission .....	267
Water and Power Resources Board .....	271

---

---

OPINION TO THE BUREAU OF  
ANIMAL INDUSTRY

---

---

## OPINION TO THE BUREAU OF ANIMAL INDUSTRY

*Dogs—Killing domestic animals—Payment of damage by State—Action against owners—Dogs of different owners—Liability for damage done by own dog—Separate or joint actions—Act of May 11, 1921.*

1. Under section 29 of the Act of May 11, 1921, P. L. 522, giving the Commonwealth, upon payment of damages to the owners of livestock killed by dogs, the rights of such owner against the owner of the dog to the extent of the payment so made, where the damage is done jointly by dogs of different owners, joint action cannot be brought against the several owners, but separate actions must be brought against each for the amount of damage done by his own dog, and in absence of any proof as to the amount of damage done by each dog the law will infer that they did equal damage.

2. A joint action cannot be sustained in such case unless it be shown that the defendants were acting in concert with a common intent to do injury.

Department of Justice,

Harrisburg, Pa., July 1, 1929.

Doctor T. E. Munce, Director, Bureau of Animal Industry, Department of Agriculture, Harrisburg, Pennsylvania.

Sir: You request that you be advised upon the matter of a claim of two hundred eighty-one dollars fifty cents (\$281.50) for damages paid by the Commonwealth for sheep killed by dogs in Mercer County.

The record discloses that the owners of the dogs killing the sheep, are non-residents of Mercer County, and your chief inquiry is, whether the whole sum may be collected from one of the owners who is responsible, and whose dog was unlicensed, and the other whose dog was licensed, is not the owner of property, and further you wish to be advised whether only one-half the sum sought to be collected shall be from each party.

The authority of the Commonwealth to collect from owners of dogs killing sheep arises by legislative enactment. We therefore begin with Act of May 11, 1921, P. L. 522, relating to loss or damage to livestock destroyed by dogs. Said Act provides inter alia, that a justice of the peace and an auditor of the municipality shall appraise the damage sustained, and if possible ascertain the owner or owners of dogs by which the damage was done; that upon approval of such report by the Secretary of Agriculture he shall draw his check for the amount of loss from the Dog Fund. And further it is provided that,

“Section 26. \* \* \* Any owner or keeper of such dog or dogs shall be liable, to the owner of such livestock or poultry, in a civil action, for all damages and costs, or

to the Commonwealth to the extent of the amount of damages and costs paid by the Commonwealth as hereinafter provided. \* \* \*

“Section 29. \* \* \* Upon payment by the State of damages of livestock, or poultry, by dogs, the rights of the owner of such livestock, or poultry, against the owner of a dog, to the extent of the amount of damages so paid by the State, shall inure to the benefit of the State. \* \* \*

Preliminarily we may state that the matter of the one person having a licensed and the other an unlicensed dog, is not a material factor under the presentation and determination of the specific information you are seeking. The solution of the problem comes from a different angle. Both dog owners here, are in the wrong and both violators of the statute in permitting their dogs to be at large in the nighttime. It was this negligence and failure to observe the provisions of the statute which occasioned the damage to the sheep. Doubtless, no witness would be able to tell which sheep was killed by the one dog or the other; neither is such testimony required to render either or both liable. If I have a proper conception of the facts, the two dogs were together discovered killing and injuring a certain number of sheep belonging to the owner, who subsequently received the money for his loss or damage from the Commonwealth as provided by the statute. This money is now sought to be recovered, not under the statute cited at Section 26, where the owner of the sheep had a civil action for all damages and costs against the owner of the dogs, but, the Commonwealth having paid the claim, under Section 29, the right of the owner of the sheep against the owner of the dog or dogs, inures to the benefit of the State to the extent of damages so paid by the State.

The statute having thus fixed the status of the Commonwealth, we turn to the ascertainment of the position or relation of liability of the defendants, and whether they may be sued jointly or severally, where the dogs are not owned by the same parties. This seems to be the crux in the inquiry which you have submitted.

Where there are two joint trespassers, both or either may be sued, and if process is had against one, such one cannot be relieved from liability by showing that the other participated in the illegal act. *Burk vs. Howley et al.*, 179 Pa. 539. If these defendants were joint tortfeasors, the action would be joint, but in order to me made liable jointly, it must appear that they were acting in concert, with a common intent, their act of negligence and illegal trespass must be concurrent to render them liable. *Klauder vs. McGraith*, 35 Pa. 128. In other words, joint tortfeasorship may only be affirmed when there is shown to be a community of interest in the purpose of the under-

taking with authority to control and direct the conduct of each other in the project engaged upon. *Brobston vs. Darby Borough*, 290 Pa. 394: *Betcher vs. McChesney* 255 Pa. 398.

From these authorities it must be concluded that these defendants cannot be sued together, or jointly in the same action because there could not likely be established a concert of purpose or community of interest between the owners of the dogs, to have the dogs join in the destruction of the sheep. It then becomes necessary to institute actions in severalty, and if their purpose is not joint but several, to determine in what manner the extent of liability of each may be established.

At common law the owner of a dog was not liable for its bite until scienter was established. By this is meant that the vicious propensities of the dog must have been known to the owner prior to the time when the wrong was committed. We need not however, draw lines of distinction between actions on the case or in tort, and that of trespass, but that between actions that are joint or against the defendants severally. The defendants in the instant case, the owners of the dogs which killed the sheep were not joint owners, but each was the owner of one of the dogs doing the damage, as in the case of *Adams vs. Hall and Coolwire*, 2 Vermont 9, wherein it was said by Hutchinson, J.,

“\* \* \* Hall was under no obligation to keep the other defendant's dog from killing sheep; nor vice versa. Then, shall each become liable for the injury done by the other's dog, merely because the dogs, without the knowledge or consent of the owners, did the mischief in company? We think not. \* \* \*”

And in *Van Steenburgh and Gray vs. Tobias*, 17 Wendell's Reports, 562, it was held:

“\* \* \* Owners are responsible for the mischief done by their dogs; but no man can be liable for the mischief done by the dog of another, unless he had some agency in causing the dog to do it. When the dogs of several persons do mischief together, each owner is only liable for the mischief done by his own dog; \* \* \*”

The syllabus to this case is, “A joint action does not lie against several owners of dogs, by whom the sheep of a third person have been worried or killed.” This case is apt in its discussion where one dog may be young, small and feeble, and incapable of mischief by himself, and yet if a joint action lie, his master may be accountable for the injury caused by the large ferocious dog. The illustration used is “An ox and a calf belonging to different owners, reaching through the fence, throw it down and enter the enclosure of another at the same time; it would be unjust that the owner of the small animal should be holden to pay the damage done by the larger, \* \* \* The

jury in this case as in most cases of wrong, get at the real damages in the best way they can." *Russell vs. Tomelson*, 2 Conn. 206. *Buddington vs. Sherrer et al*, 20 Pickering, 477 (Mass.) is of like effect,

"\* \* \* Where the injury was done by two dogs, together, belonging to several owners, it was held that each owner was liable only for the damage done by his own dog, and not for the whole damage done by the two dogs."

This case is significant in that it discloses or points out a method by which the damages may be arrived at by the jury where the dogs of several owners did the injury, and the court reasons as follows:

"There may be some difficulty in ascertaining the quantum of the damage done by the dog of each, but the difficulty cannot be great. If it could be proved what damage was done by the one dog, and what by the other, there would be no difficulty; and on failure of such proof, each owner might be liable for an equal share of the damage, if it should appear that the dogs were of equal power to do mischief, and there were no circumstances to render it probable that greater damage is done by one dog than by another. But whatever the difficulty may be, it can be no reason why one man should be liable for the mischief done by the dog of another."

The reasoning of the last case cited, is followed in *Partenheimer vs. Van Order*, 20 Barbour 479, (Supreme Court of New York State), "Syl."

"Where cows, belonging to several owners, are found in the garden of an individual, committing a trespass, each owner is liable for the damage done by his own cow, no more.

"And in the absence of any proof as to the amount of damage by each cow, the law will infer that the cattle did equal damage."

The method of arriving at the measure of damages to which each owner of the dogs would be liable in the foregoing cases cited from other states, was approved by *Agnew, J.* in *Little Schuylkill Navigation, Railroad and Coal Company vs. Richards' Administrator*, 57 Pa. 146, wherein the culm or dirt from various coal mining operations were washed into a dam, thereby destroying its usefulness as a water power.

You are therefore advised that actions may be instituted against both of these parties, severally, for the recovery from each, the amount of damages which it may be shown by the evidence his dog had done in the destruction of the sheep, or suit may be instituted against one of the owners and if the jury find against such one the full sum paid

by the State, no suit could be prosecuted against the other; but, if the suit against the one produces only a part of the sum paid by the State, then suit may be brought against the other for the balance.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAS. W. SHULL,

*Deputy Attorney General.*



---

---

OPINION TO STATE BOARD OF EXAMINERS  
OF ARCHITECTS

---

---

## OPINION TO STATE BOARD OF EXAMINERS OF ARCHITECTS

*Architects—Interior architects—Registration—Act of July 12, 1919.*

A person using the title "consulting interior architect" must register as an architect, as provided by the Act of July 12, 1919, P. L. 933.

Department of Justice,

Harrisburg, Pa., June 21, 1929.

M. I. Kast, Secretary, State Board of Examiners of Architects, 222 Market Street, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether or not a person may use the term "consulting interior architect" in this Commonwealth without registering as an architect with your Board.

You state in your communication that the title, "consulting interior architect" is used more or less extensively by interior decorators who desire to take up certain sides of architectural practice.

Section 13 of the Act of July 12, 1919, P. L. 933 provides that:

"On and after July first, one thousand nine hundred nineteen, it shall be unlawful for any person in the State of Pennsylvania to enter upon the practice of architecture in the State of Pennsylvania, or to hold himself or herself forth as an architect or as a 'registered architect' or to use any word or any letters or figures indicating or intended to imply that the person using the same is a 'registered architect,' unless he or she has complied with the provisions of this act and is a holder of a certificate of qualification to practice architecture issued or renewed and registered under the provisions of this act."

"This act shall not be construed to prevent persons other than architects from filing applications for building permits or obtaining such permits; nor shall it be construed to prevent such persons from designing buildings and supervising their construction, provided their drawings are signed by the authors with their true appellation as engineer or contractor or carpenter or et cetera, but without the use in any form of the title of architect."

The Century Dictionary and Cyclopedia defines the word "consulting" as follows:

"Acting in consultation or as an adviser; making a business of giving professional advice; as, a consulting barrister; a consulting physician; a consulting accountant."

The word "interior" is defined as:

"Being within; inside of anything that limits, incloses or conceals; internal; further toward a center: opposed to exterior or superficial; as, the interior parts of a house or the earth."

As used in relation to art it is defined as:

"An inside part of a building, considered as a whole from the point of view of artistic design or general effect, convenience, etc."

It is evident, therefore, that the words "consulting" and "interior" when used to modify the term architect indicate that the architect gives, or is prepared to give, professional advice relative to the construction and artistic design of the interior of a building.

In the case of *Simons, Brittain & English, Inc., vs. Armstrong & Markell*, 86 Penna. Superior Court 98, 102, Judge Trexler in giving the opinion of the court announced that although Section 13 of the Act allows others than architects to design buildings and supervise their construction, it only permits such work, " \* \* \* as long as they do not use the title of architect." The opinion of the Court is that the act

" \* \* \* Was aimed at such persons as claimed to be architects who were not or who, at least, could not or would not register and who, notwithstanding, still employed the professional title. \* \* \*"

Every person using the term "consulting interior architect," therefore holds himself or herself out as an architect, qualified to render a limited service in the general practice of architecture. Such persons must comply with the provisions of the Act of Assembly if they employ the professional title.

It is our opinion, and we so advise you, that persons using the title "consulting interior architect" must secure registration from your Board or subject themselves to the penal provisions for practicing as a registered architect without being so registered.

Very truly yours,

DEPARTMENT OF JUSTICE,

PENROSE HERTZLER,

*Special Deputy Attorney General,*

---

---

OPINIONS TO THE AUDITOR  
GENERAL

---

---

## OPINIONS TO THE AUDITOR GENERAL

*Gasoline tax—Reports—Verification—Examination of books and papers by Auditor General—Confidential information—Furnishing names of delinquents to legislature—Act of April 14, 1927.*

Under section 6 of the Act of April 14, 1927, P. L. 287, authorizing the Auditor General or his agent to examine books and papers of dealers in gasoline to verify the accuracy of any return made by such dealer, but providing that the information so furnished shall be confidential, the Auditor General is not prevented from furnishing to the legislature the names of delinquent fuel tax payers and the amounts owed by them.

Department of Justice,

Harrisburg, Pa., February 6, 1929.

Honorable Edward Martin, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether you may lawfully comply with the Resolution offered by Representative Talbot on January 28, 1929, calling upon you to furnish to the House of Representatives "a complete list of all dealers in liquid fuels within the Commonwealth who are delinquent in the payment to the Commonwealth of tax collected by them on liquid fuels sold by them to purchasers thereof, together with the amount due from each such dealer in so far as the same can be ascertained or computed by the Auditor General."

You call our attention to Section 6 of the Act of April 1, 1927, P. L. 287, which is as follows:

"The Auditor General, or any agent appointed in writing by him, is hereby authorized to examine the books and papers of any dealer or consumer, pertaining to the business made taxable by this act, to verify the accuracy of any statement or return made under the provisions of this act; but any information gained by the Auditor General, or any other person, as a result of the reports, investigations, or verifications herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not less than one hundred dollars nor more than one thousand dollars, or to undergo imprisonment of not more than one year or both."

Section 6 of the Act of 1927 above quoted was unquestionably designed to prevent the Auditor General or any of his agents from disclosing to any one the detailed information which the Act requires

taxpayers to furnish on their reports or any detailed information which the Auditor General or his agents may obtain as the result of an examination of the books and papers of any taxpayer. It was not, however, in our opinion, the intention of the Legislature to prevent the Auditor General from disclosing the names of delinquent taxpayers or the amounts which they owe.

The law provides for the collection by legal process of amounts of tax owing by delinquents. This cannot be done without making public the names of those whom it becomes necessary to sue and the amounts of tax claimed to be due. It is no more a crime for the Auditor General to give this information to the Legislature than to furnish it to the Attorney General for the purpose of enabling him to institute Court proceedings to force payment of the tax due.

Accordingly, we are of the opinion that Section 6 of the Act of 1927 does not prevent the Auditor General from furnishing to the Legislature or to either House thereof the names of delinquent liquid fuel taxpayers and the amounts which they owe respectively, and we advise you that you may lawfully comply with the request made in the Talbot Resolution.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*Appropriations—Pennsylvania State College—Purposes for what appropriations may be used—Acts of June 9, 1911, P. L. 736 and Act of 1927 (Appropriation Acts, page 71).*

Department of Justice,

Harrisburg, Pa., February 7, 1929.

Honorable Virgil E. Bennett, Deputy Auditor General, Harrisburg, Pennsylvania.

Sir: We have your request to be advised regarding certain questions which have arisen under the appropriation acts making appropriations to Pennsylvania State College.

You ask the following questions:

“I. Is Pennsylvania State College subject to the requirements imposed upon institutions not wholly managed by the Commonwealth, by the Act of June 9, 1911, P. L. 736, for appropriations for permanent improvements of any kind?

"II. Is it lawful for the board of trustees to take out policies of fire insurance on the property of the institution and charge the cost thereof to the State appropriation for maintenance and operation?

"III. Is it lawful for the board of trustees to borrow money by issuing bonds secured by a mortgage on the property, and charge the interest thereon to the State appropriation for maintenance and operation?

"IV. In connection with question No. III aforesaid, is it lawful to renew such indebtedness at the expiration of the stated period and continue to charge the interest to the State appropriation for maintenance and operation?

"V. Is it lawful to charge the repayment of such bonds referred to in questions III and IV aforesaid to a State appropriation granted for the purpose?

"VI. Is it lawful for the board of trustees to borrow money from time to time for current expenses by means of short term notes in the usual way and charge the interest thereon to the State appropriation for maintenance and operation?

"VII. Under the present form of appropriation, can the Auditor General require a quarterly statement or report of the receipts and expenses of the institution as called for by the Act of 1899, P. L. 8?"

## I

Pennsylvania State College is an incorporated educational institution. It is not owned by the Commonwealth nor is it managed exclusively by the Commonwealth. The Governor, the Superintendent of Public Instruction, and the Secretary of Agriculture are ex-officio members of the institution's board of trustees, which has a total membership of thirty-one; and the Governor is empowered by the charter of the institution to appoint six trustees.

Accordingly as far as the Commonwealth is concerned the institution comes within the class commonly called "semi-State institutions."

In view of the facts just stated it is quite clear that Pennsylvania State College comes within the purview of the Act of June 9, 1911, P. L. 736, which applies to "All appropriations of money hereafter made by this Commonwealth to any \* \* \* educational \* \* \* institution, corporation or unincorporated association not wholly supported by this Commonwealth and not under the exclusive control and management of this Commonwealth, for structures, erections or other permanent improvements of any kind."

## II-VII

The 1927 appropriation to State College (Appropriation Acts, page 71) permits the money appropriated to be used, among others, for the following purposes:

“For the general maintenance of instruction in the school of agriculture, and of instruction, research, and extension in the school of engineering, the school of liberal arts, the school of mines and metallurgy, the school of chemistry and physics, the school of education, the graduate school, the department of physical education, the department of military science, and the Carnegie Library, including repairs to grounds and buildings, service, light, heat, power, water, and sewage disposal, salaries and wages, materials, and supplies, and equipment, street paving, insurance and interest, and such other expenditures as the trustees may deem necessary and practicable \* \* \*.”

II. As the institution is a corporation managed by a board of trustees created by its charter it is entirely appropriate that the board should take out policies of fire insurance on the property of the institution and charge the cost thereof to maintenance and operation; and as the 1927 appropriation may be used, among other purposes, for insurance, this item is properly payable out of it.

III. The board of trustees may lawfully borrow money by issuing bonds secured by a mortgage on the institution's real estate, the lien of such mortgage being, of course, subject to any outstanding liens under the Act of June 9, 1911, P. L. 736, or otherwise created. As the 1927 appropriation expressly provides that it may be used for the payment of interest, there can be no doubt that interest may lawfully be paid out of it.

IV. There is no difference between interest paid on indebtedness during any extension of the term thereof and during the original term thereof, as far as concerns its payment out of the 1927 appropriation.

V. The Legislature may lawfully make an appropriation to the institution to enable it to pay off its bonded indebtedness.

VI. The institution may through its board of trustees from time to time borrow money for current expenses, giving to the lender short term notes in the usual way. The interest on such notes may be paid out of the State appropriation.

VII. The Act of March 15, 1899, P. L. 8 applies to all appropriations made to educational institutions whether they be owned and operated by the Commonwealth or by private corporations. Accordingly, it is applicable to the appropriation made to Pennsylvania



State College. However, as we advised the Budget Secretary, in an opinion dated June 25, 1928, published in a pamphlet entitled "Opinions of the Department of Justice relating to State Institutions within the Department of Welfare" at page 57, the Act of 1899 applies only to appropriations for maintenance and has no bearing whatever upon appropriations for construction, equipment or capital expenditures generally.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*Judges—Assignment to other districts—Report to Auditor General—Compensation—Acts of April 27, 1911, and May 16, 1929.*

In re Compensation of Judges Assigned for Judicial Work in Other Districts.

1. Section 4 of the Act of April 27, 1911, P. L. 101, requiring a judge assigned to assist in judicial work in other districts to make monthly reports to the Auditor General of the place where he presided, the time so engaged, and the nature and number of cases heard, is not amended or repealed by section 9 of the Act of May 16, 1929 (No. 585).

2. The Act of 1929 amends section 5 of the Act of 1911 by raising the compensation of such a judge to \$30 a day and carfare, and allowing payments for each day actually engaged in performance of duty, even though he does not actually preside in court.

3. No compensation can be allowed, however, for time spent in his own district on work incident to trial of cases in another district.

Department of Justice,

Harrisburg, Pa., June 18, 1929.

Honorable Charles A. Waters, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether Section 9 of the Act of May 16, 1929 (Act No. 585) supersedes Sections 4 and 5 of the Act of April 27, 1911, P. L. 101.

The Act of April 27, 1911, P. L. 101, provides for the assignment of judges through the Prothonotary of the Supreme Court to assist in the judicial work of districts other than their own.

Sections 4 and 5 of the Act are as follows:

"Section 4. Each judge so assigned, and presiding in said court as aforesaid, shall, at the end of the month in which he is so engaged, make and forward to the Auditor

General, on a blank form to be furnished for that purpose, the place or places where he presided as judge, the name of the court, number of cases heard, and nature of the same, that is, criminal, civil, or in equity, and the number of days engaged.

“Section 5. The said judges, assigned as aforesaid, shall be paid as compensation for so presiding the sum of twenty dollars per day, and car-fare, and no more. No payment shall be made for days consumed in such service of more than expenses and car-fare, unless said judge, so assigned, actually presides in open court, either at argument, hearing, or trial; and no such judge shall preside in another district while an outside judge is sitting in his own district.”

The Act of May 16, 1929 (Act No. 585) increased the compensation of all of the judges of Pennsylvania. It is entitled, “An act to fix the salaries and compensation of the judges” of the several courts. This is its single subject and only purpose.

Section 9 of the Act is as follows:

“When any judge learned in the law is called in, as now provided by law, to assist the judge or judges of any other judicial district, such judge so called in shall be entitled to receive for each day he is actually engaged in the performance of such duty the sum of thirty dollars (\$30) per day and car-fare.”

In effect, you desire to be advised:

First—Whether it is necessary for judges who serve outside of their own districts at the end of each month to make and forward to the Auditor General the report required by Section 4 of the Act of April 27, 1911; and

Second—Whether the restriction contained in Section 5 of the Act of April 27, 1911, limiting the payment of per diem compensation to days when a visiting judge actually presides in open court, either at argument, hearing or trial, is still in force.

The Act of May 16, 1929, does not in any way supply, nor is it in any degree inconsistent with, Section 4 of the Act of April 27, 1911; and, in our opinion, this section of the Act of 1911 is still in force.

Section 9 of the Act of May 16, 1929, deals with the same subject matter embraced within Section 5 of the Act of April 27, 1911, and, in our opinion, Section 9 of the Act of 1929 repeals Section 5 of the Act of 1911.

The Act of 1911, provided per diem compensation to judges for “presiding” and permitted them to receive “expenses and car fare” on days when they served outside of their own districts but were not

presiding in open court. The Act of 1929, on the other hand, permits per diem compensation to be paid for each day that a visiting judge "is actually engaged in the performance of such duty" and makes no provision for the payment of any expenses other than car fare.

However, in our opinion, the first four sections of the Act of April 27, 1911, when read with Section 9 of the Act of May 16, 1929, limit the compensation to be paid to judges for serving outside of their districts to the days actually expended by such judges outside of their own districts. Section 9 provides compensation when judges are "called in, as now provided by law, to assist the judge or judges of any other judicial district." The compensation provided is for each day the visiting judge is "actually engaged in the performance of such duty." The amount of compensation is thirty dollars (\$30.00) per day and car fare.

In our opinion, a judge cannot be paid compensation, under the Act of 1929, for time expended in his own office, in his own district, on work resulting from a trial, hearing or argument outside of his district. He is entitled to be paid only for the days he actually expends in another district, but for such days he may be paid even though he does not preside in open court.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*Relief funds for firemen—Taxes from foreign fire insurance companies—Townships—Acts of June 28, 1895, and April 25, 1929.*

1. Where a township has no relief fund association for firemen, it cannot receive from the State Treasurer and use for its own purposes moneys received from foreign insurance companies as taxes under the Acts of June 28, 1895, P. L. 408, and April 25, 1929, P. L. 709, which require such moneys to be paid to local relief funds for firemen.

2. If a township uses such funds for its own purposes, the township, under the Act of April 9, 1929, P. L. 345, cannot receive any money from the State Treasurer for any purpose until it has expended an amount equal to such fund as specifically directed by the Act of April 25, 1929.

Department of Justice,

Harrisburg, Pa., October 22, 1929.

Honorable Charles A. Waters, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your request for an interpretation of the Act of April 25, 1929, P. L. 709.

This Act amends Section 2 of the Act of June 28, 1895, P. L. 408, as amended, by providing that the State Treasurer shall pay to the treasurers of the respective cities, townships and boroughs within Pennsylvania, “\* \* \* the entire net amount received from the two per centum tax paid upon premiums by foreign fire insurance companies.” The amount which is to be paid to each local treasurer is to be based upon the return of the two per centum tax from foreign fire insurance companies doing business within the respective cities, townships, and boroughs as shown by the report made to the Department of Revenue.

The 1929 amendment continues by providing that “Each city, borough, or township receiving any payment from the State Treasurer hereunder, shall forthwith pay the amount received to the Relief Fund Association of the fire department, or of such fire company, or fire companies, paid or volunteer, now existing, or hereafter organized, in such city, borough, or township, as is or are engaged in the services of such city, borough or township and duly recognized as such by the council or commissioners as the case may be, of such city, borough, or township.”

You state that the treasurer of Dunbar Township, Fayette County, has received a check from the State Treasurer for two hundred two dollars (\$202.00), but advises that Dunbar Township does not have within it any Relief Fund Association of a fire company to which the check received can be paid as provided by the Act of 1929. The township treasurer desires to know what he shall do with the check,—whether he shall pay fifty per centum of it to the road supervisors and fifty per centum to the school district, and if not, what disposition he shall make of it.

Dunbar Township does not have any right, under the Act of 1929, to make any disposition of the check received from the State Treasurer, except as specifically set forth in the Act. If it cannot use the money for the purposes set forth in the Act, the check should be returned to the State Treasurer for cancellation.

In this connection, I call your attention to Section 403 of The Fiscal Code (Act of April 9, 1929, P. L. 343) under which it would be the duty of your Department upon discovering that Dunbar Township had used this check otherwise than for the purposes set forth in the Act of 1929, immediately to notify the Governor and to decline to approve any further requisition for the payment of any appropriation or any further portion of any State tax to Dunbar Township until two hundred two dollars (\$202.00),—the amount of the check in question,—

“\* \* \* shall have been expended for the purpose for which the money improperly expended was received from the State Treasurer.”

Under this section of The Fiscal Code, Dunbar Township could not receive any money from the State Treasury for any purpose until it had expended two hundred two dollars (\$202.00) as specifically directed by the Act of April 25, 1929, if it were to use this money for any other purpose.

Clearly, as the township cannot use the money for the purpose specified by the Legislature, it is the duty of the township treasurer to return the check to the Commonwealth. He cannot do what the Legislature failed to do, namely, make an alternative provision for the use of the money if it cannot be applied as the Legislature directed.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*Taxation—Capital stock—Gulf Oil Corporation.*

No question of lack of uniformity in the settlements made by fiscal officers for the tax years 1924 and 1925, can arise in the case of the Gulf Oil Corporation for said years, whereby it would be entitled to exemption during said years for its ownership of the entire stock of certain foreign corporations.

There are no other like corporations for the same tax years which were granted such exemptions.

Department of Justice,

Harrisburg, Pa., January 23, 1930.

Honorable Frank H. Lehman, Deputy Auditor General, Harrisburg, Pennsylvania.

Sir: In your letter of December 23, 1929, to me, you advise that a question of uniformity has arisen with respect to settlements for Capital Stock taxes of the Gulf Oil Corporation, a domestic corporation, for the years 1924 and 1925. You state that an investigation was made of approximately 4,500 Capital Stock tax settlements, covering all coal companies, all public utilities, all railroad companies, all oil and gas companies, and a large number of mercantile and manufacturing corporations, taken at random from the files, and that all of the reports of the companies examined, indicate that no more than eighteen claimed exemption for stocks owned in foreign corpo-

rations, under the principles laid down in the case of *Commonwealth vs. Westinghouse Airbrake Co.*, 251 Pa. 12, and definitely set forth by the Dauphin County Court in the case of *Commonwealth vs. The Aluminum Company of America*, 27 Dauphin Co. Rep. 140, decided May 9, 1924, although foreign stockholders were taxed against one hundred and two companies claiming no exemption, and submitting no evidence relative to the ownership of the corporations represented by such holding.

You advise that with respect to the eighteen corporations who claimed exemption as aforementioned, five corporations were apparently exempted, although they failed to strictly measure up to the rules laid down in said case of *Commonwealth vs. The Aluminum Company of America*, in that there did not appear to be any evidence in these cases establishing that the corporations, which were exempted, owned the tangible property of the subsidiary companies outside of the State prior to the date of incorporation thereof, which was one of the essential requisites laid down in said Aluminum Company of America case.

You further advise that in the case of these five corporations, four of them were public utilities and one was a manufacturing company. Of the remaining thirteen corporations, you report that all the tests prescribed in the Aluminum Company of America case were met by three of them to whom the exemption was allowed, but as to the remaining ten cases, exemption was denied. With these facts you request to be advised whether or not there was such lack of uniformity in the application of the principles laid down in the case of *Commonwealth vs. The Aluminum Company of America*, supra, for the years 1924 and 1925, by the taxing officers of the Commonwealth, as would justify the Auditor General in approving the Capital Stock tax settlements of the Gulf Oil Corporation as made by the Department of Revenue for said years.

It is obvious from a mere statement of the facts presented in your letter, which I have briefly detailed above, that no question of lack of uniformity in the settlements made by the fiscal officers for the tax years 1924 and 1925, can arise in the case of the Gulf Oil Corporation for said years, whereby it would be entitled to exemption during said years for its ownership of the entire stock of certain foreign corporations, because, according to the facts presented, there are no other like corporations for the same tax years, which were granted such exemptions. With respect to the four public utilities, which were allowed said exemption in their settlements for said year, I understand

that such allowance made by the fiscal officers on the ground that a public utility of Pennsylvania could not possibly meet all of the tests laid down in said Aluminum Company of America case. The correctness of this determination does not, however, arise in this matter.

Very truly yours,

DEPARTMENT OF JUSTICE,

CYRUS E. WOODS,

*Attorney General.*

---

*State contracts—Certificate of Department of Property and Supplies—Duties of Auditor General—Acts of April 9, 1929, P. L. 343, and April 9, 1929, P. L. 177.*

The Legislature has placed upon the Department of Property and Supplies the responsibility for seeing that materials have been furnished and work and labor performed as required by contracts. It is not necessary for the Auditor General's Department to maintain employes at the site of construction work to duplicate the checking done by the Department of Property and Supplies.

Department of Justice,

Harrisburg, Pa., June 6, 1930.

Honorable Charles A. Waters, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your request for an interpretation of Section 1502 of The Fiscal Code (Act of April 9, 1929, P. L. 343) and Section 2408 (k) of The Administrative Code of 1929 (Act of April 9, 1929, P. L. 177).

Section 1502 of The Fiscal Code provides that:

“All requisitions shall be audited by the Department of the Auditor General, and, if they appear to be lawful and correct, the department shall approve them and transmit them to the Treasury Department for examination and approval. Otherwise, they shall be returned to the source from which they came for revision, correction, or cancellation.”

Section 2408 (k) of The Administrative Code of 1929 provides that:

“The Department of Property and Supplies shall examine all bills on account of the contracts entered into under the provisions of this section, and if they are correct, the department shall certify that the materials

have been furnished, or that the work or labor has been performed in a workmanlike manner and in accordance with the contract, approve the bills, and issue its requisition therefor, or forward its certificate to the proper department, board or commission, as the case may be."

You ask the following questions:

"1. Under the duty of determining whether requisition transmitted to him are 'lawful and correct' is the Auditor General warranted in accepting as final the certification of the Department of Property and Supplies attached thereto that all materials have been furnished or that the work or labor has been performed in a workmanlike manner and in accordance with the contract or contracts whereon such requisitions are based without further investigation, or does an additional duty rest upon the Auditor General to make independent investigations for the purpose of determining and verifying these facts in order that his responsibility under the law may be fully discharged."

"2. If such further responsibility or duty rests upon the Auditor General then to what extent should independent investigations be carried on by him in order fully to meet and discharge such responsibility?"

Section 2408 (k) of The Administrative Code of 1929 provides in detail the procedure which is to be followed in the erection of new buildings or in making alterations or additions to existing buildings. Detailed provisions specify the steps which are to be taken preliminary to the execution of contracts for such work and clause (j) of this section provides that "the enforcement of all contracts provided for by this section shall be under the control and supervision of the Department of Property and Supplies." Then follows clause (k) mentioned in your inquiry which has already been quoted in full.

Section 1502 of The Fiscal Code is a reenactment of the Act of March 30, 1811, P. L. 145. It provides the steps which are to be taken by your Department and the Treasury Department in approving requisitions for payments out of the State Treasury. This section is consistent with Section 404 of The Fiscal Code which provides that "the Department of the Auditor General shall carefully audit and examine all requisitions calling upon the Auditor General to draw a warrant upon the State Treasurer for the payment of any money out of the State Treasury."

In our opinion, the provisions of Sections 404 and 1502 of The Fiscal Code do not require your Department to duplicate the work which the Legislature has specifically imposed upon the Department of Property and Supplies by Section 2408 (k) of The Administrative Code of 1929. The Legislature has placed upon that Department the responsibility



for seeing that materials have been furnished and work or labor performed as required by contracts for the construction of or alterations or additions to State buildings. It has directed that that Department shall, after it is satisfied that materials have been furnished or work or labor done as per the contract, issue its requisition for payment if the appropriation is under its control, or issue a certificate to the proper Department if payment is to be made out of an appropriation to another Department. Your Department may lawfully rely upon the presumption that the Department of Property and Supplies has performed its duty, and it is not necessary for your Department in the performance of the duty to audit requisitions, to maintain employes at the site of construction work to duplicate the checking which must be done by the Department of Property and Supplies to enable it to issue requisitions or certificates for payment.

The only exception to the advice hereinabove given is that if information comes to your Department indicating that notwithstanding the requisition or certificate of the Department of Property and Supplies, materials have not been furnished or work or labor has not been done as per contract, it would clearly be the duty of your Department to investigate these charges before approving any requisition covering payment for the material or work or labor in question.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

---

OPINIONS TO THE SECRETARY  
OF BANKING

---

---

## OPINIONS TO THE SECRETARY OF BANKING

*Banks—State and national—Consolidation—Effect—Surrender of charter of State bank—Failure to take proceedings—Quo warranto—Acts of April 9, 1856, June 15, 1923, May 5, 1927, and the Federal Act of February 25, 1927.*

Where a State bank or trust company consolidates with a national bank under the Federal Act of Feb. 25, 1927, 44 Stat. at L. 1224, the national bank becomes the consolidated corporation, but the State bank still retains its corporate identity until proceedings are taken to surrender its charter under the provisions of the Act of April 9, 1856, P. L. 293, and if this is not done, the Secretary of Banking should return the name of the State bank to the Attorney-General for the institution of *quo warranto* proceedings to have its charter declared void under the provisions of Section 17 of the Act of June 15, 1923, P. L. 809, as amended by the Act of May 5, 1927, P. L. 762.

Department of Justice,

Harrisburg, Pa., July 30, 1929.

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

Sir: We beg to acknowledge receipt of your request to be advised relative to the effect of the consolidation of a bank or trust company, incorporated and organized under the laws of this Commonwealth, with a national banking association, under the provisions of the Act of Congress of February 25, 1927, Chap. 91, 44 Stat. at L. 1224, amending the Act of November 7, 1918, Chap. 209, 40 Stat. at L. 1044, by adding a new section known as Section 3 thereto, upon the corporate existence of such bank or trust company.

The Act of Congress under consideration, referred to above, reads as follows:

“Section 3. That any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of such State bank if the laws of the State where the same is organized so require, at a meeting to be held on the call of the directors after publishing notice of the time, place

and object of the meeting for four consecutive weeks in some newspaper of general circulation published in the place where the said association or bank is situated, and in the legal newspaper for the publication of legal notices or advertisements, if any such paper has been designated by the rules of a court in the county where such association or bank is situated, and if no newspaper is published in the place, then in a paper of general circulation published nearest thereto, unless such notice of meeting is waived in writing by all stockholders of any such association or bank, and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting, but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where the same is organized. The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national banking association in the place in which such consolidated association is located; and all the rights, franchises, and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interests including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association. When such consolidation shall have been effected and approved by the comptroller any shareholder of either the association or of the State or District bank so consolidated, who has not voted for such consolidation, may give notice to the director of the consolidated association within twenty days from the date of the certificate of approval of the comptroller that he dissents from the plan of consolidation as adopted and approved, whereupon he shall be entitled to receive the value of the shares so held by him, to be ascertained by appraisal made by a committee of three persons, one to be selected by the shareholder, one by the directors of the consolidated association, and the third by the two so chosen; and in case the value so fixed shall not be satisfactory to such shareholder he may within five days after being notified of the appraisal appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and the consolidated association shall pay the expenses of reappraisal, and the value as ascertained by

such appraisal or reappraisal shall be deemed to be a debt due and shall be forthwith paid to said shareholder by said consolidated association, and the shares so paid for shall be surrendered and, after due notice, sold at public auction within thirty days after the final appraisement provided for in this Act; and if the shares so sold at public auction shall be sold at a price greater than the final appraised value, the excess in such sale price shall be paid to the said shareholder; and the consolidated association shall have the right to purchase such shares at public auction if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price as its board of directors by resolution may determine. The liquidation of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases if such provision is made in the State law; otherwise as hereinbefore provided. No such consolidation shall be in contravention of the law of the State under which such bank is incorporated.

“The words ‘State bank,’ ‘State banks,’ ‘bank,’ or ‘banks,’ as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.”

The legal effect of a consolidation under the above Act has been considered fully by the Supreme Judicial Court of Massachusetts in the cases of *Petition of Worcester County National Bank of Worcester*,—Mass.—, 161 N. E. 797, and—Mass.—, 162 N. E. 217. In the first case, the facts were that the Fitchburg Bank and Trust Company had consolidated with the Merchants’ National Bank of Worcester, the name of which was simultaneously changed to Worcester County National Bank of Worcester, and the question involved was whether the national bank could continue to function as administrator of an estate of which the Merchants’ National Bank of Worcester had been duly appointed administrator prior to the consolidation. The Court answered the question in the affirmative, discussing in its opinion the effect of the consolidation upon the status of the national bank in the following language: (p. 798)

“It is unnecessary for the decision of this case to determine whether the trust company lawfully could consolidate with the national bank, because we are of opinion that the legal obligation of the national bank appointed by the court to administer this estate is not in any respect impaired by what has taken place with respect to consolidation with the trust company under said Section 3. The national bank has not been extinguished, dissolved or

essentially altered by the form of consolidation under said Section 3, whether that consolidation be treated as lawful and effective or as unauthorized and futile. Plainly, if it be the latter, the obligation of the national bank to administer the estate remains in full force. That obligation, lawful at its inception, has not been diminished, enhanced, or changed thereby any more than it would be by any other ultra vires act of the national bank. If the consolidation be treated as lawful and effective, the national bank is the corporation now existing and operative. By the terms of said Section 3 the consolidation was 'under the charter' of the national bank. That bank has continued to exercise all its functions without modification, under the same charter, in the same manner and under the same legal sanctions and authorization since the consolidation as before. No new charter has been issued to it. The certificate of approval of the consolidation by the comptroller of the currency is in no sense a new or modified charter. It is no more than a formal expression by the comptroller of the currency of his approval of the consolidation. The corporate identity of the national bank has continued unaffected by anything in connection with the consolidation. Its corporate existence under the same charter, subject to the same laws, and owing fealty to the same jurisdiction has persisted without change. Its financial resources may have been increased or diminished by the addition of the assets of the trust company and the assumption of its debts, but its obligations and duties, not arising out of the consolidation, abide in full force and effect as if there had been no consolidation. Among the duties and obligations which endure undisturbed by the consolidation is the trust to continue and finish the administration of the estate of the decedent.

"The simple change of name of the national bank did not disturb its corporate identity or continuity of existence, which has remained uninterrupted. See Act of Congress of May 1, 1886, c. 73, Section 2, 24 U. S. Sts. at Large, 18 (12 USCA Section 30)."

In the second Worcester County National Bank case, the consolidation of the Fitchburg Bank of Worcester was likewise involved. The Worcester County National Bank filed a petition with the probate court of Worcester County for leave to render an account as

Executor of the Estate of Julia A. Legnard, Deceased, of which estate the bank and trust company had been appointed and duly qualified as executor prior to its consolidation with the national bank. No change in the administration of the estate appeared on the court record. Leave to so account was denied. The Court said, in considering the effect of the consolidation upon the status of the state banking institution: (162 N. E. 220)

“The next question to be determined is what is the legal effect of such consolidation upon the trust company and upon the national bank. The words of said section 3 (44 U. S. Stat. at Large, pt. 2, pp. 1225, 1226), are explicit to the point that the consolidation shall be ‘under the charter of such national banking association.’ This of itself is clear indication of intent that the state trust company shall not continue as a corporation in combination with the national bank. The words of St. 1922, c. 292, amending G. L. c. 172, Section 44, are equally explicit that upon any consolidation of a Massachusetts trust company, whether with a bank or another trust company, its charter ‘shall be void except for the purpose of discharging existing obligations and liabilities.’ The statutes of this Commonwealth upon the subject of a trust company, owing its creation and existence exclusively to those statutes, must be valid and binding to this extent. The later provision of said section 3 that there shall be transferred to the national banking association and be held by it among other things the ‘franchise’ of the state bank, cannot mean its right to be a corporation. The right to transfer franchise powers of a corporation organized under the laws of one sovereignty to a corporation organized under the laws of a different sovereignty is extraordinary. It cannot be implied in the absence of explicit statutory enactment to that end. There is no such provision in the statutes of this commonwealth. Any other conclusion would be in contravention of the laws of this commonwealth. It is manifest from the terms of said section 3 (44 U. S. Stat. at Large, pt. 2, pp. 1225, 1226), and from the terms of said St. 1922, c. 292, that the charter of the trust company here in question became void on the consolidation (except for purposes not here material), and that the only corporation now operative is the national bank. The trust company as a Massachusetts corporation has ceased to be an institution capable of transacting business. The national bank existing before the consolidation has continued to exercise all its functions without alteration or modification under the same charter since the consolidation as before. The consolidation contemplated by said section 3 is an absorption of the state bank with all its assets by the national banking association, which retains its corporate identity. Its provisions differ in this particular from many statutes au-

thorizing the consolidation of corporations, which effect the extinguishment of the constituent corporations and the establishment of a new corporation.”

The latter case was appealed to the United States Supreme Court, and Mr. Chief Justice Taft, in delivering the opinion of that court, commented upon the decision of the Massachusetts Court upon the question here under consideration in the following language, 73 L. Ed. (Adv. 427) :

“The court then considered what was the legal effect of the consolidation on the trust company and the national bank, and emphasized the explicit provision of Section 3 that the consolidation was to be under the charter of the national bank. It referred again to the provision of the state law that upon the consolidation, the charter of the trust company should be ‘void except for the purpose of discharging existing obligations and liabilities.’ It held that the word ‘franchises’ directed to be transferred to the national bank by virtue of Section 3 did not mean its charter or its right to be a corporation, for that would be in contravention of the law of the commonwealth; that it was only the national bank that retained its corporate identity; that the certificate of the Comptroller did not constitute a charter but only his approval of the consolidation; that the trust company had gone out of existence and all its property had become the property of the consolidated bank; and that the latter was not a newly created organization, but an enlargement of the continuously existing national bank. Thus the court found that the identity of the trust company had not been continued in a national bank, but had been extinguished. The court distinguished this case from cases of union where contract obligations had been held to pass from one of the uniting corporations to the other. Such cases were held not to be applicable to sustain the view that positions of trust like executor, administrator and other fiduciaries could be transferred to the national bank by the mere consolidation under Massachusetts law.”

It will be noted that, while the holding of the state court is not expressly adopted or approved, no dissent is expressed. The Act of Congress clearly provides that the consolidation shall take place under the charter of the existing national bank, and the decision in the Massachusetts case clearly holds that the corporate existence of the state bank or trust company consolidating with the national bank is not rendered void and its corporate existence dissolved by the mere fact of such consolidation. The legal effect of such a consolidation upon the charter and corporate existence of the state institution depends upon the laws of the state under which the institution is organized. In Massachusetts,



the state statute specifically provides that the charter of a state institution shall become void upon consolidation with any other bank or trust company, and since its scope is not limited to the consolidation of one state institution with another state institution, it was held to apply to the case of the consolidation of a state banking institution with a national banking association.

On the other hand, it would seem to be contrary to every principle of law that a corporation created under the laws of one sovereignty could be dissolved and its corporate existence terminated by virtue of the provisions of a law of another sovereignty in the absence of the express consent, evidenced by legislative enactment, of the sovereignty creating such corporation. We can see no escape from this proposition, and it is supported by the authority above cited.

The only statute in Pennsylvania relative to the disposition of the charter of a state bank upon its affiliation with a national bank is the Act of April 26, 1889, P. L. 56, which provides a method for the surrender of the charter of a state bank upon its becoming a national banking association, but the surrender takes place only upon compliance with the requirements of the Act. If, therefore, in any case in which a bank or trust company of this Commonwealth is consolidated with a national banking institution under the Act of Congress referred to above, the provisions of the Act of 1889 just referred to are also followed, a surrender of the charter of the state bank or trust company will necessarily follow.

You are, therefore, advised that, unless the provisions of the Act of April 26, 1889, P. L. 56, are followed, the consolidation of a state bank or trust company with a national bank, under the Act of Congress of February 27, 1927, does not void the charter or terminate the corporate existence of such state bank or trust company. Proceedings should be taken by the proper officers of the state institution to effect a voluntary dissolution under the provisions of the Act of April 9, 1856, P. L. 293. If such proceedings are not taken, you should return such institution to the Attorney General, under the provisions of Section 17 of the Banking Act of 1923 (Act of June 15, 1923, P. L. 809), as amended by the Act of May 5, 1927, P. L. 762, for the institution of quo warranto proceedings.

Very truly yours,

DEPARTMENT OF JUSTICE,

PAUL C. WAGNER,

*Deputy Attorney General*

*"Corporations—Charters—Title insurance—Acts of April 29, 1874, and May 9, 1889.*

1. A corporation incorporated for the insurance of owners of real estate, mortgagees or others interested in real estate from loss by reason of defective titles, liens and encumbrances must be organized under the provisions of clause xix of sub-division 2 of section 2 of the Act of April 29, 1874, P. L. 73.

2. Such corporation is not authorized to exercise any of the powers conferred upon it by section 29 of the Act of 1874 without having a minimum capital of \$125,000 and without having first accepted the provisions of the Act of May 9, 1889, P. L. 159.

Department of Justice,

Harrisburg Pa., August 20, 1929.

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

Sir: We beg to acknowledge receipt of your letter of August 6, in which you ask to be advised

1. Whether a corporation organized, "for the insurance of owners of real estate, mortgagees and others interested in real estate from loss by reason of defective titles, liens and encumbrances" may be incorporated under the Act of April 29, 1874, P. L. 73, as amended by the Acts of July 9, 1901, P. L. 624, and May 11, 1909, P. L. 515, with a nominal capital and the right and power of transacting a title insurance business only and,

2. Whether a corporation incorporated "for the insurance of owners of real estate, mortgagees and others interested in real estate from loss by reason of defective titles, liens and encumbrances" pursuant to the provisions of said Act of 1874, may engage in such business with a capital of less than \$125,000.00, and without having first accepted the provisions of the Act of May 9, 1889, P. L. 159.

The two questions which you have asked are so closely related, that it is advisable to answer them together.

Section 2 of the Act of 1874 referred to above, as amended from time to time, sets forth the purposes for which corporations may be formed under the provisions of the Act. Clause XIX of Subdivision 2 of said Section 2 has not been changed since 1874 and reads as follows:

"XIX. The insurance of owners of real estate, mortgagees and others interested in real estate from loss by reason of defective titles, liens and encumbrances."

Clause XVIII of Subdivision 2 of Section 2 covers the incorporation of companies for the purpose of carrying on a mechanical, mining,

quarrying or manufacturing business. This clause, by the amendment contained in the Act of July 9, 1901, P. L. 624, was expanded to include the incorporation of a company "for the transaction of any lawful business not otherwise specifically provided for by Act of Assembly."

Clause XX of Subdivision 2 of said Section 2 was amended by the Act of May 11, 1909, P. L. 515, to provide for the incorporation of a company "for any lawful purpose not specifically designated by law as the purpose for which a corporation may be formed."

In view of the fact that the incorporation of title insurance companies is specifically provided for under Clause XIX of Subdivision 2 of Section 2 of the Act of 1874, it is our opinion that no corporation for the purpose of transacting the business of such a company may be organized under the provisions of Clauses XVIII or XX of Subdivision 2 of said Section 2.

Nor in our opinion is it lawful for a corporation organized under the provisions of Clause XIX referred to above, to transact business with a capital of less than one hundred and twenty-five thousand dollars or without having first accepted the provisions of the Act of May 9, 1889, P. L. 159, referred to above.

While Clause XIX states the purposes for which a title insurance company may be formed, the powers of such company were set forth in Section 29 of the Act of April 29, 1874. This Section 29 was amended by the Act of 1889 referred to above and one of the powers conferred by Section 29 as amended by the Act of 1889 is

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

This language is practically identical with that contained in Section 29 as originally enacted in 1874. The Act of 1889 added numerous other powers including the power to act as fiduciary, to transact a trust business and to become surety and security in certain designated instances.

Paragraph 13 of Clause I of Section 29, as amended by the said Act of 1889, contains the following proviso: "Provided however, \* \* \* That before exercising any of the powers hereby conferred, each such corporation shall have a paid up capital of not less than one hundred and twenty-five thousand dollars, \* \* \* and each such company \* \* \* shall file in the office of the Secretary of the Commonwealth a certificate of its acceptance hereof \* \* \*."

It will be noted that the requirements of a minimum capital of one hundred and twenty-five thousand dollars, and the acceptance of the Act of 1889 are necessary before corporations incorporated as title insurance companies may exercise *any of the powers hereby conferred*. One of the powers conferred by the Act under discussion is the power to make insurances pertaining to or connected with titles to real estate, and it would seem evident that before such power may be exercised, the corporation desiring to exercise it must comply with the requirements above set forth.

In view of the above, the answer to both of the questions propounded by you is in the negative, and you are therefore advised that a corporation incorporated "for the insurance of owners of real estate, mortgagees or others interested in real estate from loss by reason of defective titles, liens, and encumbrances," must be organized under the provisions of Clause XIX of Subdivision 2 of Section 2 of the Act of April 29, 1874, P. L. 73, and that such a corporation is not authorized to exercise any of the powers conferred upon it by Section 29 of the said Act of 1874 without having a minimum capital of one hundred and twenty-five thousand dollars and without having first accepted the provisions of the Act of May 9, 1889, P. L. 159.

Very truly yours,

DEPARTMENT OF JUSTICE,

PAUL C. WAGNER,  
*Deputy Attorney General.*

---

*Banks and banking—Christmas clubs—Violation of Banking Acts.*

"Christmas Clubs" conducted by individuals, partnerships and associations of this State which receive deposits for repayment at Christmas are subject to the provisions of the Private Banking Act of June 19, 1911, P. L. 1060, and the Amendments of April 5, 1927, P. L. 106, and April 26, 1929, P. L. 813, and corporations doing a like business, unless so empowered by law and licensed by the Department of Banking, are violating the banking acts.

Department of Justice,

Harrisburg, Pa., December 17, 1929.

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

Sir: We have your request to be advised whether or not what are popularly known as "Christmas Clubs" conducted by individuals, asso-

ciations, and incorporated institutions in this State, come within the provisions of the Banking Acts. We understand that it has been the practice for some years past for department stores, manufacturers and other large employers to receive from their employees deposits from week to week during the year to be held by the employers, or deposited by them in banking institutions for payment back to the employees at Christmas time. In some cases this activity has taken the form of a fund operated by an unincorporated association of individuals elected from the employees of the employer concerned, and in other cases it has been carried on by corporations acting directly with the employee. You ask for an opinion as to whether or not such Christmas funds are legally operated.

A particular example of this activity which has been brought to our attention by your Department is that of a company conducting an unincorporated association in charge of individuals who are employees and possibly officers of the employer company. They receive deposits from the employees and place them on deposit in a bank, drawing from such deposit account from time to time for the purpose of loaning the money to their company employer and receiving such money back in time to make payment thereof to the employee depositors at such time as they desire to withdraw such deposits, particularly shortly before Christmas of each year.

The Private Banking Act of June 19, 1911, P. L. 1060, as amended by the Act of April 5, 1927, P. L. 106, and the Act of April 26, 1929, P. L. 813, provides as follows:

“That, except as provided in section eight (8), no individual, partnership, or unincorporated association shall hereafter engage, directly or indirectly, in the business of receiving deposits of money for safe-keeping or for the purpose of transmission to another, or for any other purpose, without having first obtained from a board, consisting of the State Treasurer, the Secretary of the Commonwealth, the Secretary of Banking,—hereinafter referred to as the ‘Board’,—a license to engage in such business.  
\* \* \*

Section 8 provides for various exceptions such as corporations authorized to do a banking business, hotel keepers, certain public service corporations, individuals complying with the requirements for the filing of bonds as private bankers with the Commissioner of Banking, those engaged in business as private bankers for a period of seven years prior to the approval of the Act, etc.

Organizations such as that above referred to do not come within these exceptions. They are transacting a business of receiving deposits of money for safe-keeping and for the purpose of transmission to another, or for some other purpose, and by collecting such funds they violate the Private Banking Act.

There is no question that the collecting of such funds for the purpose of conducting a savings account comes within the terms of that Act. In *Commonwealth vs. Bilotta*, 61 Pa. Sup. 264 (1914), the Court, deciding that the Act of June 19, 1911, P. L. 1060, was constitutional, stated the following:

“The business of receiving deposits is so manifestly germane to and so universally associated with the business of banking, that a general statute which in its title declares a purpose to provide for the licensing and regulating of private banking, naturally suggests to the mind that the statute will make provision for the protection of those who deposit money in such banks. The receiving of deposits is a part of the business of such banks. The provisions of this statute which relate to the conditions upon which private bankers may be permitted to receive deposits are germane to the general subject of regulating the business of private banking, expressed in the title of the statute.  
\* \* \*

You have called to our attention the practice of a certain loan company which under a charter granted by the Commonwealth of Pennsylvania is limited in purpose to the loaning of money to the public and to purchasing and selling various kinds of securities in connection with the conduct of said loan business. Under the guise of selling subscriptions to those bonds by weekly payments of small amounts on account of such purchase, this company is actually conducting a Christmas Club and is not primarily endeavoring to sell its bonds. Such a proceeding has no connection with its loan business and is merely a subterfuge for transacting a private banking business. In its contract with the depositor it agrees to return the amount of the subscription at any time upon proper notice and it does not insist at the end of the subscription payment upon delivering its bond to the subscriber, but gives him the opportunity to accept cash in lieu thereof, which, we understand, is the usual practice. Obviously, a corporation without banking powers cannot engage in such an undertaking. To do so it must have its charter amended and thereby come directly under the control of the Department of Banking. Its present practice of conducting what is generally known and is advertised as a “Christmas Club,” under whatever guise, is illegal.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

*Deputy Attorney General.*

*Trust companies—Banks and banking—Merger—Powers of merged companies—Continuance of trusts.*

1. The Orphans' Court is not required by law to appoint substituted trustees for trust estates held by a trust company that merged or consolidated with another trust company prior to the Act of April 26, 1929, P. L. 839, or that after that date merges or consolidates with another trust company.

2. The Orphans' Court is not required by law to appoint substituted trustees for trust estates held by a trust company that merged or consolidated with a national banking association prior to April 26, 1929, or that after that date merges or consolidates with a national banking association.

3. That no legal action is necessary for the transfer of trust estates from a national banking association to a trust company when the merger or consolidation of the two was effected either prior to or after April 26, 1929.

4. In the case where a trust company, under an agreement to collect and liquidate all the assets of another trust company having fiduciary powers, takes over such assets and assumes all the deposit liabilities of said company, such procedure is not such a "merger" or "consolidation" as would come within the provisions of the Act of April 26, 1929.

Department of Justice,

Harrisburg, Pa., February 24, 1930.

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

Sir: We have received your request for an opinion from this Department on various questions arising by reason of the enactment of Acts of Assembly Nos. 365 and 366, approved April 26, 1929, both being P. L. 839.

Act No. 365 authorizes merged or consolidated corporations, possessing fiduciary powers and composed of trust companies, or banking companies, or both, whether created by the Commonwealth or the Federal Government, and located in the Commonwealth, to act in any fiduciary capacity under instruments naming or appointing one of their constituent companies to such fiduciary capacity. Act No. 365 validates the grant of letters testamentary in all relationships of any fiduciary nature assumed by, and acts in fiduciary capacities performed by, merged or consolidated corporations, such as those just referred to, under like instruments of appointment.

These questions are as follows:

I.

Is an Orphans' Court required by law to appoint substituted trustees for trust estates held by a trust company (a) that merged or consolidated with another trust company prior to April 26, 1929, or (b) that merges or consolidates with another trust company after April 26, 1929, or are the trust estates in either or both cases transferred under authority of the said Acts of 1929?

## II.

Is an Orphans' Court required by law to appoint substituted trustees for trust estates held by a trust company (a) that merged or consolidated prior to April 26, 1929, with a national banking association authorized to act in fiduciary capacities, or (b) that merges or consolidates with such national banking association after April 26, 1929, or are the trust estates transferred in either or both cases under authority of the said Acts of 1929.

## III.

What legal action is necessary for the transfer of trust estates from a national banking association to a trust company, in the case of the merger or consolidation of such companies prior to, as well as after, April 26, 1929?

## IV.

In the case where a trust company, under an agreement to collect and liquidate all the assets of another trust company having fiduciary powers, takes over such assets and assumes all the deposit liabilities of said company, is such procedure a "merger" or "consolidation" as would come within the provisions of the Acts referred to?

It is clear from the titles of the Acts and their phraseology that the purpose of their enactment was to remove uncertainty as to the legality of fiduciary acts performed by a trust company or banking company, following a merger or consolidation with another institution duly appointed and acting as fiduciary prior to such merger or consolidation, and at the same time to ensure, in the case of such mergers or consolidations in the future, that the powers and rights of the merged or consolidated company theretofore acting as fiduciary automatically and legally pass from it to its successor without further action on the part of such fiduciary or any judicial authority having jurisdiction over it.

The question arises, however, as to whether or not the Legislature has the power to interfere in any way with the jurisdiction of the various Orphans' Courts of the Commonwealth in appointing such fiduciaries and superintending their activities. Article V, Section 22, of the Constitution of the Commonwealth of 1873, provides that the various Orphans' Courts:

" \* \* \* shall exercise all the jurisdiction and powers now vested in or which may hereafter be conferred upon the orphans' courts \* \* \* "

and that

"In every county orphans' courts shall possess all the powers and jurisdiction of a registers' court and separate registers' courts are hereby abolished."



First reference to Registers' Courts is found in the Constitution of 1790, where Article V, Section 7, prescribes the composition thereof, but says nothing about their powers or jurisdiction. This section is copied verbatim in the Constitution of 1838, under like article and section. We must look to legislative enactment for such powers and jurisdiction. Section 23 of the Act of June 14, 1836, P. L. 628, 634, and Section 19 of the Act of June 16, 1836, P. L. 784, 792, both now repealed, enumerate such powers. These sections are followed almost completely by the Act of June 7, 1917, P. L. 363, where, in Section 9, subsections (a), (b), (c) and (d), the jurisdiction of the several Orphans' Courts of the Commonwealth, whether separate or otherwise, is held to extend to and embrace the appointment of various fiduciaries and the control of their activities. The concluding paragraph of said Section 9 is as follows:

“And such jurisdiction shall be exercised under the limitations and in the manner provided by law.”

In the absence of such a clause as is quoted, there might have been a question as to whether or not the Legislature, by subsequent Act, could have in any way restricted the exercise of duly granted powers or interfered with the jurisdiction of the Courts so far as the supervision and administration of estates in the hands of previously appointed trustees is concerned. It might well be that while a certain trust company is, as trustee of an estate, satisfactory to an Orphans' Court or the beneficiary, it might cease to be when merged with another institution, and the Court of its own will or on petition of the beneficiary might desire to exercise its supervisory power in such manner as to take the trust estate out of the control of the merged institution. However, in the absence of constitutional limitation and in view of the clause referred to, it seems clear that the Legislature, in granting various rights and privileges to the Orphans' Courts in the Act of 1917, intended that such powers and jurisdiction should be at all times within the control of the Legislature and not definitely beyond abridgment or modification by it. So far as we have been able to discover, there is nothing in the books holding that the Act of 1917 improperly curtailed such powers and jurisdiction.

It would seem, therefore, that the two Acts of 1929 are clear as to title and purpose and would be held constitutional even in the event of an attack upon them as infringing upon the powers of the Orphans' Courts. In any case, with these Acts on the statute books, so far as the Department of Banking is concerned, there should be no hesitancy in considering that the effect of this new legislation is to carry on uninterrupted the fiduciary relationship of trustee to cestui que trust, even though the trustee ceases to exist as the entity it was when named or appointed for the trust estate, but becomes merged with another institu-

tion, which was previously a stranger to the trust. So far as the Department of Banking is concerned, no remedial decree on the part of the Orphans' Court is required. In answer to Questions I, II and III above listed, you are, therefore, advised as follows:

I.

The Orphans' Court is not required by law to appoint substituted trustees for trust estates held by a trust company that merged or consolidated with another trust company prior to April 26, 1929, or that after that date merges or consolidates with another trust company.

II.

The Orphans' Court is not required by law to appoint substituted trustees for trust estates held by a trust company that merged or consolidated with another banking association prior to April 26, 1929, or that after that date merges or consolidates with a national banking association.

III.

That no legal action is necessary for the transfer of trust estates from a national banking association to a trust company, when the merger or consolidation of the two was effected either prior to or after April 26, 1929.

The fourth question relates to the meaning of the words "merger" and "consolidation" in the Acts of 1929. Are the words used in the sense in which they appear in other Acts of the Legislature relative to mergers and consolidations of banks and trust companies?

The Act of May 3, 1909, P. L. 408, authorizes the merger and consolidation of two or more companies organized and existing under the laws of the Commonwealth and transacting the same or a similar line of business, thereby creating a new entity existing by virtue of a charter of the Commonwealth. It can have no application to the merging or consolidation of a Pennsylvania trust company with a national banking association. Consequently, the words "merger and consolidation" used in the Acts of 1929 referred to are not used in the same sense as in the Act of 1909.

The Act of May 9, 1923, P. L. 174, provides for the succession of merged or consolidated trust or banking companies incorporated under the laws of the Commonwealth to all the relations, obligations and liabilities of the component companies, and further provides that such new corporation "shall execute and perform all the trusts and duties devolving upon it in the same manner as though it had itself assumed the relation or trust." In this Act the words "merger" and "consolidation" are used in the same sense as in the Act of 1909.

The Act of April 16, 1929, P. L. 522, provides for the "merger and

consolidation'' of national banking associations with State banks, trust companies, or banks and trust companies, whereby the rights, franchises and interests of the national banking association in and to every species of property are transferred to the State institution, which, under the provisions of Section 7 of that Act, holds and enjoys all the rights and property, etc., of the national banking association, *inter alia* :

“ \* \* \* including the right of succession as trustee, executor, or in any other fiduciary capacity, if qualified by its charter under the laws of this Commonwealth, in the same manner and to the same extent as was held and enjoyed by such national banking association.”

The Act of April 25, 1929, P. L. 763, provides for the conversion of national banking associations into State banks or trust companies, which by the provisions of Section 8 succeed to the fiduciary rights and powers of such national banking associations in the same manner as is provided by Section 7 of the Act of April 16, 1929, P. L. 522.

In the latter two acts the use of the words is in a somewhat different sense than in the Acts of 1909 and 1923. Nevertheless, it seems that the words “merger or consolidation” in all of the Acts of 1929 herein referred to are intended to cover only those cases where, by proper action of their stockholders, two or more trust or banking companies join together all of their corporate rights, franchises, privileges and interests. Such a situation does not exist where there is merely a taking over of the physical assets of one company by another, or an absorption of one company by another, caused by an assignment of the property for the benefit of the creditors, or otherwise. No new corporation is created and no merged or consolidated corporation succeeds to all the rights, powers, privileges, franchises and interests of the “absorbed” company, as is contemplated by the Acts of 1909, 1923 and 1929. Consequently, there is no “merger and consolidation.”

In answer to Question IV above listed, you are, therefore, advised as follows:

#### IV.

In the case where a trust company, under an agreement to collect and liquidate all the assets of another trust company having fiduciary powers, takes over such assets and assumes all the deposit liabilities of said company, such procedure is not a “merger” or “consolidation” as would come within the provisions of the Acts of April 26, 1929.

In such cases the Department of Banking could properly require a decree by the Orphans’ Court having jurisdiction authorizing the bank

which took over the assets to act as substituted trustee for the bank as-signing them.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

*Deputy Attorney General.*

---

*"Thrift Corporation"—"Thrift Plan"—Duties of Secretary of Banking—Act of May 5, 1921, P. L. 374.*

Individuals, firms, partnerships, associations or corporations carrying on a thrift plan are subject to the provisions of the Act of May 5, 1921, and it is the duty of the Secretary of Banking to require such persons or corporations to comply with the provisions of that act, relative to the procuring of a license from and the deposit of security with the Secretary of Banking.

Department of Justice,

Harrisburg, Pa., March 27, 1930.

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

Sir: We have your request for an opinion as to the application of the Act of May 5, 1921, P. L. 374, to those individuals, firms, partnerships, associations, or corporations operating and selling thrift and savings plans in connection with the maintenance of a trustee account and the issuance of life and casualty insurance policies. You have submitted to us copies of applications, agreements, advertising literature, receipt books, and other data showing the nature of the activities carried on by such "Thrift Corporations" under the name of "thrift plans," which seem to consist of the following:

The thrift corporation solicits an individual to enter into a contract with it whereby the individual agrees to pay a certain sum each month for a definite period, usually ten years, to a bank acting as trustee, which later becomes a party to the agreement. In most cases, the agreement provides for life and health and accident insurance for the benefit of the subscriber. The trustee is authorized to pay out of these monthly deposits the premiums on such insurance policies, and to carry for the account of the individual the balance of such deposits at interest, which balance, if any exists, may be withdrawn during the term of the contract, after allowing to the trustee commissions for services rendered. The subscriber makes his initial deposit at the time he signs the application and agreement on solicitation by the thrift corporation, whose receipt is given for this deposit. Usually, after the subscriber

is accepted as a risk by the insurance company, or companies, and the policies are issued, delivery thereof, together with the initial deposit, less commission to the thrift corporation, is made to the trustee, which thereupon issues a receipt book, which, with the insurance policies and a copy of the agreement, is turned over to the thrift corporation and delivered by it to the subscriber.

The subscriber makes all deposits subsequent to the initial one direct to the trustee, which is authorized to make an annual service charge. The thrift corporation itself, in most cases, receives an original fee for its negotiation of the contract, and, in some cases, subsequent fees for keeping the subscriber informed of the due dates of insurance premiums and monthly deposits.

The balance in the subscriber's account, if any, after the payment of insurance premiums and other fees, is invested by the trustee in securities which may be legal investments for fiduciaries or non-legal investments, selected by officers of the trustee company alone or acting jointly with officers or representatives of the thrift corporation.

Individuals, partnerships, associations and corporations operate this plan with variations in more or less unessential details. In doing so they are primarily engaging in the business of "issuing, negotiating, offering for sale, or selling any contract on the partial payment or installment plan," under which contract all or part of the total amount received is to be repaid at some future time, as covered by the provisions of Section 2 of the Act of May 5, 1921.

Section 12 of the Act exempts various individuals, copartnerships, associations and corporations from the application of its provisions. "Thrift Corporations" of the character here considered do not come within these exceptions.

You are, therefore, advised that individuals, firms, partnerships, associations, or corporations carrying on a thrift plan, generally as above outlined, are subject to the terms and provisions of the Act of May 5, 1921, and it is the duty of your Department to require such persons or corporations to comply with the provisions of that Act relative to the procuring of a license from and the deposit of security with you, and otherwise.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

*Deputy Attorney General.*

*Trust companies—Investment of trust funds—First mortgage on real estate—Participation certificates.*

A trust company may invest trust funds in a first mortgage of an individual or individuals on real estate in this Commonwealth securing a collateral form note given by an individual or individuals, and in participation certificates issued by a trust company against deposits with it of such mortgages securing such notes.

Department of Justice,

Harrisburg, Pa., May 6, 1930.

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

Sir: We have your request for an opinion as to whether a trust company may invest trust funds in its possession in:

(a) A first mortgage on real estate in this Commonwealth securing a collateral form note, and

(b) Participation certificates issued against first mortgages on such real estate securing collateral notes.

Section 41 (a) 1 of the Act of Assembly, approved June 7, 1917, P. L. 447, as amended from time to time, and finally amended by the Act of April 26, 1929, P. L. 817, provides 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 first mortgages on real estate in this Commonwealth, securing bonds or other obligations not exceeding in amount two-thirds of the fair value of such real estate; \* \* \* or in trust certificates, issued by a trust company organized under the laws of this Commonwealth, certifying that the holders thereof are respectively the owners of undivided interests in deposits, with such trust company, of securities in which trust funds may be invested under the preceding provisions of this clause: \* \* \*.”

It appears that the Act, as amended, authorizes fiduciaries to invest funds in their possession in “first mortgages on real estate in this Commonwealth, securing bonds or other obligations not exceeding in amount two-thirds of the fair value of such real estate.” Clearly, a collateral form note, that is to say, a promissory or judgment note, secured by collateral, therein referred to, comes within the category of “other obligations.”

The Act, as amended, also provides that such funds may be invested “in trust certificates, issued by a trust company organized under the

laws of this Commonwealth, certifying that the holders thereof are respectively the owners of undivided interests in deposits, with such trust company, of securities in which trust funds may be invested under the preceding provisions of this clause." Such deposits of securities may include a collateral form note or notes secured by first mortgages of the character referred to in the section, which mortgages are made a part of the deposit along with the note or notes they secure.

The opinions of this Department of May 10, 1926, December 10, 1926, February 8, 1927, April 26, 1927, and August 10, 1927, given in response to your requests for advice on somewhat similar phases of the same question, are referred to in connection with your present inquiry.

You are, therefore, advised that it is legal for a trust company to invest trust funds in a first mortgage of an individual or individuals on real estate in this Commonwealth securing a collateral form note given by an individual or individuals, and in participation certificates issued by a trust company organized under the laws of this Commonwealth against deposits with it of such mortgages securing such notes.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

*Deputy Attorney General.*

---

*Mortgage guaranty company—Supervision by Department of Banking—Act of June 15, 1923, sec. 4—Receipt of money.*

Under the provisions of section 4 of the Banking Act of June 15, 1923, P. L. 509, a mortgage guaranty company is not subject to supervision and regulation by the Department of Banking unless by its charter it has power to and actually does receive money on deposit or for safe-keeping.

Department of Justice,

Harrisburg, Pa., June 25, 1930.

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

Sir: You have requested an opinion on your right to examine and supervise mortgage guarantee corporations which do not have the power to receive and do not receive deposits.

In the opinion of this Department to your Department under date of May 10, 1926, Official Opinions of the Attorney General 1925-1926, page 127, it was stated that Pennsylvania corporations formed for the

purpose of guaranteeing mortgages are subject to the supervision and regulation of your Department. No distinction, however, was drawn in that opinion between mortgage guarantee corporations having the power to receive and receiving money on deposit and for safe-keeping and such corporations not having and not exercising such power.

Section 4 of the Banking Act of June 15, 1923, P. L. 809, provides, *inter alia*, as follows:

“The said supervision, duties, and powers shall extend and apply to the following corporations now or hereafter incorporated under the laws of this State or under the laws of any other State and authorized to transact business in this State; namely, all such corporations having power to receive and receiving money on deposit or for safe-keeping otherwise than as bailee, including all banks, banking companies, cooperative banking associations, trust, safe deposit, real estate, mortgage, title insurance, guarantee, surety, and indemnity companies, savings institutions, savings banks and provident institutions. \* \* \* ”

It is clear that the Legislature in enacting this law did not intend that the Department of Banking should have under its supervision mortgage guarantee companies unless such companies, not only had the power to receive, but also did receive money on deposit or for safe-keeping otherwise than as bailee. It would appear, therefore, that unless a mortgage guarantee corporation actually has the charter power to receive money on deposit or for safe-keeping and exercises such power, it is not within the scope of the Banking Act of 1923 and does not, therefore, come under the supervision, duties and powers of your Department.

You are, therefore, advised that a mortgage guarantee company not having the power to receive and receiving money on deposit or for safe-keeping is not within the supervision of your Department. Consequently, you are not required by law to demand called reports of such companies nor to examine them.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

*Deputy Attorney General.*

---

*Trust companies—Minimum number of directors—Act of 1926, P. L. 30.*

The Act of February 19, 1926, provides all banks, banking companies and trust companies of the Commonwealth must have a minimum of five directors.



Department of Justice,  
Harrisburg, Pa., June 25, 1930.

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

Sir: You have asked for an opinion on the minimum number of directors of a bank or trust company required by the laws of the Commonwealth.

Trust companies, so called, enjoy powers granted to title companies incorporated under the provisions of Clause XIX of Section 2 of the Act of April 29, 1874, P. L. 73, as amended by the Act of May 9, 1889, P. L. 159. Paragraph 2 of Section 5 of the Act of 1874, providing for the election of officers and directors of corporations organized under the Act, reads, *inter alia*, as follows: "The number of directors or trustees shall not be less than three. \* \* \*"

The Act of June 17, 1887, P. L. 411, Section 1, supplements Section 5 of the Act of 1874 by permitting stockholders of corporations to divide their directors or managers into two, three or four classes and to elect the different classes for terms varying from one to four years. To this extent the Act of 1874, Section 5, is supplemented, but not amended.

The Act of February 19, 1926, P. L. 30, provides:

"That in all banks, banking corporations or trust companies, heretofore incorporated under special acts of the Legislature, or heretofore or hereafter incorporated under the laws of this Commonwealth concerning banks, banking corporations or trust companies, the board of directors may consist of any number not less than five. \* \* \*"

Section 2 of this Act repeals all acts and parts of acts, general, local or special, so far as they are inconsistent with the provisions of Section 1. While no specific mention is made of Section 5 of the Act of 1874, to the extent that trust companies shall have a minimum of five directors instead of three, the Act of 1874 is nevertheless amended.

By the provisions of the Act of May 6, 1927, P. L. 828, Section 5 of the Act of 1874 is again supplemented in that a clause is added with respect to the board of trustees or managers of corporations of the first class, but nothing is said in the Act of 1927 with respect to corporations of the second class, which, of course, includes trust companies. Furthermore, nothing is said with reference to the effect of the Act of 1926 on Section 5 of the Act of 1874.

So far as the term of office of directors of trust companies is concerned, as provided by the Act of June 17, 1887, there is no change

caused by the legislation of 1926 and 1927 referred to, and the Act of 1887, in this respect, is the law of the Commonwealth.

There is a question, however, as to whether the Act of 1927, by virtually re-enacting Section 5 of the Act of 1874 and supplementing it so far as first class corporations are concerned, restores the situation with respect to directors of trust companies as it existed prior to the enactment of the Act of February 19, 1926.

It is a rule of interpretation followed in an unbroken line of decisions in the Commonwealth that a general affirmative statute will not repeal a previous particular statute upon the same subject, though the provisions of the former be different from those of the latter.

It is, therefore, our opinion that, so far as trust companies are concerned, the Act of 1926 is still the law of the Commonwealth and is not modified nor amended by the Act of 1927. You are, therefore, advised that the minimum number of directors of a trust company required by the law of the Commonwealth is five and not three.

Banking companies incorporated under the Act of May 13, 1876, P. L. 161, are required by Section 12 thereof, as amended by the Act of July 19, 1917, P. L. 1101, to have not less than five directors. There is no ambiguity in the legislation in the case of such institutions as there seems to be with respect to trust companies.

You are, therefore, advised that, as provided by the Act of February 19, 1926, all banks, banking companies and trust companies of the Commonwealth must have a minimum of five directors.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

*Deputy Attorney General.*

---

*Trust companies—Suretyship on bonds—Act of May 16, 1923—"Fiduciary"—  
Meaning—Inclusion of tax collector.*

1. Neither a bank nor a trust company may act as surety except as permitted by section 2 of the Act of May 16, 1923, P. L. 248, and the words "other fiduciary," as used therein, do not include a tax collector.

2. The term "fiduciary," as used in the Act of 1923, refers to an individual or institution so known and described in common usage, and is not used in the broad sense of one who holds funds not his own in trust for another without being a technical trustee.

Department of Justice,

Harrisburg, Pa., July 1, 1930.

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

Sir: We have your request for an opinion on the right of a trust company to act as surety on a tax collector's bond.

The matter of trust companies and banks acting as sureties on bonds in general was discussed in the opinion of this Department to your Department of September 26, 1924, (Report and Official Opinions of the Attorney General, 1923-1924, p. 100), in which the Act of May 16, 1923, P. L. 248, was construed. While the specific matter covered by that opinion was the question whether a bank could act as surety on bonds of contractors for the faithful performance of their contracts, the general conclusion was reached that trust companies and banks could not become sureties on bonds except as provided in Section 2 of the Act of 1923. This section reads as follows:

"No bank shall become surety on any bonds, except that any bank, which has qualified itself under the laws of this Commonwealth to engage in a fiduciary business, may become sole surety in any case where, by law, one or more sureties are or may be required for the faithful performance of the duties of any assignee, receiver, guardian, committee, executor, administrator, trustee, or other fiduciary, and may also become sole surety on any writ of error or appeal, or in any proceeding instituted in any court of this Commonwealth in which security is or may be required; Provided, That nothing in this act shall be construed to dispense with the approval of any court or officer now or hereafter required by law to approve such security."

Section 1 of this Act states that the word "bank" as used in the Act, means "any State bank, incorporated banking company, trust company, savings bank, or unincorporated bank, heretofore or hereafter organized."

The question arises whether the words "other fiduciary" in Section 2 include a tax collector. The right of a "bank" to act as surety for fiduciaries would appear to be limited by the Act of 1923 to those cases involving what are called technical trusts, such as are executed by a bank or trust company "which has qualified itself under the laws of this Commonwealth to engage in a fiduciary business."

Section 1, clause 1, of the Act of May 9, 1889, P. L. 159, which gives title companies of the Commonwealth various powers and rights,—by assuming which, upon compliance with certain requisites as pre-

scribed by the Act, such companies become trust companies in the general sense of the word,—includes the following:

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

Trust companies exercising such powers come within the jurisdiction of the various Orphans' Courts of the Commonwealth and are subject to the provisions of the Act of June 3, 1917, P. L. 447, known as the Fiduciaries Act of 1917. Section 1 defines “fiduciary,” as used in the act, as including “executors, administrators, guardians, and trustees, whether domiciliary or ancillary subject to the jurisdiction of the orphans' court of any county of this Commonwealth.”

It would, accordingly, appear that a fiduciary within the meaning of the Act of 1923 is the type of individual or institution known in common parlance and defined in the Century Dictionary and Encyclopedia as “one who holds a thing in trust; a trustee.”

To give the term, as used in the Act of 1923, a wider meaning would result in an expansion of the field far beyond any reasonable limits. To be sure there are persons and institutions which may be and are at times considered to be fiduciaries in that they hold funds not their own for another. Many individuals in private and public capacity at some time in the course of the performance of their duties are fiduciaries in the broadest sense. A street car conductor holding fares, a theater box office attendant receiving payment for tickets sold, a milk wagon driver collecting cash on his rounds from customer to customer; all of these individuals are fiduciaries as long as they hold what is not theirs for delivery at the proper time to their employers, the true owners. The world, however, knows them, not as “fiduciaries,” but as conductors, box office agents, and milk wagon drivers, which is their true and primary capacity. And so a tax collector is primarily a collector of taxes and only secondarily a fiduciary.

Merely because a person is temporarily holding funds he has collected for another may be in a broad sense a fiduciary is no justification for a trust company to become surety for him. That might involve liability for the faithful performance of his office above and beyond his duties as a holder of funds. Were a trust company surety for a tax collector, it would be liable for his acts as a public officer while engaged in collecting taxes before he became a “fiduciary” even in the broadest use of that term. It cannot be seriously considered that the Legislature, in passing the Act of 1923, had any intention of giving a bank such power.

It is, therefore, our conclusion that the words "other fiduciary," as used in the Act of May 16, 1923, do not include a tax collector. In so deciding we refer you to a previous interpretation of this Act with reference to notaries public and county officers, as set forth in the opinion of this Department to the Secretary of the Commonwealth dated October 31, 1923. Therein it is stated that the Act of 1923 limits the authority of trust and banking companies to serving as sureties for those generally classed as fiduciaries and on bonds on appeal and for court where security is required. The opinion further states that what constitutes a fiduciary relationship is often the subject of controversy, but it seems generally to be limited to technical trustees, and, therefore, does not include notaries public or county officers, both of which are classified as public officers and not as fiduciaries, at least if the word is used as applying to technical trustees. The same conclusion must be reached with reference to tax collectors, who are unquestionably public officers.

You are advised that a tax collector is not a fiduciary and cannot be so considered in the sense in which that word is used in the Act of May 16, 1923, and that, therefore, a trust company does not have the right to act as surety on his bond.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

*Deputy Attorney General.*

---

---

OPINIONS TO THE BUDGET  
SECRETARY

---

---

## OPINIONS TO THE BUDGET SECRETARY

*State employes—Temporary employment—Approval of Governor—Section 214 of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177.*

The Governor must approve the number and compensation of all employes whose employment is authorized and regulated by Section 214 of the Code.

Department of Justice,

Harrisburg, Pa., December 30, 1930.

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

Sir: You have requested us to advise you whether departments, boards and commissions which are required to obtain the Governor's approval for the employment of permanent employes upon a regular salary basis, may lawfully employ temporary help upon a daily, weekly, or monthly wage basis without obtaining the Governor's approval.

We understand that a number of such administrative agencies have habitually employed temporary help without obtaining the Governor's approval. In certain cases this practice has been due to emergency work and in other cases to a desire to determine whether such person is qualified to perform the work to be done.

Section 214 of The Administrative Code of 1929 (Act of April 9, 1929, P. L. 177) provides that excepting the Auditor General and State Treasurer the heads of the several administrative departments and the independent administrative boards and commissions, shall appoint and fix the compensation of such officers and employes as may be required for the proper conduct of the work of the respective departments, boards and commissions. Also that the heads of the respective administrative departments shall, except as otherwise provided in other sections of the Code, appoint and fix the compensation of officers and employes necessary to perform the work of any departmental administrative boards, commissions or officers, and of any advisory boards or commissions established in their respective departments. After making these provisions the section continues: "

"The number and compensation of all employes appointed under this section shall be subject to approval 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,"

This provision is of general application and permits no exception. It renders it unlawful for any person to be employed by department heads (except the Auditor General and State Treasurer) or by independent administrative boards or commissions beyond the number of employes which the Governor has approved. It prohibits the employment by these agencies of any employe for any type of work except at compensation approved by the Governor. It requires the compensation of all employes appointed under Section 214 to be in accordance with the standards established by the Executive Board, after the Executive Board has established standards for the particular type of employment involved.

The Governor may approve the employment of not more than a fixed number of temporary employes to be paid upon a per day, per week or per month basis at the compensation established as standard by the Executive Board. For work covered by the Executive Board's classification, and for which an annual salary is provided, it is unlawful to employ persons at a daily, weekly or monthly rate, except that a person may be engaged only temporarily, but in such cases the rate of pay must be that established by the Executive Board. If, on the other hand, the Executive Board's classification does not cover a particular class of work, the rate of compensation may be established by the Department head or the independent administrative board or commission making the temporary appointment, but the rate must have the approval of the Governor.

Any different conclusion would render it possible for department heads or for independent administrative boards or commissions to evade the provisions of Section 214 which clearly require the Governor's approval as to the number and compensation of all employes engaged for the State's service by departments other than those over which the Auditor General and State Treasurer preside, or by independent administrative boards or commissions.

You have also asked us to advise whether there is any distinction between part-time employes and full-time employes, as far as concerns the necessity for approval by the Governor of the number and compensation of employes.

There is no distinction. The Governor must approve the number and compensation of all employes whose employment is authorized and regulated by Section 214 of the Code. This includes full-time, part-time, temporary, permanent, regular and emergency employes, whether they be paid on an hourly, weekly, monthly or annual basis.

In all cases, if the classification covers the type of employment in operation, the employing department, board or commission in fixing compensation and the Governor in approving it, must abide by the



classification. If the classification does not cover the case, the employing agency and the Governor are not restricted by its provision. The Executive Board could not under any circumstances by a provision in the classification or otherwise, eliminate the necessity for approval by the Governor of the number and compensation of all persons employed for State service under Section 214 of the Code. Any provision in the existing classification purporting to do so, is unlawful and void.

So that there may be no misunderstanding as to the scope of this opinion we beg to call attention to the fact that there are a number of State employes appointed by administrative agencies whose appointments are not subject to approval by the Governor. Employees of the State educational institutions within the Department of Public Instruction other than the president, principal, or superintendent are appointed by the respective boards of trustees who also fix the compensation of such employes, but must do so "in conformity with the standards established by the Executive Board." (Section 1311 of The Code.) Employees of State institutions within the Department of Welfare are appointed in like manner. (Section 2318 of The Code.) The secretaries of the examining boards within the Department of Public Instruction are selected by the boards and their compensation is fixed by the boards with the approval of the Superintendent of Public Instruction. (Sections 412 to 425 of The Code, inclusive.) The compensation of the secretary of the Pennsylvania Historical Commission is fixed by the Commission with the approval of the Superintendent of Public Instruction. (Section 411 of The Code.)

This opinion does not apply to any of these cases, but is confined in its application to appointments made under authority of Section 214 of The Code.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*State moneys—Investment by administrative department or board—Approval by Governor—Necessity—Administrative Code of 1929, sec. 701.*

Since the passage of the Act of April 13, 1927, P. L. 207, the provisions of which were re-enacted by section 701 of The Administrative Code of April 9, 1929, P. L. 177, no administrative department, board or commission of the state government may make any investment of funds in its charge or under its control without first obtaining the approval of the Governor thereto.

Department of Justice,  
Harrisburg, Pa., October 14, 1930.

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

Sir: We have your request to be advised respecting the legality of investments made by boards of trustees of state institutions which have the right to make investments of funds donated to such boards to be held in trust for certain specific purposes stated by the donors of the funds.

A number of boards having such funds have made investments without submitting them to the Governor for approval. You desire to know whether this can lawfully be done.

Prior to the passage of the Act of April 13, 1927, P. L. 207, the boards of trustees having such funds in their care were free to make investments in their discretion and without referring their action to any other officer for approval. Section 39 of the Act of 1927 amending Section 701 of The Administrative Code of 1923 provided that:

“The Governor shall have the power and it shall be his duty\* \* \*

“(f) To approve or disapprove all investments by departments, boards, or commissions of funds administered by such departments, boards or commissions.”

This same provision was reenacted in Section 701 (f) of The Administrative Code of 1929 (Act of April 9, 1929, P. L. 177).

In view of the fact that the same Act in which occurs the provision above quoted, provides for the organization and specifies the powers and duties of all of the administrative departments, boards and commissions of the state government there can be no doubt whatever that the power conferred upon the Governor to approve or disapprove all investments by departments, boards and commissions necessarily renders it the duty of all departments, boards and commissions to submit to the Governor proposals for investment so that he may either approve or disapprove them. As all boards of trustees of state institutions are departmental administrative boards they are of course embraced within the meaning of Section 701 (f) of The Code.

Accordingly, since April 13, 1927, it has not been lawful for any department, board or commission to make any investment of funds in its charge or under its control without first obtaining the approval of the Governor.

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

---

---

OPINIONS TO THE SECRETARY OF  
THE COMMONWEALTH

---

---

## OPINIONS TO THE SECRETARY OF THE COMMONWEALTH

*Justice of the Peace—Election—Commission—Borough of Plymouth—Acts of 1839, P. L. 376; 1851, P. L. 320.*

Each of the three persons elected to the office of justice of the peace in the Borough of Plymouth is entitled to a commission as such justice of the peace.

Department of Justice,

Harrisburg, Pa., January 4, 1930.

Honorable Robert R. Lewis, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We are advised that the Borough of Plymouth, in Luzerne County, was incorporated in 1866 under the provisions of the Act of 1851, P. L. 320. Under the provisions of the Act of 1839, P. L. 376, Section 4, the borough voted in 1883 to increase the number of justices of the peace from two to four and up to the present time four justices of the peace have been commissioned in and for said borough; that the term of one of the four does not expire until 1932; that the terms of three of the four expire the first Monday of January, 1930, and that at the election held in 1929, three persons were elected. We have your request to be advised whether all three are entitled to commissions or whether under the provisions of the twenty-sixth section of the Act of 1851, P. L. 320, entitled, "An Act Regulating Boroughs," said borough is entitled to but two justices of the peace, and further, if said borough be entitled to but two justices of the peace, whether the election so held was a valid election, and if it was not a valid election, whether the Governor may appoint one person to fill the vacancy, or, if it was a valid election, whether the person receiving the highest number of votes shall be commissioned.

We are also advised that the same question arises in twelve other boroughs, wherein at the Fall Election of 1929 the number of justices elected, plus the number whose terms do not expire, exceeds the number authorized by the Act of 1851.

The question to be determined is: Did the Act of 1851, P. L. 320, repeal Section 4 of the Act of 1839, P. L. 376? We are of opinion, and so advise, that it did not, and that each of the three persons elected to the office of justice of the peace in the Borough of Plymouth is entitled to a commission as such justice of the peace. It is not necessary, therefore, to consider the other questions submitted.

Our conclusion is based upon consideration of certain constitutional and legislative provisions, to wit:

The Constitution of 1839, Article VI, Section 7;

The Act of June 21, 1839, P. L. 376, entitled, "An Act Providing for the Election of Aldermen and Justices of the Peace," Sections 1 and 4;

The Act of April 3, 1851, P. L. 320, entitled, "An Act Regulating Boroughs," Section 26;

The Constitution of 1874, Article V, Section 11, as originally adopted and in force in 1883, and as amended November 2, 1909;

The Act of May 10, 1878, P. L. 51, entitled, "A Supplement to an act, entitled 'An act to prescribe the manner in which the courts may divide boroughs into wards,' approved the fourteenth day of May, Anno Domini one thousand eight hundred and seventy-four," Section 1, as affected by the Act of 1915, P. L. 312;

The Act of May 14, 1915, P. L. 312, entitled, "An act providing a system of government for boroughs, and revising, amending, and consolidating the law relating to boroughs," Chapter XIII, Article I, Section 1 (b);

The Act of May 4, 1927, P. L. 519, entitled, "An Act concerning boroughs, and revising, amending, and consolidating the law relating to boroughs," Section 102.

The Borough of Plymouth was incorporated on April 27, 1866, under and subject to the provisions of the Act of April 3, 1851, P. L. 320.

In *Commonwealth ex rel. Palmer, Attorney General vs. Eno*, 1 Kulp 343, it was held that this borough was not entitled to elect justices of the peace from each ward and that it was restricted by the Act of 1851 to two justices of the peace.

The Court, in its opinion, also said:

"\* \* \* It seems, therefore, that before any borough organized under this act (the Act of 1851, *supra*) can be entitled to more than this number of justices, she must show some special act of legislation, or some authority derived under a general law, permitting the increase."

In *Commonwealth ex rel. vs. Isaac Morgan*, 178 Pa. 198, it was held:

"Where boroughs incorporated under the general borough act of April 3, 1851, P. L. 320, have been divided into wards under the act of May 14, 1874, P. L. 159, two justices of the peace cannot be elected for each ward in the borough, inasmuch as the supplement of the act of May 10, 1878, P. L. 51, provides that when any borough is divided into wards, by authority of the act of 1874, only two justices shall be elected by the concurrent votes of each ward. The act applies to boroughs, which, having been previously divided into wards, are further divided or subdivided under the act of 1874."

In that case the Borough of Mahanoy City was incorporated in 1863 under the General Borough Act of 1851, P. L. 320. By Special Acts of Assembly and by proceedings under the Act of 1874, P. L. 139, the borough had been divided and subdivided into wards. The electors of each ward, as so subdivided, voted for two justices of the peace, claiming the privilege by virtue of the Act of June 21, 1839, P. L. 376.

In a proceeding in quo warranto, brought to determine the title of a justice of the peace so elected, a judgment of ouster was entered. The Court, in its discussion, said, "ward," as used therein did not include wards of boroughs, and "in this respect," i. e., election of two justices by each ward, the Act of 1851 repealed the Act of 1839, therefore, only two justices might be elected by the concurrent votes of all wards.

The opinion of the Court below was adopted in a per curiam opinion by the Supreme Court.

The Court below, in its opinion said:

"\* \* \* There has been no special legislation giving to either borough the right to elect more than two justices in the whole borough, and there is no other general law upon the subject except the act of 1839. \* \* \*"

The Court clearly indicates that it had in mind in its discussion, which forms part of its opinion, only the question of the right of each ward in a borough to elect two justices, when it said:

"It was vigorously urged at the hearing of these cases that the business of both boroughs requires an unusual number of magistrates. Upon this point we need only say, that by the necessary implication of the constitution the number of justices may be increased by the consent of a majority of the qualified electors within the borough. Whenever, therefore, the borough desires to elect more than two, it has the power and the right to declare its will by the proper procedure. \* \* \*"

The Act of 1839 was again presented for consideration in the case of *Commonwealth ex rel. vs. Schwartz*, 257 Pa. 159. This was an action of quo warranto to test the right of the defendant to act as a justice of the peace in the Borough of Old Forge. The borough was incorporated May 2, 1899, and was entitled to two justices of the peace. In 1905 an election was held upon the question of increase in the number of justices and a majority of the electors voted in favor of an increase of one. The Court there recognized the validity of the election of the third justice of the peace under and pursuant to the election held in 1905 at which the question of increase in the number of justices was voted upon.

No authority for this election can be found except the constitutional provisions above noted and the Act of June 21, 1839, P. L. 376.

The only conclusion which may be drawn from an examination of the cases above noted is: that the total number of the justices of the peace which may be elected in any borough, incorporated under the Act of 1851, *supra*, may not exceed two, unless such borough shows some special act of legislation enacted prior to 1874 or some authority derived under a general law permitting the increase; that the only general law upon the subject is the Act of 1839, *supra*; that the word "ward," as used therein, does not include wards of boroughs, or if it may be so construed, then in that respect the Act of 1839 has been repealed by the Act of 1851, *supra*. This falls far short of saying that the Act of 1851 repeals Section 4 of the Act of 1839.

On the other hand, we find the implicit recognition of the validity of an election to increase the number of the justices of the peace in a borough to a greater number than two in the case of *Commonwealth ex rel. vs. Schwartz*, *supra*.

The office of a justice of the peace is not a borough office: *Commonwealth ex rel. vs. Callen*, 101 Pa. 375; *Commonwealth ex rel. vs. Cameron*, 259 Pa. 209, 212.

The Act of 1851, P. L. 320, regulating boroughs, repealed, (Section 34), all general laws of this Commonwealth inconsistent therewith. We do not find, however, the provisions of this Act, nor specifically the provisions of Section 26 of this Act, inconsistent with the provisions of Section 4 of the Act of 1839, P. L. 376, providing for an increase in the number of justices of the peace from two to four upon petition of fifty taxables by an election of the qualified voters of the borough.

The presumption goes against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed. Between the two acts there must be plain, unavoidable, and irreconcilable repugnancy, and even then the old law is repealed by implication only *pro tanto*: *York Gazette Company, Limited, vs. York County*, 25 Pa. Superior Ct. 517, 521; 36 CYC. 1071, 1074.

When the General Borough Act of 1851 was enacted, the only existing legislation providing for the election of justices of the peace and aldermen was the Act of 1839, *supra*.

To hold that the Act of 1851, *supra*, repeals Section 4 of the Act of 1839, *supra*, we must hold the proviso contained in Article VI, Section 26, to read:

Provided: That this section shall not be so construed as to authorize the commissioning of, or to have commissioned, more than two justices at the same time residing within said borough, unless under the provisions of the *Act of 1839, P. L. 376, the electors of said borough have, prior to the enactment hereof*, by a vote of the electors, increased the number of justices within the limits of any such borough or boroughs.

Under such construction we would hold that the election must have been an accomplished fact when the Act of 1851 was enacted. This construction seems untenable to us in view of the fact that Article VI, Section 26, of that Act, related only to boroughs thereafter to be incorporated. Clearly a borough could not have possessed that right at the date of the enactment of this Act, because the borough was not then in existence and could only thereafter come into existence by virtue of that Act. Further, such construction would deny the constitutional right then in force, and still in force, giving to the electors of the borough the right to increase the number of justices of the peace to exceed two, with the consent of a majority of the qualified electors within the borough.

Entertaining these views, we are of the opinion that the term, "existing laws," as used in Section 26 of that Act, does not mean by an election held prior to its enactment, and is not confined to laws existing at the date of its enactment, but is intended to mean: the law or laws then in force or thereafter enacted, by which a borough, by a vote of the electors thereof, may increase the number of justices of the peace within its limits.

We are confirmed in this opinion by the fact that it has been so interpreted in the instant case for forty-seven years and by the implicit recognition of the right of a borough to increase the number of justices of the peace, pursuant to the Act of 1839, as late as 1917, by the Supreme Court, in the case of *Commonwealth ex rel. vs. Schwartz*, supra, as well as by the general rules of statutory construction.

The rule of statutory construction, with regard to the adoption of statutes by reference is thus stated in 2 Sutherland on Statutory Construction, (2nd Ed.), page 787; (167 Pac. 169):

"Where one statute adopts the particular provisions of another, by specific and descriptive reference to the statute or provision adopted, the effect is the same as though the statute or provision adopted had been incorporated bodily into the adopting statute. When so adopted only such portion is in force as relates to the particular subject of the adopting act and as is applicable and appropriate thereto. Such adoption takes the statute as it exists, and does not include subsequent additions or modi-



fications of the statute so taken unless it does by express intent. When, however, the adopting statute makes no reference to any particular act by its title or otherwise, but refers to the general law relating to the subject in hand, the reference will be regarded as including not only the law in force at the date of adopting the act, but also the laws in force when action is taken or proceedings are resorted to.'''

Such construction is consonant with the constitutional right vested in the boroughs to increase the number of the justices of the peace by an election of the majority of the electors thereof and the general rules of statutory construction.

This result is not affected by the Act of May 10, 1878, P. L. 51. In our opinion that Act repeals by implication only Section 1 of the Act of 1839, or limits its application to boroughs created before the Act of 1878, P. L. 51, was passed.

Plymouth Borough voted to increase the number of the justices of the peace in said borough by a vote of its electors in 1883 from two to four. The increase in the number of the justices of the peace was within the maximum limitation provided in Section 4 of the Act of 1839, P. L. 376, and was a valid election under the constitutional provisions above noted and the Act of 1839, *supra*, Section 4.

Being of this opinion, you are advised that commissions may issue to the three persons whose election as justices of the peace have been certified to you.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA,

*Deputy Attorney General.*

---

*Corporations—Individuals—Registration of fictitious names—Act of June 28, 1917, P. L. 645.*

The Secretary of the Commonwealth may decline to register as the assumed or fictitious name of an individual or of individuals a name which indicates that the business conducted has been incorporated when on the face of the papers presented such is not the case.

Department of Justice,

Harrisburg, Pa., April 24, 1930.

Honorable Robert R. Lewis, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request to be advised regarding certain ques-

tions which have arisen in the administration of the Act of June 28, 1917, P. L. 645, which requires the registration of fictitious names in certain cases.

You ask:

“First: May a Pennsylvania *corporation* register in this Department and do business under an Assumed or Fictitious Name?

“Second: May a Foreign *corporation* registered in Pennsylvania register in this Department an Assumed or Fictitious Name?

“Third: May a Foreign *corporation* unregistered in Pennsylvania register an Assumed or Fictitious Name in this Department?

“Fourth: May individuals or partnerships register in this Department an Assumed or Fictitious Name containing the abbreviation ‘Inc.,’ ‘Incorporated,’ ‘Corporation’ or any other word tending to denote incorporation?”

Section 1 of the Act of 1917 provides:

“That no individual or individuals shall hereafter carry on or conduct any business in this Commonwealth, under any assumed or fictitious name, style, or designation, unless the person or persons conducting or carrying on the same shall have first filed in the office of the Secretary of the Commonwealth \* \* \* a certificate, under oath, and signed by such person or persons, setting forth the real name or names and addresses of all the persons owning or interested in said business, and also the name, style, or designation under which said business is being or will be carried on or conducted.

“Where any of the owners of said business live outside of the Commonwealth of Pennsylvania, and carry on or conduct any such business through an agent, such certificate shall also show the name and address of such agent.”

Section 3 of the act provides that “Any person carrying on or conducting any business in violation of this act shall be guilty of a misdemeanor” and punishable by a fine or imprisonment or both.

While the Act of 1917 was amended by the Acts of May 10, 1921, P. L. 465, and June 29, 1923, P. L. 979, the language above quoted was not modified.

Section 806 of The Administrative Code of 1929, (Act of April 9, 1929, P. L. 177) provides that

“The Department of State shall have the power, and its duty shall be, to register \* \* \* the assumed or fictitious names under which individuals carry on or conduct business, upon application duly made \* \* \*.”

The Act of 1917 and its amendments have been construed in a number of cases, none of which, however, furnishes a specific answer to your questions; but in *Lamb vs. Condon et al.*, 276 Pa. 544, the language used by Mr. Justice Sadler in rendering the opinion of the Supreme Court is significant in the consideration of your first, second, and third questions. At page 547, Mr. Justice Sadler said:

“An examination of the act discloses an intention on the part of the legislature to deal with two classes of individuals who might use assumed names; one, covered by the first paragraph of Section 1 of the act, being those who are residents of the State, and the other, individuals who are nonresidents \* \* \*.”

In an earlier case, decided by the Superior Court, (*Engle vs. Capital Fire Insurance Company of Concord, New Hampshire*, 75 Pa. Superior Court 390), Judge Henderson, speaking of the same Act said:

“\* \* \* It is a penal regulation and should be so construed as not to extend its operations beyond the purposes for which it was evidently enacted \* \* \*.”

The Act in express terms applies only to individuals engaging in business under assumed or fictitious names. Clearly, a corporation is not an “individual,” and the Act does not therefore apply to corporations. That being the case, there is no distinction between a domestic corporation and a foreign corporation, as far as concerns a corporation’s duty to register under the Act.

We have quoted from Section 806 of The Administrative Code of 1929, which outlines in a general way the duties of the Department of State in connection with such registrations as were formerly required by law to be made or filed with the Secretary of the Commonwealth. It is to be noted that in mentioning the duty of your Department in connection with the registration of assumed or fictitious names your Department was directed to register only the assumed or fictitious names “under which individuals carry on or conduct business.”

Except for the Act of 1917 and its amendments and The Administrative Code of 1929, there is no statutory law on the subject; and your Department is, therefore, without authority to register a fictitious or assumed name under which a corporation seeks to transact business in Pennsylvania.

In view of the interpretation which we have placed upon the Act of 1917, it is not important to consider the question raised in your letter whether a corporation may lawfully transact business under an assumed name. With respect to this question, we take it that the extent of a corporation’s power to conduct its operations in a name or in names other than that contained in its charter or certificate of incorporation, must be determined under the laws of the State in

which the corporation was created. We do not hesitate to express the opinion that under the laws of Pennsylvania a corporation does not have the right to transact business under an assumed or fictitious name. In Pennsylvania a corporation is required in its certificate of incorporation to state "the name of the corporation," and "the purpose for which it is formed" (Section 3 of the Act of April 29, 1874, P. L. 73). Pennsylvania corporations can be formed for only one purpose. Under our law it has been repeatedly held the name of the corporation should be indicative of its purpose. Were it possible for a Pennsylvania corporation at will to adopt names other than that stated in its certificate of incorporation, the object of our law in confining a corporation to one purpose and requiring its name to be indicative of that purpose, could, and would, readily be defeated. Further, the very first Section of our Corporation Act of 1874, in stating the powers of a Pennsylvania corporation provides, that it shall "have succession *by its corporate name* for the period limited by its charter, and when no period is limited thereby, or by this act, perpetually \* \* \*." The Legislature clearly indicated that a Pennsylvania corporation should not have succession for any period of time otherwise than by its proper corporate name.

We realize that there are two decisions of our Courts which have been cited to you as indicating that a corporation may, under the law of this State, assume and use a name other than that stated in its certificate of incorporation. One of these cases is *Phillips vs. International Text Book Company*, 26 Pa. Superior Court 230, in which the Court declined to permit a corporation to escape liability on a contract admittedly executed by it, but in a name other than that stated in its certificate of incorporation. In deciding the case, Judge Porter said at page 232:

"\* \* \* The evidence indicates that there was no corporation or firm in existence named the 'International Correspondence Schools,' but for purposes which were entirely proper the International Text Book Company had for its own convenience carried on one branch of its business in that name \* \* \*."

And in *Berg Company vs. Douredoure Brothers*, 5 D. and C. Reports 597, Judge Gordon, of Court of Common Pleas No. 2 of Philadelphia County, held that although it had made a contract in a fictitious name a corporation suing in its own name could recover on a contract, where the defendant admitted having received the benefits of the contract and was seeking to escape liability upon the technicality that the contract was not made by the corporation in its proper name. The Court stated at page 599 that to escape liability:

“\* \* \* the defendants should at least show, if it be true, that they were in some manner prejudiced or injured by the use by the plaintiff of an assumed name in the execution of the contract.”

Clearly, the conclusions reached in these cases have no bearing upon the consideration of the question whether in the administration of our corporation laws, your Department should under any circumstances or for any purpose, recognize the use by a Pennsylvania corporation of a name other than that stated in its certificate of incorporation; and for the reasons which we have indicated, it is our view that your Department must take the position in administering the corporation laws, that a Pennsylvania corporation cannot lawfully adopt or use a name other than that contained in its certificate of incorporation.

With respect to your fourth question, we have been unable to find any authority which furnishes a decisive answer. The Act of 1917 as amended does not give to your Department any jurisdiction to determine the propriety of a name which an individual seeks to register in your office. The registration of a fictitious name used by an individual or individuals is a ministerial act. At the same time we are clearly of the opinion that the Legislature did not intend to authorize your Department to assist an individual to work a fraud upon the public. The use of an assumed or fictitious name which concludes with “Inc.,” or “Incorporated,” or “Corporation,” must necessarily deceive the public into believing that the business conducted under such name has been incorporated. Whether or not a business is conducted by an individual, a partnership or a corporation, may or may not be important, but in any event, public policy would seem to require that official recognition should not be given in any way, shape or form to the use of a name which on its face is calculated to deceive the public.

We, therefore, advise you that you may properly decline to register as the assumed or fictitious name of an individual or of individuals, a name which indicates that the business conducted has been incorporated, when on the face of the papers presented to you such is not the case.

It would, of course, be better for the Legislature expressly to prohibit the use of such names by individuals, and your Department should, in our judgment, recommend such action to the next Session of the General Assembly.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

*Secretary of the Commonwealth—Preparation of a list of titles of Acts of Assembly approved by the Governor within thirty days after the final adjournment of the General Assembly.*

There is no statutory law requiring the Governor to send to the General Assembly a list by title of the bills which he approved after the Legislature adjourned.

Department of Justice,

Harrisburg, Pa., May 22, 1930.

Honorable Robert R. Lewis, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your letter asking to be advised whether it is necessary for the Department of State to prepare a communication to be sent by the Governor to the next Session of the General Assembly, advising what bills passed by the 1929 Session of the Legislature, he approved within thirty days after the date of final adjournment.

You state that it has been customary from time immemorial for the Governor to address such communications to the Legislature; that the communication recites in full the titles of all bills approved by the Governor within the thirty day period following the adjournment of the preceding Session of the Legislature; that if this custom must be followed, it will be necessary for your Department to prepare a list of the full titles of upwards of three hundred (300) Acts of Assembly, which now appear in full in the 1929 Pamphlet Laws and Appropriation Acts; and that the preparation of such a document involves a substantial expense and is, in your judgment, of no value either to the Legislature or to the public.

You further state that the custom can no doubt be traced to the time when the Legislature met annually and the laws of one Session had not been fully printed and published before the next Session convened. Under those circumstances, there was obviously a substantial purpose to be served in having the Governor transmit the communication in question to the Legislature.

There is no constitutional provision which requires your Department to prepare such a communication or the Governor to forward it to the Legislature. Article IV, Section 15 of the Constitution does require the Governor to give notice by public proclamation within thirty days after the adjournment of the General Assembly of all bills which he has filed with his objections, in the office of the Secretary of the Commonwealth. This is the only constitutional provision requiring the Governor to make a proclamation or give notice of his action on bills following the adjournment of the Legislature.

There is no statutory law whatever requiring the Governor to send to the General Assembly a list by title of the bills which he approved after the Legislature adjourned.

Accordingly, whether the Governor shall continue to send such a communication to the Legislature, is a matter wholly within his discretion. Should the present Governor decide to transmit to the Legislature the customary communication, it would be the duty of your office, upon the Governor's request, to prepare it. If, on the other hand, the Governor agrees with your view, that the preparation of the communication is an unnecessary waste of public funds which serves no useful purpose whatever, there is no reason why the custom should not be discontinued.

As stated by you, the Pamphlet Laws and Appropriation Acts are official publications and any person can, by reference to these volumes, ascertain for himself not only the titles to the measures which the Governor approved subsequent to the adjournment of the Legislature, but the full text of the acts.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*Election law—Voting machines—Approval by Secretary of Commonwealth—Revocation—Act of April 18, 1929, P. L. 549—Change in device—Procedure—Petition of elector—Security required.*

1. Where a voting machine has been approved by the Secretary of the Commonwealth, in accordance with the Act of April 18, 1929, P. L. 549, and no change in device in such machine has been made, the approval once given cannot be revoked.

2. Where, upon examination, a voting machine is found to have been changed in device so as to impair its accuracy or efficiency, the Secretary of the Commonwealth may re-examine and refuse to approve the machine as changed, and may cancel the existing approval, notifying the several county commissioners so that they may take proper steps to withdraw the machine.

3. Such re-examination may be initiated upon complaint of an elector under oath alleging such change, accompanied by the statutory fee or a bond with approved surety to secure the payment of the cost of such examination.

Department of Justice,

Harrisburg, Pa., August 11, 1930.

Honorable James A. Walker, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your communication of July 28, 1930, wherein you state that complaint has been made to you that the Shoup Voting Machine, heretofore approved by the Secretary of the Commonwealth under and pursuant to the provisions of the Act of April 18, 1929, P. L. 549, and used in the Primary Election of May 20, 1930, in Philadelphia, improperly registered votes which apparently had not been cast by any voter, and in which you submit for our opinion the following questions:

“Where it is shown that a certified or approved voting machine is susceptible of fraud or error which impairs its accuracy, efficiency, or capacity, may the Secretary of the Commonwealth invalidate temporarily the certificate of approval issued to the manufacturer of such voting machine pending determination of the allegation or complaint against the machine?”

“Where it is shown that a voting machine so certified and approved, is actually susceptible of fraud or error and that its accuracy, efficiency, or capacity, is or has been impaired, may the Secretary of the Commonwealth revoke and invalidate permanently certificate of the approval heretofore issued for such machine?”

The Act of April 18, 1929, P. L. 549, provides:

“Section 6. (c) No kind of voting machine not so approved shall be used at any election.

“(d) When a machine has been so approved, no improvement or change that does not impair its accuracy, efficiency or capacity, shall render necessary a re-examination or reapproval of the machine, or of its kind.”

“Section 7. (e) It shall preclude each voter from voting for any candidate, or upon any question, for whom or upon which he is not entitled to vote, and from voting for more persons for any office than he is entitled to vote for, and from voting for any candidate for the same office or upon any question more than once, except in districts and for offices where cumulative voting is authorized by law.”

If the complaint above noted is due to defect in mechanical device and not to defect acquired by use of the machine, it would appear that either there has been a change in the machine since its approval, or that the machine does not meet the requirements of the Act of April 18, 1929, P. L. 549, and, if sustained by proper evidence, that



such change or defect in the mechanical device impairs its accuracy, efficiency or capacity.

If there has been a change in the mechanical device after its approval, the Act of Assembly specifically recognizes the necessity for reexamination and reapproval of the machine, and in the absence of statutory designation of the procedure by which such reexamination may be accomplished, the Secretary of the Commonwealth may initiate such reexamination upon complaint of an elector of the Commonwealth, under oath filed with him, alleging such change, and accompanied by the statutory fee or a bond, with surety approved by him as to sufficiency and amount (which amount should not exceed double the fee for an initial examination) to secure the payment of the cost of such examination.

If upon such reexamination, the machine is found to have been changed in device so as to impair its accuracy, efficiency or capacity, the Secretary of the Commonwealth may refuse to approve the machine as changed and may cancel the existing approval, notify the several county commissioners of the substitution, so that the county commissioners may take proper steps for the withdrawal of the machines and protect the county against loss incurred through delivery of the substituted device.

If, on the other hand, no change in device in such approved machine is claimed, the Legislature has unfortunately failed to provide any method by which the Secretary of the Commonwealth can require a reexamination and review the approval which he has given. This is a serious defect in the Voting Machine Act, but it is a defect which can be remedied only by legislative action. We are, therefore, obliged to advise you that there is no procedure under which the Secretary of the Commonwealth's approval of the voting machine once given can be revoked, as long as the identical machine which he has approved is supplied by the manufacturer.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA

*Deputy Attorney General*

---

OPINIONS TO THE  
GOVERNOR

---

## OPINIONS TO THE GOVERNOR

*Railroad policemen—Act of Feb. 27, 1865—Qualification—Dual capacity—Private employe and public officer—Removal—Constitution, art. vi, sect. 4—Incompatible offices—Constable.*

1. A railroad policeman appointed by the Governor under the Act of Feb. 27, 1865, P. L. 225, has a dual capacity, in that he is at the same time an employe of a private corporation and a public police officer, with the authority of a policeman in a city of the first class; the liability of the railroad as his principal is dependent upon whether the act complained of was performed by him as its employe or in the discharge of his public duties as a police officer.

2. A railroad policeman cannot begin to function as such until he has been commissioned by the Governor and has taken the constitutional oath of office, although he is employed and paid by the railroad.

3. A railroad policeman is a public officer within the meaning of article vi, section 4, of the Constitution, and may be removed by the Governor at pleasure.

4. The duties of a constable and of a railroad policeman are so similar as to make it difficult to determine in which capacity particular acts are performed, and it is highly improper for a constable, during his term of office, to serve as a railroad policeman; under such circumstances, the Governor may remove him from the latter office.

Department of Justice,

Harrisburg, Pa., March 25, 1930.

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

Sir: We have your letter requesting us to advise you whether you should take any action by reason of the following circumstances.

A railroad policeman, commissioned by the Governor, also holds a constable's commission, and is at the same time acting as a constable and as a railroad policeman.

Your Secretary for Industrial Police feels that the two offices are incompatible and has submitted the facts to you for such action as you may see fit to take.

Railroad policemen are appointed under the provisions of the Act of February 27, 1865, P. L. 225. This act provides that any railroad corporation operating in Pennsylvania may apply to the Governor to commission such persons as the corporation may designate to act as railroad policemen; and that the Governor upon such application, "may appoint such persons or so many of them as he may deem proper to have and shall issue to such person or persons so appointed, a commission to act as such policeman."

Persons appointed railroad policemen must take and subscribe the constitutional oath of office, which must be filed with the Secretary of the Commonwealth and recorded in every county in which the policeman is to act, have the power of policemen of the City of Philadelphia, and are required to wear badges containing the words "Railroad Police," which must be in plain view, except when the policemen are employed as detectives.

Compensation is paid by the companies for which the policemen are appointed.

There is no provision in the act for the removal by the Governor of policemen commissioned by him thereunder; and the only provision relative to the termination of the commission is that contained in Section 6, which provides that whenever any railroad shall no longer require the services of a policeman appointed under the act, it shall file a notice to that effect in several offices where the commission of the policeman has been recorded, this notice to be noted by the recorders of deeds upon the margin of the record where the commission is recorded and, thereupon, the power of such policeman shall cease and be determined.

The act authorizing the Governor to commission these policemen does not empower him to remove them, nor is there any other Act of Assembly which specifically authorizes the Governor to revoke commissions issued by him under the Act of 1865. If, therefore, the Governor has any power to remove a railroad policeman it is conferred upon him by Article VI, Section 4, of the Constitution, which provides, among other things, that "Appointed officers, other than judges of the courts of record, and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed." This section clearly applies only to public officers. If railroad police are public officers appointed by the Governor they may be removed under the constitutional provision quoted. If they are not public officers the Governor does not have any power of removal, because the power is not conferred upon him by any constitutional or statutory provision.

Railroad police have a dual capacity. They are at the same time employes of a private corporation and public police officers, having the authority of municipal policemen.

Thus, when acting as employes of the railroad for which they are appointed, their actions may justify the recovery of damages against the railroad, *Tufshinsky vs. Pittsburgh, etc. Railroad Company*, 61 Pa. Superior Ct. 121 (1915); but in making an arrest in the discharge of their public duties as police officers they are not regarded as employes of the railroad in such a sense as to sustain a verdict against the rail-

road for false arrest, *Bunting vs. Pennsylvania Railroad*, 284 Pa. 117 (1915), and *Knaugle vs. Pennsylvania Railroad Company*, 83 Pa. Superior Ct. 528 (1924).

In the *Bunting Case*, Mr. Justice Frazier, speaking for the Supreme Court, said at page 121:

“\* \* \* under the charge of forgery and embezzlement made at the instance of one in no manner connected with the defendant company, it must be presumed the officer, in making the arrest and also in the subsequent conduct in having plaintiff held to bail, was not acting for and on behalf of defendant company but as a *public police officer*. \* \* \*”

Similar language was employed by the Superior Court in the *Knaugle Case*.

It is true that railroad policemen are paid by the railroads, but it is also true that they cannot begin to function as such until they have been commissioned by the Governor and have taken the constitutional oath of office, and that in the discharge of their duties they have the same authority which is conferred by law upon police officers in cities of the first class. Accordingly, while these officers are anomalous in that they are charged with the performance both of public and of private duties, nevertheless, we are clearly of the opinion that they are public officers within the meaning of Article VI, Section 4, of the Constitution and may be removed by the Governor at pleasure.

Should a railroad policeman be removed because he is also a constable?

There is no constitutional or statutory provision specifically declaring incompatible the offices of railroad policeman and constable. However, a constable is an elected public officer, whose duties are in a large measure police duties. The work of a constable and of a railroad policeman is work of a similar character; and when the same person is acting in both capacities we cannot conceive that it would be possible clearly to distinguish at all times between the duties he was performing as constable and the duties he was performing as a railroad policeman. There should be no ground for suspicion that, in the performance of his duties, an elected public officer of any grade is subject to the directions of a private corporation, and it seems to us that it is highly improper for a constable to serve during his term of office as such, also as a railroad policeman. This, however, is not a conclusion required by any constitutional or statutory provision or any adjudicated case.

Whether a constable should be permitted to function as a railroad policeman is, in the last analysis, a question of policy which you alone have jurisdiction to determine.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*Notaries public—Term of office—Computation—Re-appointment.*

1. The four year's term of a notary public is to be computed to exclude the date of his confirmation.

2. On re-appointment, the notary's new term will be computed from the date of the expiration of the previous commission and will expire at midnight of the day of the fourth anniversary of the date of the commission.

Department of Justice,

Harrisburg, Pa., March 31, 1930.

Honorable Frank J. Gorman, Secretary to the Governor, Harrisburg, Pennsylvania.

Sir: In your letter of February 14 you request the opinion of this Department concerning the method to be employed in ascertaining the date of commencement and the date of expiration of the term of a notary public appointed by the Governor under the provisions of the Act of April 4, 1901, P. L. 70.

Section 1 of the Act of 1901 provides that notaries public appointed by the Governor during the recess of the Senate shall each receive a commission that shall expire at the end of the next session of the Senate. There seems to be no uncertainty as to the meaning of this section. The term of a notary public appointed by the Governor during the recess of the Senate expires at midnight of the day upon which the session of the Senate has ended. The law knows no fraction of a day.

Section 2 provides that when notaries public appointed by the Governor during the session of the Senate, and those appointed under the provisions of the first section of the Act of 1901, are duly confirmed by the Senate, they shall each be entitled to receive a commission for the term of four years, to be computed from the date of such confirmation.

The question arises as to when a commission issued to a notary becomes effective and when it expires.

On June 20, 1883 the Governor approved an act "To regulate the computation of time under statutes, rules, orders and decrees of court; and under charters and by-laws of corporations, public and private." (P. L. 136) In accordance with the provisions of this act, the period of time shall be computed so as to exclude the first and to include the last day of the prescribed period.

You are therefore advised that the four-year term of a notary public is to be computed to exclude the date of his confirmation. For example, if a notary public's appointment is confirmed by the Senate on February 28, 1931, his term will commence March 1, 1931 and expire at midnight February 28, 1935.

Section 3 of the Act of 1901 provides that where notaries public are re-appointed by the Governor and confirmed by the Senate before the expiration of their commissions, they should each receive a commission for a term of four years, to be computed from the date of the expiration of their previous commission.

The same rule of construction must apply in relation to re-appointments under the provisions of the above section. The new term will be computed from the date of the expiration of the previous commission and will expire at midnight of the day of the fourth anniversary of the date of the commission. In other words, in the case of the notary above instanced, the new term would commence March 1, 1935 and would expire at midnight February 28, 1939.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROSCOE R. KOCH,

*Deputy Attorney General.*

---

*Justice of the peace—Newly-created borough—Election—Special or municipal election—Appointment by Governor.*

1 A justice of the peace is not a borough officer.

2 A special election for the election of a justice of the peace is not authorized by the General Borough Act of May 4, 1927, P. L. 519.

3 When a borough is incorporated, a justice of the peace cannot be chosen at the special election thereafter held for the election of borough officers, he must be appointed by the Governor to hold office until the next municipal election.

Department of Justice,

Harrisburg, Pa., April 25, 1930.

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

Sir: The Court of Quarter Sessions of Cambria County entered a decree on January 18, 1930, incorporating the Borough of Geistown, in said county. A special election was held therein on February 25, 1930, whereat one G. N. Good was elected justice of the peace, "to serve until the next Municipal Election." (The quoted words are taken from the certificate of election furnished by the Prothonotary).

Mr. Good has requested the issuance of a commission to him as justice of the peace, for a term to expire, presumably, the first Monday of January following the next municipal election; Constitution, Article V, Section 11; Act of March 2, 1911, P. L. 8. The next municipal election will be held the Tuesday next following the first Monday of November, 1931; Constitution, Article VIII, Section 3; unless the Legislature, perchance, should meantime fix another date, in the manner provided in said article and section.

The contention has been advanced that upon the creation of the Borough of Geistown a vacancy ipso facto existed in the office of justice of the peace, and that the right of the Governor to appoint an incumbent immediately attached to such vacancy. This contention finds support in *Commonwealth ex rel. Snyder vs. Machamer*, 5 D. R. 560.

Mr. Good contends that his election at the special borough election entitles him to a commission, and that the right of the Governor to appoint extended no further than to an appointment to expire on the date of the special borough election.

The authority for a special borough election is found in The General Borough Act, approved May 4, 1927, P. L. 519. Section 805 provides that when the court orders a special election for the election of borough officers in a newly created borough, the officers so elected shall hold office until the first Monday of January next succeeding the municipal election. Section 807 lists the officers to be elected, but excludes from said list the office of justice of the peace, which is entirely in harmony with the provisions of Section 102, which distinctly provides:

"This act does not include any provisions, and shall not be construed to repeal any acts, relating to:

\* \* \* \* \*

"(i) Justice of the peace."

It therefore goes without saying that a special election for the



election of justice of the peace, is not authorized under the provisions of The General Borough Act of 1927.

Nor is it contended that a justice of the peace is a borough officer: *Commonwealth ex rel. Attorney General vs. Callen*, 101 Pa. 375; *Commonwealth ex rel. Graham vs. Cameron*, 259 Pa. 209.

The Act of April 3, 1851, P. L. 320, Section 26, authorizes the electors in any newly incorporated borough, "at the first borough election to elect six school directors under the provisions of the law regulating common schools, and two justices of the peace to serve for a term of five years, and thereafter to elect justices of the peace and school directors as directed by law."

But Article V, Section 11 of the Constitution, both as originally adopted and as amended in 1909, seriously affected the Act of 1851. As amended, said article and section provide for the election of justices of the peace at the municipal election, for a term of six years. There is no provision, either in the Constitution, or in any Act of Assembly enacted after its adoption, that provides for a *special* election of a justice of the peace. It seems clear, therefore, that Section 26 of the Act of 1851, as applicable to the question here under consideration, is inconsistent with the provisions of the Constitution, that justices of the peace may be elected only at the municipal election.

It has been the unbroken practice of your predecessors to refuse to issue commissions to persons claiming to have been elected to the office of justice of the peace at special elections. This practice should not be changed, in our opinion: first, because there has been no argument advanced that convinces us that the practice is legally unsound; and second, because it is always wise, in cases of doubt, to refrain from issuing a commission until the party claiming the same has tested out his right thereto by appropriate action.

Attorney General McCormick advised the Secretary of the Commonwealth, in an opinion rendered June 3, 1896, (5 D. R. 437) that it was the duty of the Governor to appoint an alderman in a newly created ward in the city of Harrisburg. Another person was later elected to the office at a special ward election, and obtained a rule to show cause why a quo warranto should not issue against the Governor's appointee. The Attorney General's ruling was vindicated by the Court of Common Pleas of Dauphin County, (*Commonwealth ex rel. Snyder vs. Machamer*, 5 D. R. 560). The situation here presented is very similar, and we therefore advise that in our opinion there exists a vacancy in the office of justice of the peace in Geistown Borough, and that the same may lawfully be filled only by appointment by the Governor, until the person elected at the next municipal election is entitled to

enter upon his term of six years. Article IV, Section 8, of the Constitution, as amended November, 1909.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROSCOE R. KOCH,

*Deputy Attorney General.*

*Elections—Representatives in Congress—Vacancy—Special election—Issue of writ by Governor—U. S. Constitution, art. i, sections 2 and 4—Time for election—Act of July 2, 1839.*

1. Where a vacancy has occurred in the representation in Congress from this state since the last session of that body, it is the duty of the Governor, pursuant to article i, sections 2 and 4, of the Constitution of the United States, to issue a writ of election to fill such vacancy.

2. If the vacancy happens during a session of Congress or if Congress is required to meet prior to the next general election in this state, the Governor must fix a time for such election as early as may be convenient, as required by the Act of July 2, 1839, P. L. 519; otherwise, he should direct the election to be held at the same time as the general election, giving reasonable time for the promulgation of the notice thereof.

Department of Justice,

Harrisburg, Pa., September 11, 1930.

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

Sir: We have your request under date of September 8, for an interpretation of, and procedure under, Article I, Section 2, of the United States Constitution, where a vacancy has occurred in the representation in Congress from this State since the last session of Congress. The next session will convene the first Monday of December, 1930. You desire to be advised whether or not the issuance of a writ of election prior to the convening of the short term of Congress is mandatory.

Article I, Section 2, paragraph 4, of the Constitution of the United States, provides:

“When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.”

Article I, Section 4, paragraph 1, provides:

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress

may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

The Act of July 2, 1839, P. L. 519, Sections 39 to 42 inclusive, provide for the issuance and requisites of the writ of election, time of election, and when writ shall be delivered to the sheriff.

"Every writ which shall be issued by the governor of this commonwealth, in pursuance of the constitution of the United States, to supply a vacancy in the representation of the people of this commonwealth in the house of representatives of the United States, shall be directed to the sheriff of the county, or counties, composing the congressional district, and shall particularly express the day on which the election shall be held to supply such vacancy. (1839, July 2, P. L. 519, Section 39).

"If such vacancy shall happen during the session of congress, or if congress shall be required to meet at some time previous to the next general election, the governor shall appoint a time as early as may be convenient for holding such election, otherwise he shall direct the election to be held at the time appointed for holding the general elections. (1839, July 2, P. L. 519, Section 40).

"Every writ for holding a special election, as aforesaid shall be delivered to the sheriff, to whom the same may be directed, at least fifteen days before the day appointed for such election, who shall forthwith give due and public notice thereof throughout the county, at least ten days before such election, and shall send a copy thereof to at least one of the inspectors of each election district therein. (1839, July 2, P. L. 519, Section 41)."

Article VIII, Section 2, of the Constitution of Pennsylvania, provides:

"The general election shall be held biennially on the Tuesday next following the first Monday of November in each even-numbered year, but the General Assembly may by law fix a different day, two-thirds of all the members of each House consenting thereto: Provided, That such election shall always be held in an even-numbered year."

Where the legislature of a state has failed to "prescribe the times, places and manner" of holding elections, as required by the Constitution of the United States, the Governor may, in case of a vacancy, in his writ of election, give notice of the time and place of election, but a reasonable time ought to be allowed for the promulgation of the notice:

*Hoge's Election Case*, (1804), *H. R. Contested Election Cases*, 52, *I Watson on the Constitution*, 200.

Since the decision in the Hoge Election, the Legislature of Pennsylvania, pursuant to the provisions of Article I, Section 4, of the Constitution of the United States, enacted Sections 39 to 42 of the Act of July 2, P. L. 519, *supra*.

In our opinion, and you are so advised, the writ which shall be issued by the Governor of this Commonwealth to fill a vacancy now existing in the representation in Congress from this State should direct the election to be held at the time for holding the next general election, to wit: Tuesday, next following the first Monday of next November, and should be delivered to the sheriff, to whom the same may be directed, in sufficient time to permit the sheriff to give the notice required by law, and that those provisions are mandatory.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA,

*Deputy Attorney General.*

---

*United States Department of Commerce, Population Bulletin as per fifteenth census of the United States.*

Form of certificate to be issued by the Governor. Act of 1919, P. L. 887.

Department of Justice,

Harrisburg, Pa., December 24, 1930.

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

Sir: We have your request to be advised on three questions as follows:

1. Can you regard as official a printed but uncertified "population bulletin" issued by the Department of Commerce and purporting to contain the number and distribution of the inhabitants of Pennsylvania, as per the fifteenth census of the United States?
2. Is the form of certificate attached to your inquiry appropriate for elevating to a higher classification a county whose population entitles it to reclassification under the Act of July 10, 1919, P. L. 887?
3. Do you have authority, by certificate, to reduce in classification a county whose population, as shown by the last census, is less than that required to include it in the class to which it now belongs?

In answer to your first question, we beg to advise that, in our opinion, you should have before you a certified copy of the bulletin of the Department of Commerce showing the number and distribution of inhabitants of this Commonwealth, as a basis for taking any action under the Act of July 10, 1919, P. L. 887.

In response to your second question :

The form which you submitted is as follows :

“I, John S. Fisher, Governor of the Commonwealth of Pennsylvania, Do Hereby Certify, as directed by the Act providing for the classification of Counties, approved July 10, 1919, P. L. 887, that according to the “Fifteenth Census of the United States: 1930” as published in a “Population Bulletin” entitled “Pennsylvania, Number and Distribution of Inhabitants,” officially issued on December 13, 1930 by the Bureau of the Census of the United States Department of Commerce, the County of McKean now has a population of fifty-five thousand one hundred and sixty-seven (55,167), and that said county is, therefore, a County of the Sixth Class with all of the rights, powers and duties of counties of that class, as provided by law.”

We are of the opinion that this form of certificate is proper and in accordance with the Act of 1919. You have, doubtless, noted that under the act the great seal of the Commonwealth must be impressed on the certificate.

With respect to your third question :

Section 2 of the Act of 1919 provides that “The classification of counties shall be ascertained and fixed according to their population by reference from time to time to the last preceding decennial United States census.” It then provides specifically that you shall issue your certificate evidencing that a county has been advanced in classification because of an increase in population, but it is silent regarding the procedure for establishing, officially, the reclassification of a county downwards.

In our opinion the Act of 1919 automatically reduces a county from a higher to a lower class if the latest decennial United States census establishes the fact that the population of the county is less than that which would entitle it to remain in the class to which it belonged when the census was taken; and while the act does not render it the mandatory duty of the Governor to certify this fact as he is required to certify an advance in classification, nevertheless, in our opinion, he

may at his option issue a certificate indicating a reduction in classification. If he does so, the certificate should be similar in form to that which the act specifically requires in the case of an advance in classification, and should be similarly recorded.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Attorney General.*

---

---

OPINIONS TO THE BOARD OF FINANCE  
AND REVENUE

---

---

## OPINIONS TO THE BOARD OF FINANCE AND REVENUE

*Taxation—Inheritance tax—Refunding—Appraisement—Appeal—Fiscal Code of April 9, 1929.*

1. The legislature, in section 503 of the Fiscal Code of April 9, 1929, P. L. 343, providing for a refund of taxes paid to the Commonwealth as the result of an error of law or of fact, or of both law and fact, did not intend to authorize the Board of Finance and Revenue to allow a refund of an alleged overpayment of tax due to an error of judgment on the part of the appraiser in arriving at the value of the property of a decedent at the date of his death.

2. If such an error has been made, an appeal should be taken within thirty days to the Orphans' Court, as provided in section 13 of the Act of June 20, 1919, P. L. 521.

Department of Justice,

Harrisburg, Pa., October 9, 1929.

Mr. Walter J. Kress, Secretary, Board of Finance and Revenue, Harrisburg, Pennsylvania.

Sir: With a recent letter to this Department you submitted the petition of the Fayette Title and Trust Company, administrator of the Estate of Henry T. Cochran deceased, late of Fayette County, which had been filed with the board, praying for a refund to the petitioner of transfer inheritance taxes to the amount of \$11,121.80 which it is claimed were paid to the Commonwealth as a result of an error of both law and fact.

According to the petition the decedent died December 28, 1926, a resident of Fayette County and an appraisement for transfer inheritance tax due the Commonwealth was made, showing the real and personal property of the decedent, at the time of his death to be of a total value of \$1,738,443.11. There appear to have been deductible debts to the amount of \$131,535.86 making the net value of the estate \$1,606,907.26, which at two per cent made a tax of \$32,138.15 due the State. The estate paid inheritance tax to the Commonwealth in the amount of \$31,298.45. It is contended by the petitioner that included in the appraisement for transfer inheritance tax is an item of 3,431 shares of the capital stock of the Cochran Coal and Coke Company, valued by the appraiser at \$325.00 per share or a total of \$1,115,075.00, which was grossly in excess of its fair value, no appeal as taken from said appraisement as provided in the Inheritance Tax Act of June 20, 1919, P. L. 521.

In an opinion of the Orphan's Court of Fayette County in this estate, filed May 8, 1929, a copy of which was attached to the petition



the Court found: "That a fair valuation for the 3,431 shares of the stock in question (that is of the said Cochran Coal and Coke Company) would be \$150.00 per share as of the time of the death of the decedent." It is therefore contended by the Petitioner that there was an over-valuation on said stock by the appraiser of \$600,425.00 representing \$12,008.50 in tax which would make the tax due the Commonwealth \$20,176.65. Accordingly, it is claimed there has been an over-payment of \$11,121.80 in tax, as a result of an error of both law and fact on the part of the administrator, the petitioner. Your Board is asked to refund to petitioner, said amount of tax. You inquire whether this case comes within the provisions of Section 503 of The Fiscal Code (Act of April 9, 1929, P. L. 343).

The part of said Section 503 immediately applicable to the question presented reads as follows:

"Section 503. Refunds of State Taxes, License Fees, Et Cetera, The Board of Finance and Revenue shall have the power, and its duty shall be, to hear and determine any petition for the refund of taxes, license fees, penalties, fines, bonus, or other moneys alleged to have been paid to the Commonwealth as the result of an error of law or of fact, or of both law and fact, and, upon the allowance of any such petition to refund such taxes, license fees, penalties, fines, bonus, or other moneys, out of any appropriation or appropriations made for the purpose, or to credit the account of the person, association, corporation, body politic, or public officer entitled to the refund."

Prior to the enactment of The Fiscal Code the provision for the refund of transfer inheritance taxes erroneously paid into the State Treasury, was contained in Section 40 of the Act of June 20, 1919, P. L. 521, which provided in part as follows:

"Section 40. In all cases where any amount of such tax is paid erroneously, the State Treasurer, on satisfactory proof rendered to him by the register of wills or Auditor General of such erroneous payment, may refund and pay over to the person paying such tax the amount erroneously paid. All such applications for the repayment of such tax erroneously paid in the treasury shall be made within two years from the date of payment. \* \* \*"

It is to be noted that in said Act of 1919 the expression used with respect to the erroneous payment is: "where any amount of such tax is paid erroneously," whereas in The Fiscal Code, the expression used is: "taxes \* \* \* alleged to have been paid to the Commonwealth as the result of an error of law or of fact, or of both law and fact." By the use of the latter expression, the legislature attempted to enlarge

the scope comprehended by the words used in the Act of 1919 so as to include errors of law as well as errors of fact. It has been determined by various opinions of this Department, that the expression "paid erroneously" as found in said Act of 1919 did not include errors of law. Although the expression "erroneously paid" in said Act of 1919 comprehended certain errors of fact, it has never been held by this Department that it included errors of judgment on the part of the appraiser in arriving at the value of the decedent's property.

In an opinion by the Attorney General to the State Treasurer dated March 11, 1892, (Opinions of Attorney General, 1891-92 page 76) construing the word "erroneously" in the Act of June 12, 1878, P. L. 206, which act authorizes the State Treasurer to refund collateral inheritance tax which had been paid "erroneously to the register of wills of the proper county for the use of the Commonwealth \* \* \* on satisfactory proof rendered to him by said register of wills of such erroneous payment" Attorney General Hensel said as follows:

"The legislature having provided in the act of 1887, for an appeal from the register's appraisal of the value of real estate for collateral inheritance tax, it cannot be assumed that it was ever contemplated the State Treasurer should be constituted an appellate jurisdiction on this subject, or that he should be empowered to revise an error of judgment on the part of the appraiser, nor that interested parties should be permitted to take the chances of property being appraised too low and secure a rebate from the commonwealth if it happens to have been appraised higher than its market price."

It was expressly held in this opinion that the word "erroneously" as used in the Act of 1878 did not authorize the State Treasurer to revise an error of judgment on the part of the appraiser as to the value of the real estate in question upon which appraised value tax had been paid and that no appeal having been taken from the appraisal it became conclusive. The legislature has not indicated in Section 503 of The Fiscal Code, any intention to change the law in this respect.

Section 13 of the Act of June 20, 1919, P. L. 521, provides that any person not satisfied with the appraisal of the property of a resident decedent any appeal, within thirty days, to the Orphan's Court. It is expressly provided that "upon such appeal, the Court may determine all questions of valuation, etc." This provision has not been changed or modified in any respect by The Fiscal Code. Any question as to the over-valuation of the capital stock of the Cochran Coal and Coke Company in the appraisal in this case which was made on March 28, 1927, about three months after the death of the decedent, should have been raised by the parties in interest in an appeal to the Orphans' Court. However, even though an appeal had been taken in this case

it is not clear to us how the fact, referred to in the opinion of the Orphans' Court in discussing the value of the coal lands in question, that an explosion had occurred in these mines in January following the death of the decedent, necessitating the flooding of the mines, the interruption of operation and the occasioning of much loss thereby, or any other factor occurring since the death of the decedent, which tended to lessen the value of the coal land in question, could effect the value of the coal stock for transfer inheritance tax purposes, said value being as of the date of the death of the decedent.

You are therefore advised, that the legislature in Section 503 of The Fiscal Code, in providing, inter alia, for a refund of taxes paid to the Commonwealth as the result of an error of law or of fact, or of both law and fact, did not intend to authorize your Board to allow a refund of an alleged over-payment of tax due to an error of judgment on the part of the appraiser in arriving at the value of the property of a decedent at the date of his death.

Accordingly, the application for refund in this case should be refused. An appeal should have been taken in this case from the appraisal for transfer inheritance tax, within thirty days, to the Orphans' Court, as provided in Section 13 of the Act of June 20, 1919, P. L. 521.

Very truly yours,

DEPARTMENT OF JUSTICE

PHILIP S. MOYER,  
*Deputy Attorney General.*

---

*Taxation—Tax settlement—Procedure—The Fiscal Code of April 9, 1929.*

1. The Fiscal Code of April 9, 1929, P. L. 343, became effective in part on June 1, 1929, and in part on July 1, 1929, Article V became effective on the former date and the remainder of the act on the latter.

2. As far as concerns jurisdiction to resettle taxes and to hear and determine appeals from settlement, The Fiscal Code has not effected any changes, except that the jurisdiction of the Auditor General and State Treasurer to settle and resettle taxes has been transferred to the Department of Revenue subject to approval by the Department of the Auditor General.

3. The procedure to be followed in seeking a resettlement or taking an appeal has been modified radically.

4. The Board of Finance and Revenue had conferred upon it by the Acts of April 8, 1869, P. L. 19, June 9, 1911, P. L. 758, and June 7, 1923, P. L. 498, the power to resettle, but the power can be exercised only after petition for settlement or for review has been filed as provided in sections 1102 and 1103 of The Fiscal Code.

5. The Department of Revenue as the successor of the Auditor General continues to have the power to resettle taxes, but only if (a) a petition for resettlement has been filed with it within ninety days, as provided in section 1102 of The Fiscal Code, or (b) if the Board of Finance and Revenue, acting under section 1105, has authorized a resettlement.

6. The Court of Common Pleas of Dauphin County continues to have jurisdiction to hear and determine appeals from tax settlements, but an appeal can be taken only after the appellant has filed a petition for resettlement under section 1102 and a petition for review under section 1103, and he must file his appeal through the Department of Justice instead of through the office of the Auditor General.

7. Appeals to the Court of Common Pleas taken prior to July 1, 1929, are not affected by the passage of The Fiscal Code. The court has the same jurisdiction which it formerly enjoyed, and, in any event, section 5 clearly evidences the Legislature's intention not to interfere with any such pending proceedings.

8. Petitions for resettlement filed with the Auditor General prior to July 1, 1929, may be concluded by the Department of Revenue, with the approval of the Department of the Auditor General, under section 5 of The Fiscal Code, as the function of acting upon such petitions has been transferred to the Department of Revenue, acting, however, with the approval of the Department of the Auditor General (section 1102). However, when a decision has been rendered upon any such petition, the taxpayer, if dissatisfied, must file petition for review under section 1103. He cannot appeal to the court without this intermediate proceeding.

9. The petition for resettlement filed with the Board of Finance and Revenue prior to June 1, 1929, may be disposed of as formerly, but when the board has acted, there is no appeal from its decision under section 1104. Such petitions were not petitions for review, and prior to the passage of The Fiscal Code the law did not provide an appeal from the action of the board on a petition for resettlement.

10. The right to file petitions for resettlement with the Board of Finance and Revenue expired on June 1, 1929, after which date all such petitions were required to be filed with the department which made the settlement.

11. The Department of Revenue, acting as the successor to the Auditor General, does not have any jurisdiction to entertain a petition for resettlement filed after July 1, 1929, unless such petition was filed within ninety days after the date of settlement, as required by section 1102 of The Fiscal Code; but it may, acting as successor to the former settling officers, petition the Board of Finance and Revenue, under section 1105, for permission to make a settlement or prior resettlement.

12. With respect to settlements made by the Auditor General and State Treasurer within ninety days of July 1, 1929, the procedure available to the taxpayer was as follows:

(a) He could appeal under the Act of March 30, 1811, P. L. 145, within sixty days of the date of settlement, if the appeal was taken prior to July 1, 1929. If he appealed, the Court of Common Pleas of Dauphin County has the right to determine the case as prior to the passage of The Fiscal Code. If he appealed, no other proceedings are permissible, as section 16 of the Act of 1811 was not, and section 1105 of The Fiscal Code is not, applicable if an appeal has been taken.

(b) Not having appealed, he could prior to July 1, 1929, file a petition for resettlement with the Auditor General. In this case, if the Auditor General acted upon the petition prior to July 1, 1929, the taxpayer could appeal within sixty days of the date of resettlement (*Com. v. Wyoming Valley Ice Co.*, 165 Fed. Repr. 789; Tax Settlement Rules, 43 Pa. C. C. Repr. 489), but unless the appeal was taken prior to July 1, 1929, it could be taken only after action of the Board of Finance and Revenue upon a petition for review filed under section 1103 of The Fiscal Code;

(c) He could after July 1, 1929, and within ninety days after the date of settlement, file a petition for resettlement with the Department of Revenue as successor to the settling departments, and thereafter the procedure would be by petition for review and appeal; or

(d) Having neither appealed nor filed a petition for resettlement within the period mentioned in (a), (b) and (c), he could, prior to June 1, 1929, file a petition for resettlement with the Board of Finance and Revenue, or he could, after July 1, 1929, file a petition for refund, under section 505 of The Fiscal Code, after paying the tax, or, without paying the tax, he can seek to have the Department of Revenue, as successor to the settling departments, apply to the Board of Finance and Revenue within one year after the date of settlement for permission to make a resettlement under section 1105 of The Fiscal Code.

13. With respect to settlements made by the Auditor General and State Treasurer more than ninety days prior to July 1, 1929, the procedure available to the taxpayer was as follows:

(a) He could appeal within sixty days after the date of settlement.

(b) Not having appealed, he could file a petition for resettlement with the Auditor General prior to July 1, 1929, but within one year of the date of settlement. If the Auditor General resettled the tax prior to July 1, 1929, an appeal could be taken from the resettlement, providing it was taken prior to July 1, 1929.

(c) He could, prior to June 1, 1929, file a petition for resettlement with the Board of Finance and Revenue.

(d) Having pursued none of these courses, he could, after July 1, 1929, file a petition for a refund or seek to have the Department of Revenue obtain from **the Board of Finance and Revenue** permission to resettle the account as outlined in the case of settlements made within ninety days of July 1, 1929.

Department of Justice,

Harrisburg, Pa., January 27, 1930.

Honorable Edward Martin, Chairman, Board of Finance and Revenue,  
Harrisburg, Pennsylvania.

Sir: We have your request to be advised regarding the procedure subsequent to the settlement of taxes, in cases in which the settlements were made prior to July 1, 1929.

Your inquiry arises out of the following fact situation:

The Fiscal Code (Act of April 9, 1929, P. L. 343) became effective

in part on June 1, 1929 and in part on July 1, 1929. Article V became effective on the former date and the remainder of the Act on the latter.

Prior to the passage of The Fiscal Code the procedure subsequent to the settlement of taxes was governed by certain sections of the Act of March 30, 1811, P. L. 145, and of The Administrative Code of 1923.

Section 11 of the Act of March 30, 1811 provided for the taking of appeals from settlements made by the Auditor General and State Treasurer, the appeal to be taken to the Court of Common Pleas of Dauphin County, but filed with the Auditor General and transmitted by him to the clerk of the Court to be entered of record. With the appeal the Act required that a specification of objections to the settlement be filed and that security be entered before one of the judges of the Court of Common Pleas "within ten days next after such appeal."

Section 16 of the same Act provided that "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."

The Act of June 9, 1911, P. L. 738 amending the Act of April 8, 1869, P. L. 19, authorized the Auditor General, the State Treasurer and the Attorney General "to revise any settlement made with any person or body politic by the Auditor General, when it may appear from the accounts in his office, or from other information in his possession, that the same has been erroneously or illegally made." The three officers named were authorized to resettle the account "according to law and to credit or charge, as the case may be, the amount resulting from such resettlement upon the current accounts of such person or body politic."

Section 1102 of The Administrative Code of 1923 (Act of June 7, 1923, P. L. 498) transferred to the Board of Finance and Revenue, created by it, the powers which the Act of 1911 authorized the Auditor General, the State Treasurer and the Attorney General to exercise and reenacted them without substantial change.

The Fiscal Code repealed, as of July 1, 1929, Sections 11 and 16 of the Act of March 30, 1811, P. L. 145. The Administrative Code of 1929 (Act of April 9, 1929, P. L. 177) repealed, as of June 1, 1929, Section 1102 of The Administrative Code of 1923.

In lieu of the repealed provisions, The Fiscal Code provided in Section 1102 that within ninety days after the date of any settlement,

“date of settlement” being defined in Section 1 (a), a petition for resettlement may be filed with the Department which made it; in Section 1103, that within thirty days after notice by such Department of the action taken in disposing of a petition for resettlement the party aggrieved may file a petition for review with the board of Finance and Revenue; in Section 1104, that within sixty days after the decision of the Board of Finance and Revenue upon a petition for review an appeal may be taken to the Court of Common Pleas of Dauphin County the appeal to be lodged with the Department of Justice which must transmit it to the clerk of the Court of Common Pleas of Dauphin County; in Section 1105, that within one year after the date of settlement or date of resettlement of any account, except such as have been appealed from, the Department which made the settlement may by petition request the Board of Finance and Revenue to authorize a resettlement thereof “upon the ground that it appears from the accounts or other information in the Department’s possession, that the settlement or resettlement was erroneously or illegally made;” in Section 502, that “upon the presentation to it of a petition for review, as hereinafter provided” the Board of Finance and Revenue shall have power “to revise any settlement made with any person, association, corporation, body politic or public officer by the Department of Revenue or by the Department of the Auditor General and the Treasury Department;” and in Section 503, that within certain time limits the Board of Finance and Revenue shall have power to hear petitions for the refund of taxes and other moneys paid to the Commonwealth “as the result of an error of law or of fact or of both law and fact,” and if the petition be allowed “to refund such taxes \* \* \* or other moneys out of any appropriation or appropriations made for the purpose, or to credit the account of the person, association, corporation, body politic or public officer entitled to the refund.”

Section 3 of The Fiscal Code provides that all rights, powers and duties transferred by the Code in whole or in part to a department, board, commission or officer not previously charged with the performance of such functions “shall be vested in, exercised by and imposed upon the department, board, commission or officer to which or to whom the same are transferred by this Act and not otherwise.” It also provides that every such act shall have the same legal effect as if done by the agency formerly required to perform it, and that “every person, association, or corporation shall be subject to the same obligations and duties, but no others and shall have the same rights” as if the rights or powers of the new administrative agency had been exercised by the predecessor agency.

Section 5 saves “all petitions, hearings and other proceedings pending before any department, board, commission or officer, and all prose-

cutions and other legal proceedings of every kind and description" begun by a department, board, commission, or officer and not completed upon the effective date of The Fiscal Code, such proceedings to "continue and remain in full force and effect notwithstanding the passage of this Act." It also specifically provides that the Department of Revenue shall settle and collect taxes upon reports filed with the Department of the Auditor General prior to the effective date of the Code with the same force and effect as if such settlements and collections had been made by the Auditor General and State Treasurer under existing laws, "but, upon the settlement of any such tax, the procedure for resettlement review, appeal, and collection shall be that provided by this act."

Section 201 provides that, "Except as otherwise in this Act provided, the Department of Revenue shall exercise the powers and perform the duties heretofore exercised and performed by the Auditor General, the State Treasurer, the Insurance Commissioner and all other departments, boards and commissions \* \* \* in the settlement of taxes, and the collection of taxes, license fees and other moneys due the Commonwealth."

Section 501 provides that, "Subject to any inconsistent provisions in this act contained," the Board of Finance and Revenue "shall continue as the successor to the Board created by the Act approved the eighth day of April, one thousand eight hundred and sixty-nine \* \* \* its amendments and supplements."

Under Section 1802 the provisions of The Fiscal Code "as far as they are the same as existing laws shall be construed as a continuation of such laws and not as new enactments."

From this detailed recital of the statutory law relevant to a consideration of your inquiry, it is apparent that as far as concerns *jurisdiction* to resettle taxes and to hear and determine appeals from settlements The Fiscal Code has not effected any changes, except that the jurisdiction of the Auditor General and State Treasurer to settle and resettle taxes has been transferred to the Department of Revenue subject to approval by the Department of the Auditor General; but the procedure to be followed in seeking a resettlement or taking an appeal has been modified radically.

Your Board continues to have the power to resettle taxes, conferred upon it by the Acts of 1869, 1911 and 1923, but the power can be exercised only after petitions for resettlement or for review have been filed as provided in Sections 1102 and 1103 of The Fiscal Code.

The Department of Revenue as the successor of the Auditor General continues to have the power to resettle taxes, but only if either (a) a



petition for resettlement has been filed with it within 90 days, as provided in Section 1102 of The Fiscal Code or (b) if your Board, acting under Section 1105, has authorized a resettlement.

The Court of Common Pleas of Dauphin County continues to have jurisdiction to hear and determine appeals from tax settlements, but an appeal can be taken only after the appellant has filed a petition for resettlement under Section 1102 and a petition for review under Section 1103; and he must file his appeal through the Department of Justice instead of through the office of the Auditor General.

To what extent are these procedural changes applicable in the case of tax settlements made prior to July 1, 1929, when The Fiscal Code became effective, and Sections 11 and 16 of the Act of March 30, 1811, were repealed; and what was the effect of the repeal on June 1, 1929 of Section 1102 of The Administrative Code of 1923?

In considering these questions there are several well-settled principles of statutory construction which must be kept in mind.

"Legislation which affects rights will not be construed to be retroactive unless it is declared so in the act. But where it concerns merely the mode of procedure, it is applied, as of course, to litigation existing at the time of its passage." *Kuga v. Lehigh Valley Coal Co.*, 268 Pa. 163, 166, citing *Kille v. Reading Iron Works*, 134 Pa. 225, 227; *Lane v. White*, 140 Pa. 99, 101; *Laukhauff's Estate*, 39 Pa. Superior Ct. 117, 119; *Long's App.*, 87 Pa. 114.

"When a proceeding founded upon one act of assembly is commenced and, while pending, another act is passed taking away the jurisdiction, the proceeding falls; but where the remedy only is changed, it continues under forms directed by the new act where it applies." *Bradford County v. Beardsley*, 60 Pa. Superior Ct. 478, 483, citing *Hickory Tree Road*, 43 Pa. 139; *Com. v. Robb*, 14 Pa. Superior Ct. 597; *Com. v. Mortgage Trust Co.*, 227 Pa. 163.

In the case last cited Mr. Justice Elkin said, at page 183:

"We think the sound rule is, especially as to acts which provide for the assessment and collection of annual taxes, that a statute repealing former laws on the same subject does not abolish all rights and remedies under the repealed acts, if the legislative intent not to abolish them appears."

In *Hickory Tree Road*, 43 Pa. 139, at 143, Chief Justice Lowrie said:

"And the distinction adopted by us, that proceedings fall on the repeal of the *jurisdiction*, and continue on the repeal or change of the *remedy* appears often on our books as one of undoubted validity."

"The repeal of a statute will not operate to impair rights vested under it." *Keystone S. B. & L. A. v. Butterfield*, 74 Pa. Superior Ct.

582, at 585. See also *Tiegel v. Love*, 61 Pa. Superior Ct. 149, 157; *Philadelphia v. Mason*, 37 Pa. Superior Ct. 478, 487; *Scranton v. Stokes*, 28 Pa. Superior Ct. 434.

Before applying these principles we desire to point out that:

(a) As to the procedure to be followed in settling taxes upon reports filed with the Auditor General but not settled prior to July 1, 1929, Section 5 of The Fiscal Code leaves no room for doubt. These settlements are to be made by the Department of Revenue, but "the procedure for resettlement, review, appeal, and collection, shall be that provided by this act;"

(b) As to all matters arising in connection with any tax settlement not concluded by payment, regardless of the date of the settlement, the Department of Revenue has displaced and been substituted for the former taxing officers, and has the right to take any steps and perform any acts which the former officers would have had the right to take if The Fiscal Code had merely modified procedure without transferring functions. (See Sections 3, 5 and 201 of The Fiscal Code.) Accordingly, in our opinion, when the Legislature, in Section 1102 provided that "within ninety (90) days \* \* \* the party with whom \* \* \* the settlement was made, may file, with the *department which made it*, a petition for resettlement", and, in Section 1105 that "the *department which made the settlement* may, by petition, request the board of Finance and Revenue to authorize a resettlement," it intended the underscored expressions to include the Department of Revenue, successor to the Auditor General, as far as settlements made prior to July 1, 1929, are concerned.

(c) The repeal of Section 1102 of The Administrative Code of 1923 by The Administrative Code of 1929, did not affect the continuous existence of the Board of Finance and Revenue, (Section 202 of The Administrative Code of 1929) and neither The Fiscal Code nor The Administrative Code of 1929 transferred to any other agency, any function previously exercised by the Board of Finance and Revenue. The new legislation merely modified the procedure for bringing before the Board requests for resettlement and (Sections 503 and 1105 of The Fiscal Code) substantially enlarged its jurisdiction.

(d) All pending proceedings in connection with the settlement and collection of taxes, are expressly saved by Section 5 of The Fiscal Code. Specifically included are "legal proceedings of every kind and description."

With these observations in mind, let us apply the principles of statutory construction previously stated.

We advise you that:

1. Appeals to the Court of Common Pleas taken prior to July 1, 1929 are not affected by the passage of The Fiscal Code. The Court has the same jurisdiction which it formerly enjoyed and, in any event, Section 5 clearly evidences the Legislature's intention not to interfere with any such pending proceedings;

2. Petitions for resettlement filed with the Auditor General prior to July 1, 1929, may be concluded by the Department of Revenue, with the approval of the Department of the Auditor General, under Section 5 of The Fiscal Code, as the function of acting upon such petitions has been transferred to the Department of Revenue, acting, however, with the approval of the Department of the Auditor General (Section 1102). However, when a decision has been rendered upon any such petition, the taxpayer, if dissatisfied, must file a petition for review under Section 1103. He cannot appeal to the Court without this intermediate proceeding;

3. Petitions for resettlement filed with the Board of Finance and Revenue *prior to June 1, 1929*, may be disposed of as formerly, but when the Board has acted, there is no appeal from its decision under Section 1104. Such petitions were not petitions for review; and prior to the passage of The Fiscal Code, the law did not provide an appeal from the action of the Board on a petition for resettlement;

4. The right to file petitions for resettlement with the Board of Finance and Revenue expired on June 1, 1929, after which date all such petitions were required to be filed with the Department which made the settlement. In another opinion rendered today, we are advising you fully as to the disposition of petitions for resettlement erroneously filed with your Board since June 1, 1929.

5. The Department of Revenue, acting as the successor to the Auditor General, does not have any jurisdiction to entertain a petition for resettlement filed after July 1, 1929, unless such petition was filed within 90 days after the date of settlement as required by section 1102 of The Fiscal Code; but it may, acting as successor to the former settling officers, petition the Board of Finance and Revenue, under Section 1105, for permission to make a resettlement, if the petition be filed within one year after the date of settlement or prior resettlement;

6. With respect to settlements made by the Auditor General and State Treasurer within ninety days of July 1, 1929, the procedure available to the taxpayer was as follows:

(a) He could appeal under the Act of 1811, within sixty days of the date of settlement, if the appeal was taken prior to July 1, 1929. Having appealed, the Court of Common Pleas of Dauphin County has the right to determine the case as prior to the passage of The Fiscal Code. Having appealed no other proceedings are permissable, as Sec-

tion 16 of the Act of 1811 was not and Section 1105 of The Fiscal Code is not applicable if an appeal has been taken;

(b) Not having appealed, he could, prior to July 1, 1929 file a petition for resettlement with the Auditor General. In this case, if the Auditor General acted upon the petition prior to July 1, 1929, the taxpayer could appeal within sixty days of the date of resettlement (*Com. v. Wyoming Valley Ice Co.*, 165 Fed. Rep. 789; Tax settlement rules, 43 Pa. C. C. 489), but unless the appeal was taken prior to July 1, 1929, it could be taken only after action of the Board of Finance and Revenue upon a petition for review, filed under Section 1103 of The Fiscal Code;

(c) He could after July 1, 1929 and within ninety days after the date of settlement, file a petition for resettlement with the Department of Revenue as successor to the settling departments, and thereafter the procedure would be by petition for review and appeal; or

(d) Having neither appealed nor filed a petition for resettlement within the periods mentioned in (a), (b), and (c), he could prior to June 1, 1929 file a petition for resettlement with the Board of Finance and Revenue, or he could after July 1, 1929, file a petition for refund, under Section 503 of The Fiscal Code after *paying the tax*, or, without paying the tax, he can seek to have the Department of Revenue as successor to the settling departments, apply to your Board within one year after the date of settlement for permission to make a resettlement, under Section 1105 of The Fiscal Code.

7 With respect to settlements made by the Auditor General and State Treasurer more than ninety days prior to July 1, 1929, the procedure available to the taxpayer was as follows:

(a) He could appeal within sixty days after the date of settlement;

(b) Not having appealed, he could file a petition for resettlement with the Auditor General, prior to July 1, 1929, but within one year of the date of settlement. As already stated, if the Auditor General resettled the tax prior to July 1, 1929, an appeal could be taken from the resettlement, provided it was taken prior to July 1, 1929;

(c) He could prior to June 1, 1929 file a petition for resettlement with the Board of Finance and Revenue;

(d) Having pursued none of these courses, he could after July 1, 1929 file a petition for a refund or seek to have the Department of Revenue obtain from your Board permission to resettle the account as outlined in the case of settlements made within ninety days of July 1, 1929.

Very truly yours,

DEPARTMENT OF JUSTICE

WM. A. SCHNADER,

*Special Deputy Attorney General.*

*Board of Finance and Revenue.*

Work of the Board under the provisions of the Fiscal Code. Act of April 9, 1929, P. L. 343.

Department of Justice,

Harrisburg, Pa., January 27, 1930.

Honorable Edward Martin, Chairman, Board of Finance and Revenue,  
Harrisburg, Pennsylvania.

Sir: You have requested us to advise you upon a number of questions relating to the work of the Board of Finance and Revenue under the provisions of The Fiscal Code (Act of April 9, 1929, P. L. 343). Because of the large number of questions which you ask we shall answer them as we state them:

I.

Section 502 of The Fiscal Code has to do with "resettlements." Section 503 has to do with "refunds." No limit is put upon the time for the filing of petitions for "resettlements," which we interpret to include cases where a credit may be given a corporation on the books of the Commonwealth after a review and revision by the Board, while in the case of "refunds," the law reads, "All petitions for refunds shall be in such form as the Board shall prescribe, and must be filed with the Board within two years of the payment alleged to have been erroneously made \* \* \* ." Does the word "refunds" appearing here mean strictly those cases in which the Board is authorized to make cash refunds, such as for inheritance tax, stock transfer tax, etc., and for which appropriations to take care of same have been made in the General Appropriation Bill, or does this provision designating the two year limit apply to all petitions for refund, including those made by corporations requesting resettlements of taxes, bonus, etc., which would not result in an actual refund of cash but merely in a credit on the Commonwealth's ledger accounts of the corporation?

Section 502 of The Fiscal Code is as follows:

"Resettlements.—Upon the presentation to it of a petition for review, as hereinafter provided, the Board of Finance and Revenue shall have the power, and its duty shall be, to revise any settlement made with any person, association, corporation, body politic, or public officer, by the Department of Revenue, or by the Department of the Auditor General and the Treasury Department."

It will be noted that the jurisdiction of your Board under this section is effective only "upon the presentation to it of a petition for review as hereinafter provided." These words must be given their full meaning and effect and cannot be disregarded.

The procedure for filing a petition for review is contained in Section 1103 of The Fiscal Code. Clause (a) of that section provides:

“Within thirty days after notice by the Department of Revenue, or of the Auditor General, of the action taken on any petition for a resettlement filed with it, the party with whom the settlement was made may, by petition, request the Board of Finance and Revenue to review such action.”

Accordingly, it is quite clear that the jurisdiction of your Board under Section 502 is limited to cases in which, within thirty days after notice of the action of the settling department in disposing of a petition for resettlement, the party with whom the settlement was made files a petition for review. You do not have jurisdiction under this section under any other circumstances.

Section 503 of The Fiscal Code relates to refunds of any moneys “alleged to have been paid to the Commonwealth as the result of an error of law or of fact, or of both law and fact.”

Necessarily this section affords relief only to persons who have actually made payments of money to the Commonwealth. It does not confer any jurisdiction for revising settlements upon which payment has not yet been made.

If your Board reaches the conclusion that the petitioner for a refund erroneously paid money to the Commonwealth there are two types of relief which may be afforded. If the Legislature has made an appropriation out of which a refund is properly payable, the Board may refund in cash the erroneous payment. On the other hand, if there is no such appropriation, or if, although there is such an appropriation, the petitioner has a running account with the Commonwealth, your Board may “credit the account of the person, association, corporation, body politic, or public officer entitled to the refund.”

Under no circumstances can your Board, acting under Section 503, make or authorize a “resettlement,” as that word is used in Sections 1102, 1103, and 1105. However, if the Board determines that a petitioner is entitled to a refund, it can and should recalculate the amount of tax due by revising the settlement papers on file; and the books in the Department of Revenue and the Department of the Auditor General should be modified accordingly. Such recalculations will, as a practical matter, be tantamount to a resettlement; but it is not a resettlement in the sense that it is subject to petition for review or appeal.

Resettlements, in the technical sense of the word, can be made only when the procedure specified in Sections 1102 and 1103 has been followed or when the Department which made the settlement petitions your Board, under Section 1105, for permission to make a resettlement.

In the latter event, Section 1105 requires that the petition be filed within one year after the date of settlement. In the former case, your Board's jurisdiction is derived from Section 1102 or from Sections 502 and 1103.

## II.

Can the Board consider petitions for refund when the payment of the tax, interest, or bonus has been made more than two years prior to the filing of the petition?

The answer to this question must be in the negative unless the case comes within one of the exceptions noted in Section 503. Section 503 specifically provides that "All petitions for refunds \* \* \* must be filed with the board within two years of the payment alleged to have been erroneously made," except:

(a) In the case of transfer inheritance tax payments under certain circumstances;

(b) When a court of record has adjudged a person legally dead and the person subsequently reappears; and

(c) When money has been paid to the Commonwealth under a law subsequently held to be unconstitutional, or under an interpretation of a law subsequently held by the courts to be erroneous.

Different limitations for the filing of petitions under these three exceptions are provided by the statute.

Clearly, unless a case comes within one of these exceptions, your Board cannot entertain a petition for refund if the payment has been made more than two years prior to the filing of the petition.

## III.

Can the Board continue the practice of the preceding Board as to time limits set for cases to be considered?

Can the Board set its own time limits?

There is no doubt about the proper answer to this question. Section 503 definitely and unequivocally limits the Board's jurisdiction to cases in which petitions for refund are filed within the time limits therein specified. The Board cannot ignore Section 503 and set its own time limits.

## IV.

As to petitions filed with the Board before June 1, 1929, is it your opinion that the rules for time limit from the payment alleged to have been erroneously made, which rules were set according to the practice of the Board as constituted before June 1, 1929 should apply?

In cases in which petitions for refund were filed with the Board prior

to June 1, 1929, the Board could consider them without regard to the time limits contained in Section 503, if it had jurisdiction for that purpose prior to the passage of The Fiscal Code. Article V of The Fiscal Code became effective on June 1, 1929. (See Section 1804.) Your Board existed prior to that date. Its continuous existence was not effected by the passage of The Fiscal Code or of The Administrative Code of 1929, (Act of April 9, 1929, P. L. 177). The Board was, therefore, authorized to dispose of any business before it when Article V of The Fiscal Code became effective under the statutory provisions previously in effect. Those provisions did not place time limits upon the jurisdiction of the Board and the Board was free by rule to declare a policy with regard to the consideration of petitions for refund. Accordingly, in all cases in which such petitions were actually filed before June 1, 1929, the time limits contained in Section 503 of The Fiscal Code are not applicable.

#### V.

As to appeals filed within sixty days from the date of settlement with the Auditor General's Department and filed with that Department prior to July 1, 1929, which in practically all cases were filed for the purpose of protecting the statutory rights of the appellant corporation, should same be considered petitions for review and, therefore, now go to the Board of Finance and Revenue, or should they go to the Department of Revenue, and in all cases where an agreement cannot be speedily reached between the attorney for the appellant and the Department of Revenue, be transmitted forthwith to the Department of Justice?

The procedure suggested in this question is incorrect. The Department of Revenue does not have any jurisdiction to reach an agreement between the attorney for the appellant in cases in which appeals were filed from settlements made prior to July 1, 1929. As the successor to the Department of the Auditor General, the Department of Revenue has the right to transmit these appeals to the Department of Justice. It has no other rights in the premises.

#### VI.

In a case where applications for refund have been filed with the Department of Highways before June 1, 1929 and approved for payment by that Department before that date, is it necessary that same now be approved by the Board of Finance and Revenue?

If applications for refund were filed with the Department of Highways and approved by that Department for payment prior to June 1, 1929, the Auditor General, the State Treasurer, and the Attorney General had the right to grant the applications and complete the refund



without any supplemental procedure before your Board. If this was not done, your Board can treat such applications as applications to your Board for refund under Section 503 of The Fiscal Code.

#### VII.

Under Section 503 of The Fiscal Code, if within two years of date of payment, a claim for refund of taxes is made, should same be allowed regardless of how far back are the periods or years represented by the taxes paid? For instance, if in 1929 a payment was made covering taxes for the year 1920, is this subject to a refund in the nature of granting the claimant a credit on the books of the Commonwealth?

The date of settlement has no bearing upon the time within which a petition for a refund may be made under Section 503. Time begins to run from the date of payment of the tax. Accordingly, if in 1929 taxes for the year 1920 were erroneously paid, the taxpayer can undoubtedly file a petition for refund with your Board in the year 1930.

#### VIII.

Under Section 802, subdivisions (e) and (f) does the Board of Finance and Revenue actually make settlements, or does it simply determine in what amount the settlement shall be made and submit its recommendations or decision to the Department?

Subsection (e) of Section 802 requires your Board to make a settlement if the Department of Revenue and the Department of the Auditor General have failed to agree within four months after the original submission of the settlement by the Department of Revenue to the Department of the Auditor General. When your Board returns the papers to the Department of Revenue as provided in subsection (f), it should return a completed settlement rather than a mere recommendation or decision to be carried out by the Department of Revenue.

#### IX.

Under Section 1102 if the Department of Revenue does not act on a petition for resettlement within six months after the date of settlement, is the failure to act equivalent to the refusal of the petition for resettlement?

Section 1102 provides that it shall be the duty of the department with which a petition for resettlement was filed, "within six (6) months after the date of any settlement, to dispose of any petition for resettlement."

This provision is mandatory and should be strictly obeyed. However, The Fiscal Code does not specifically provide that failure to dispose of a petition for resettlement within the six-month period shall

be equivalent to a refusal thereof; and only the Legislature could give this effect to the failure of the Department of Revenue to observe the statutory time limit in disposing of such petitions.

### X.

Under Section 1102, where the Departments are unable to agree, does the Board of Finance and Revenue actually make resettlements or does it simply determine in what amount the resettlement shall be made and submit its recommendation or decision to the Department?

Section 1102 of The Fiscal Code provides that within ninety days after the date of any settlement, the party with whom or with which it was made may file, with the department which made the settlement a petition for resettlement, which must fully state the reasons upon which the petitioner relies.

Within six months of the date of the settlement the department with which the petition for resettlement was filed must dispose thereof.

In the case of petitions for resettlement filed with the Department of Revenue, their disposition is subject to the approval of the Auditor General as in the case of original settlements "and, if the two departments shall be unable to agree, the case shall be submitted to the Board of Finance and Revenue by the Department of Revenue. The Board of Finance and Revenue shall decide every such case within three (3) months from the date of the submission thereof, and, in case of its failure to reach a decision within such period, the disposition of the Department of Revenue shall automatically become valid, and the Board of Finance and Revenue shall immediately return to the Department of Revenue all of the papers appertaining to the case."

The section does not specifically provide whether your Board shall actually make a resettlement if you believe that the petitioner is entitled thereto, or shall merely determine upon what basis the resettlement shall be made, returning the papers to the Department of Revenue with instructions to carry out the Board's decision.

The section does not require your Board to "decide every such case." In our opinion a decision is rendered only when the amount of tax due is determined. If, therefore, your Board believes that the petitioner owes an amount of tax other than that indicated by the Department of Revenue in disposing of the petition for resettlement, it is your Board's duty actually to resettle the tax, returning the papers to the Department of Revenue after that has been done.

The fact that your Board makes a resettlement in such case does not deprive the petitioner of his or its right to file a petition for review, as provided in Section 1103, but obviously, the effect of such a petition will be to call upon your Board to reconsider your own action.

## XI.

When a taxpayer has failed to file a petition for resettlement within ninety days of the date of settlement and then files such a petition for resettlement after the expiration of ninety days but within a year of the date of settlement, and the Department which made the settlement then petitions the Board of Finance and Revenue under Section 1105 for permission to make a resettlement and the Board grants such permission, and the Department thereupon makes a resettlement can the taxpayer, if dissatisfied with the action taken on his petition for resettlement by the Department, file a petition for review within thirty days under Section 1103? In putting this question it is assumed that the Department requested permission on the Board to make a resettlement because it desired to allow part of taxpayer's claim. The subsequent dissatisfaction of the taxpayer resulted from the fact that the whole prayer of his petition was not granted.

It is entirely a matter of grace whether the Department of Revenue shall request your Board to permit it to make a resettlement after a taxpayer has petitioned it to do so. If the Department refuses to make such request, the taxpayer has no right of appeal to any tribunal; and the Department should refuse to make such request unless it is convinced that the taxpayer has been overcharged as the result of an erroneous or illegal settlement.

Likewise it is entirely a matter of grace whether your Board shall grant such requests when presented. If you refuse them, there is no right of appeal.

If the Department requests and receives permission to make a resettlement, the resettlement may result in a higher charge against the taxpayer than that shown by the original settlement. In such cases it is unthinkable that the taxpayer would be bound by the resettlement without any right of review or appeal; and if review and appeal are permissible in respect to any resettlement made under Section 1105, they must be allowed in respect to all such resettlements.

Accordingly, we advise you that the procedure set forth in Section 1103 and 1104 is applicable after resettlements have been made under Section 1105.

## XII.

Does the payment or nonpayment of tax in any way affect procedure under Section 1103 of The Fiscal Code?

In our opinion the procedure prescribed under Section 1103 of The Fiscal Code is not applicable in cases in which the tax has been paid. The tax having been paid, the question whether the settlement is cor-

rect is a moot question. The taxpayer's right to relief under such circumstances is confined to that provided by Section 503; he must petition for a refund.

### XIII.

If a taxpayer has not complied with Section 1103 of The Fiscal Code, and has let his time limits for review expire, can he nevertheless receive favorable consideration from the Board under Section 503 by petition for refund, provided, of course, that he has paid the tax?

If a taxpayer has not taken advantage of his rights under Section 1103 of The Fiscal Code, he may nevertheless petition your Board for a refund under Section 503 and seek to convince you that he paid the tax as a result of an error of law or of fact, or of both law and fact. If your Board agrees with him, you may lawfully grant the refund in cash or in the form of a credit as hereinbefore stated, but in all such cases the action of your Board is final. The last sentence of Section 503 specifically provides that there shall be no right of appeal.

### XIV.

Petitions for resettlement so called (as those that were filed with the Board prior to June 1, 1929 were captioned) have been filed with the Board in a large number of cases since June 1, 1929.

Should these petitions be considered petitions for refund under Section 503 of The Fiscal Code, subject to the time limits contained therein:

- (a) If the taxes have been paid for more than a year prior to date of filing;
- (b) If the taxes have been paid within a year from date of filing?

If the petitions to which your question refers contain all of the data required by your Board in petitions for refund, they may at the option of your Board be treated as if they had been entitled petitions for refund. Your Board does not have jurisdiction to entertain petitions for resettlement under the provisions of The Fiscal Code. Your jurisdiction with respect to resettlements is limited as provided in Section 502 and 1105. Under the former section the petition comes before you as a petition for review and a petition for resettlement must have been filed with the settling department and acted upon prior to the filing of a petition for review. Under Section 1105 the petition must come to you from the department which made the settlement.

The taxpayer may, however, file directly with your Board a petition for refund. This petition must be "in such form as the Board may prescribe." Until such time as your Board has adopted and promulgated rules specifying the form in which petitions for refund must be

presented, it may, if it so desires, treat the petitions to which your question refers as petitions for refund. It is immaterial whether the taxes have been paid within a year from the date of the filing of the petition, but they must have been paid within the time limits established by Section 503.

#### XV.

Can the Board of Finance and Revenue entertain a petition for Review under 1103 when the Department which acted on the Petition for Resettlement allowed part of the petitioner's prayer but not all of it?

The Board of Finance and Revenue must entertain petitions for review under Section 1103, no matter what action the settling department took upon the taxpayer's petition for resettlement. The taxpayer has a right to be heard upon a petition for review even though the settling department has already conceded ninety-nine per centum of his claim in disposing of the petition for resettlement.

#### XVI.

Can the Board of Finance and Revenue entertain a petition for authority to make resettlement under 1105 when the Department petitioning is willing to grant part of the taxpayer's prayer but not all?

The Board of Finance and Revenue may entertain a petition for authority to make a resettlement under Section 1105, no matter what action the petitioning department is disposed to take in resettling the taxpayer's account. Under Section 1105, the Department of Revenue may petition your Board for permission to make a resettlement either to increase the amount due by the taxpayer or to decrease it or entirely to strike off the tax.

#### XVII.

Does the Board have jurisdiction over any petitions for resettlement where taxes have been paid for less than a year (such petitions having been filed after June 1, 1929) except as provided for in Section 1105 of The Fiscal Code?

We have already indicated that the answer to this question must be in the negative unless your Board sees fit to treat such petitions as petitions for refund.

As already stated, your Board has jurisdiction to receive a petition for leave to make a resettlement as provided in Section 1105. It has no jurisdiction whatever to entertain petitions for resettlement. They must in all cases be filed with the department which made the settlement as provided in Section 1102. Your Board's jurisdiction to settle taxes is confined to cases in which the Department of Revenue

and the Department of the Auditor General have been unable to agree upon the disposition to be made of a petition for resettlement (Section 1102) and to cases coming before you upon petition for review (Sections 502 and 1103).

XVIII.

It was the custom of the taxing departments in the past and under the old procedure to forward to the Board of Finance and Revenue all petitions for resettlement of tax where tax has been paid into the State Treasury for more than a year on the date of the filing of the petition. Is this proper, and does the Board's jurisdiction over these cases correspond with the jurisdiction before the effective date of Article V of The Fiscal Code (June 1, 1929), with the exception of the new time limits provided by Section 503?

The procedure stated in this question is incorrect. The taxing departments should not forward to your Board such petitions for resettlement filed with it under any circumstances. It should return them to the petitioner calling attention to the fact that it does not have jurisdiction to entertain such petitions, and your Board should not receive any petitions forwarded to you as stated in this question.

Very truly yours,

DEPARTMENT OF JUSTICE

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

---

OPINIONS TO THE SECRETARY OF  
FORESTS AND WATERS

---

---

## OPINIONS TO THE SECRETARY OF FORESTS AND WATERS

*Forest Reserves—Payment by Commonwealth in lieu of taxes—Act of May 20, 1921 and Nos. 590 and 591 of 1929—Pymatuning Reservoir.*

1. Act No. 591 does not apply to lands and property acquired by the Commonwealth for purpose of conservation of water or to prevent flood conditions. Payments by Commonwealth in lieu of taxes must be made on basis of pre-existing law.

Said act supersedes all legislation prior to date of its approval, with respect to land acquired for forest reserves.

2. Act of 1921 (P. L. 1034) is ineffective, section 2 having been repealed by Act No. 591.

3. The words "annual charge" used in Act No. 591, mean a charge for the calendar year. The tax for entire year of 1929 must be computed under that act.

4. No distinction is to be made between payments due as the result of acquiring of land for the Pymatuning Reservoir and other payments under the act.

Department of Justice,

Harrisburg, Pa., October 9, 1929.

Honorable Charles E. Dorworth, Secretary of Forests and Waters,  
Harrisburg, Pennsylvania.

Sir: We have your letter calling attention to the inconsistencies between Acts Nos. 590 and 591 of the 1929 Session and inquiring:

First, which of these two acts is effective; and

Second, whether tax payments for the year 1929 on lands acquired for the Pymatuning Reservoir Project should be determined under the provisions of pre-existing law for that part of 1929 prior to the approval of the 1929 Acts above mentioned, and for the remainder of the year under the provisions of the new legislation; or, if not, upon what basis such tax payments should be made.

Both of the acts in question were approved by the Governor on May 17, 1929. Act No. 590 amends Section 1 of the Act of May 20, 1921, P. L. 1034. Act No. 591, in Section 3, purports to repeal absolutely the Act of May 20, 1921, P. L. 1034.

The Act of May 20, 1921, P. L. 1034, consisted of two sections. The first section required boards of school directors in certain cases in which the Commonwealth acquired land for public purposes to certify to the Auditor General and to the Superintendent of Public Instruction the assessed valuation of such lands at the time of such acquisition. Section 2 of the Act provided that after any such acquisition, the board of school directors should, from year to year, at the time of the annual tax levy for school purposes, certify to the



Auditor General and the Superintendent of Public Instruction the rate of its levy for the next school year; imposed upon the Superintendent of Public Instruction the duty of ascertaining the amount of taxes which would have been collected upon the Commonwealth's land, if it had not become State property; and provided that, upon the ascertainment of such amount, the Commonwealth should pay it to the school district. Obviously, Section 1 of the Act of 1921 is meaningless and ineffective without Section 2 so that if Section 2 has been absolutely repealed by Act No. 591 of the 1929 Session, the Act of 1921 has been rendered ineffective in its entirety.

The title of Act No. 591 is as follows:

“An act providing a fixed charge, payable by the Commonwealth, on lands acquired by the State and the Federal Government for forest reserves, or for the purpose of preserving and perpetuating a portion of the original forests of Pennsylvania, and preserving and maintaining the same as public places and parks; and the distribution of the same for county, school, township, and road purposes in the counties, school districts, and townships where such forests are located; and making an appropriation.”

Section 1 of the Act provides that from and after its passage all lands heretofore or hereafter acquired by the Commonwealth or by the government of the United States “\* \* \* for forest reserves or for the purpose of preserving and perpetuating any portion of the original forests of Pennsylvania and preserving and maintaining the same as public places and parks and which, by existing laws, are now exempt from taxation, and all lands and property heretofore or hereafter acquired for the purpose of conservation of water, or to prevent flood conditions, upon which a tax is imposed by existing laws payable by the Commonwealth, \* \* \*” shall hereafter be subject to an annual charge of one cent per acre for county purposes, two cents per acre for school purposes, and two cents per acre for township road purposes.

Certain of the counties, school districts, and townships affected by this Act have called to our attention the fact that the title **does not** give notice that the Act applies to lands and property acquired for the purpose of conservation of water or to prevent flood conditions, and they contend that as to such lands and property the Act is unconstitutional and void. Under many decisions of our appellate courts, it is too clear to require extended discussion that this contention is sound and would prevail if the validity of the Act as applied to these lands were attacked in the courts.

Accordingly, Act No. 591 does not, in our opinion, have any application to lands and property acquired by the Commonwealth or by the

government of the United States for the purpose of conservation of water or to prevent flood conditions; and payments by the Commonwealth in lieu of taxes must be made as respects such lands and property on the basis of preexisting law.

With respect to lands acquired by the Commonwealth or by the government of the United States, for forest reserves, or for the purpose of preserving and perpetuating any portion of the original forests of Pennsylvania and preserving and maintaining the same as public places and parks, Act No. 591 is effective and has superseded all prior legislation. This change became effective as of the date of the approval of Act No. 591, namely, May 17, 1929.

Act No. 591 provides for the payment of "an annual charge" and, in our opinion, this expression means a charge for the calendar year.

When Act No. 591 was approved by the Governor, payments to counties, school districts, and townships had not been made for the Commonwealth for the year 1929. The funds to be used for this purpose were appropriated by Act No. 591; and it is our opinion that for the year 1929 all payments in lieu of taxes on forest lands to the political subdivisions mentioned must be made under the provisions of Act No. 591.

With respect to lands acquired by the Commonwealth for the Pymatuning Reservoir Project, payments cannot be made under Act No. 591 for the reason already indicated. As to these lands, Act No. 591 is ineffective, both insofar as it undertakes to provide for payments, and insofar as it purports to repeal the Act of May 20, 1921, P. L. 1034, and payments in lieu of taxes will continue to be made to counties and townships, under the Act of May 31, 1923, P. L. 487, and to school districts, under the Act of May 20, 1921, P. L. 1034, as amended by Act No. 590 of the 1929 Session.

For the purpose of making payments in lieu of taxes on lands taken by the Commonwealth for the Pymatuning Reservoir Project, your Department may utilize as much as is necessary of the appropriation made to it by the General Appropriation Act of 1929 (Act No. 354-A) for the use of the Water and Power Resources Board; and the Department of Public Instruction may utilize as much as is necessary of the appropriation made to it by the same Act for the purpose, *inter alia*, of making payments to school districts of annual fixed charges in lieu of taxes on State lands as required by law.

Very truly yours,

DEPARTMENT OF JUSTICE

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

---

OPINION TO THE BOARD OF  
GAME COMMISSIONERS

---

---

## OPINION TO THE BOARD OF GAME COMMISSIONERS

*Game laws—Ownership by state—Game Code of 1923—Individual rights of Ownership—Municipality—Rearing and sale of game—Necessity of license.*

1. Game and fish are incapable of absolute private ownership, and, except in so far as the state by legislative enactment authorizes their capture, appropriation or use, they belong to the people in their sovereign capacity.

2. A municipality as such has no right to capture, rear and sell game or birds, except in accordance with the provisions of the Game Code of 1923, and it must, in order to engage in such activity, obtain a propagating license under section 406 of that act.

Department of Justice,

Harrisburg, Pa., July 31, 1930.

Honorable John J. Slautterback, Executive Secretary, Board of Game Commissioners, Harrisburg, Pennsylvania.

Sir: You ask to be advised whether a propagating license is necessary and may be issued by your Board of Game Commissioners, under the following conditions which you present:

The Borough of Norristown maintains a small park, where it has a few game birds and game animals. It is the desire of the management to sell a few of the offspring, using the money for the erection of cages, and purchase of food for the birds and animals.

The Borough Solicitor, at whose instance you write us, makes this inquiry "as the municipality is part of the State of Pennsylvania, would it be necessary to secure a propagation license?"

We may preface our reply to your inquiry with the general proposition that game and fish, like light and air, are incapable of absolute ownership. The wild game of a state belongs to the people in their collective sovereign capacity, and is not the subject of private ownership, except in so far as the sovereignty, through legislative enactment, authorizes its capture, appropriation, or use: *Geer vs. Connecticut*, 161 U. S. 519; *Com. vs. Papsone*, 44 Sup. Ct. 128. Through statutes, the Legislature has directed the methods, manner and conditions under which game may be taken, and the use to which it may be applied.

The legislative enactments regulating game and protected birds within the Commonwealth of Pennsylvania, are set forth in "The Game Code of 1923," P. L. 359, and its amendments. The part of the Code which pertains to propagation of game, the subject of your inquiry, appears in Section 406, which provides that:

"Licenses issued to persons residing within this Commonwealth and of the age of twenty-one years or upwards, and to associations and corporations resident with-

in this Commonwealth, shall authorize the holder thereof, and his or its assistants, to breed or raise game of any kind, and to sell the same, dead or alive, or the eggs of game birds, at any time, under the regulations hereinafter provided.

“It is unlawful to breed or raise game of any kind in captivity, or to sell eggs of game birds, without a propagating license \* \* \*.”

Subsequent sections of the Act relate to the character of premises suitable for purposes of propagation, enclosures for certain game, manner of sale of eggs and game raised, tagging and shipment thereof, etc., followed with penalties for violation.

The scheme of legislation thus provides the precise conditions and circumstances under which citizens may be permitted to kill game or birds, and the purposes and manner in which they may be captured; and having thus clearly expressed the method, manner, and purposes in the matter of taking, the conclusion necessarily follows, that other methods are excluded. The mere fact that the borough designated, is a municipality of the Commonwealth does not carry with it the authority to exercise the right to capture, use, or sell game, or its product or progeny. This prerogative exists only in the sovereignty of the State and may only be dispensed by the State, through its legislative body, by legislative enactment.

However, the municipality is such an association or corporate body resident within the Commonwealth, as would come within the purview of the statute and propagating license may be issued to it by the Board of Game Commissioners, upon compliance with the requirements of the statute.

It is our opinion, and we advise you, that said borough has no right as such municipality, to capture, rear, and sell game or birds, except in accordance with the provisions of the statute, and the first obligation for engaging in the enterprise, is the procurement of the propagating license provided by the statute.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAS. W. SHULL,

*Deputy Attorney General.*

---

---

OPINIONS TO THE SECRETARY  
OF HIGHWAYS

---

---

## OPINIONS TO THE SECRETARY OF HIGHWAYS

*Motor Vehicles—Non-Residents—Delivering Goods from Other States—Manufacturer—Retailer—Registration—License—Code of May 11, 1927, P. L. 886.*

Under the Motor Vehicle Code of May 11, 1927, P. L. 886, the term "Transportation of property for compensation" does not refer to the transportation of products of a manufacturer, or the wares of a retailer, using his own motor vehicle for the transportation and delivery of the same from another state into or out of Pennsylvania, so that such non-resident is not required to register or take out a license for operating within the state.

Department of Justice,

Harrisburg, Pa., February 26, 1929.

Honorable James L. Stuart, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: Our attention has been called by your Department to an instance that in our judgment requires this Department to interpret the intent and meaning of Section 409 of the Vehicle Code, approved May 11, 1927, P. L. 886. There seems to be some misunderstanding among the officers charged with the enforcement of the provisions of this Code.

Two residents of Binghamton, New York, were recently haled by members of the State Highway Patrol before a justice of the peace and were charged with a violation of Section 409 (b) and (c). They were summarily convicted and paid fines. No appeal was taken to the Court of Quarter Sessions in either case.

It appears that these two men are retail coal dealers in the City of Binghamton, New York, and they own and operate in their business certain motor trucks that are registered and licensed in the State of New York. They have been purchasing anthracite coal at the mines in Lackawanna County and hauling the same back to Binghamton for distribution to their customers.

Section 409 of the Vehicle Code provides as follows:

"(a) Non-residents of this Commonwealth, except as otherwise provided in this act, will be exempt from the provisions of this act, as to the registration of motor vehicles, trailers, and semi-trailers, for the same time and to the same extent as like exemptions are granted residents of this Commonwealth under laws of the foreign country or state of their residence: Provided, That they shall have complied with the provisions of the law of the foreign country or state of their residence relative to the registration and equipment of their motor vehicles, and

the licensing of motor vehicle operators, and shall conspicuously display the registration plates, as required thereby, and have in their possession the registration certificate issued for such motor vehicle.

“(b) A non-resident owner of a foreign vehicle, operated within this Commonwealth for the transportation of persons or property for compensation, either regularly according to schedule or for a consecutive period exceeding thirty (30) days, shall register such vehicle and pay the same fees therefor as are required for like vehicles owned by residents of this Commonwealth.

“(c) Every non-resident, including any foreign corporation carrying on business within this Commonwealth and owning and regularly operating in such business any motor vehicle, trailer or semi-trailer exclusively within this Commonwealth, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this Commonwealth.”

Under the reciprocity provisions of Section 409 (a), as the same are affected by the New York motor vehicle laws, residents of New York would ordinarily be entitled to operate motor vehicles, registered in said State, within this Commonwealth, unless such operation should come into conflict with subsection (b) or (c). It is clear that in the case at issue there was no violation of subsection (c) because the business of the nonresidents was not carried on within the Commonwealth of Pennsylvania, nor were the trucks operated exclusively within this Commonwealth.

In the recent case of *Commonwealth vs. Pickens* (not reported) the Court of Quarter Sessions of Lawrence County had occasion to consider a state of facts closely paralleling those here presented. *Pickens* was the employe of a bakery at Youngstown, Ohio, and operated a motor vehicle belonging to his employer, registered in Ohio, and used in the delivery of the product of said bakery. From time to time he delivered said product within the limits of Lawrence County, Pennsylvania, and he was arrested and charged with the violation of Section 409 (b) of the Vehicle Code.

In reversing the conviction, Judge Chambers, speaking for the Court of Quarter Sessions of Lawrence County, makes the following comment with regard to the intent of Section 409 (b) :

“It would appear that this section of the Act was intended to cover such vehicles as are engaged in the transportation of persons or property for hire or pay, in other words, whose business would be in the nature of that of a common carrier. In the case before the Court it is clear that this vehicle was not used for that purpose but simply



as a means of conveyance for the product of the owner to his customer and that it was not in the contemplation of the legislature, under this section, to require a license fee from such vehicle."

An exception was noted in favor of the Commonwealth, but this Department, feeling that Judge Chambers' construction of the section in question was entirely correct, decided to take no appeal from his decision. It is, therefore, clear that residents of states which extend like privileges to residents of Pennsylvania are entitled to operate within this Commonwealth motor vehicles properly registered in the home states, without transgressing the above mentioned provisions of the Vehicle Code. The exceptions to this privilege exist when the foreign vehicle is operated within this Commonwealth for the transportation of persons or property for compensation, either regularly according to schedule, or for a consecutive period exceeding thirty days. And the term "transportation of property for compensation" does not refer to the transportation of the products of a manufacturer, or the wares of a retailer, using his own motor vehicle for transportation and delivery of the same. Subsection (c) forbids the operation without Pennsylvania registration of motor vehicles belonging to non-residents engaged in carrying on business within the Commonwealth where such vehicles are operated exclusively within the Commonwealth in connection with said business.

The members of the Highway Patrol should be fully advised of the foregoing so that unwarranted prosecutions may no longer be instituted. It is easy to see that retaliatory measures by adjacent states might well follow the failure of the officers of this Commonwealth to closely adhere to the reciprocity provisions of our Vehicle Code.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROSCOE R. KOCH,

*Deputy Attorney General.*

---

*State highways through municipalities—Construction and maintenance—Appropriation by State—Approval of plans and work by Highway Department—Payment of expenses—Act of May 1, 1929.*

1. Under the Act of May 1, 1929, No. 409, authorizing the State Highway Department to enter into agreements with municipalities for the construction or improvement of highways within such municipalities which are not on the State highway plan, but are continuations of State highways running through such municipalities, the Highway Department has a right to provide that all

plans and specifications and all work shall be approved by it before any money shall be paid by the Commonwealth, and also to determine the purpose for which the money shall be expended.

2. Expenses of engineering and inspection are payable out of the general motor license fund appropriation and not out of the special appropriation made by the Act of 1929.

Department of Justice,

Harrisburg, Pa., July 26, 1929

Honorable James Lyall Stuart, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: We have your request for an interpretation of Act No. 409, approved May 1, 1929.

You desire to be advised:

1. Whether your department has the right in entering into agreements with cities to provide that you shall approve all plans and specifications for work to be done under the agreements, and that you shall also have the right to inspect the work to see that it conforms to the plans and specifications before any money shall be paid by the Commonwealth for the work done;

2. Whether your department has the right to determine whether the money allocated to any city shall be expended for construction, reconstruction or maintenance or a combination of these purposes; and

3. Whether your department shall pay for the engineering and inspection work which may be necessary in connection with work done on city streets out of the general Motor License Fund appropriation, or out of the special appropriation of two million dollars made by Act No. 409.

Act No. 409 authorizes your department:

“\* \* \* to enter into agreements with cities of the second class, second class A, and third class providing for the improvement, construction, reconstruction, and/or maintenance, in whole or in part, \* \* \* of any streets and highways in any such city which are not on the plan of the State highway system but which are continuations of State highways entering such cities, or running through such cities, or which furnish the shortest or most convenient route through such cities for the traveling public \* \* \*.”

It provides further that:

“\* \* \* such agreements may provide that the improvement, construction, reconstruction and/or maintenance shall be done by the Department of Highways, or the

city, or by contract let by the Department of Highways, or by the city, or by both, and that the Commonwealth shall, in either event, pay the whole or any portion of the cost of such improvement, construction, reconstruction and/or maintenance, the city to pay the remaining portion of such cost."

Further provisions grant authority to cities to enter into contracts with the Department of Highways, as hereinbefore outlined, to expend city money for such purposes, to make provision for the payment of the cities share of the cost of work done under the Act, either out of the treasury or by assessment, and so on.

Finally, the sum of two million dollars is appropriated to your department out of the Motor License Fund "for the improvement, construction, reconstruction and/or maintenance of city streets and highways, in the manner provided by this act;" and your department is directed to allocate the appropriation among all of the cities "to which this act applies" upon a specified basis.

It is apparent that plans and specifications for the work to be done under the Act must be prepared and approved by someone. The Act does not attempt to prescribe what they shall be.

Likewise, someone must determine whether the work shall be done by your department, by the several cities, or by contract, and in the last-named event, whether the contract shall be let by the city or by your department or by joint action. The Act permits the appropriated money to be expended under any of the procedures mentioned, without specifying which procedure shall apply in any particular case.

Another question requiring determination by an administrative authority is whether, in any case, the money allocated to a particular city shall be expended for improvement, construction, reconstruction or maintenance, or more than one of these purposes.

Three possible methods of determining these questions occur to the mind. Your department acting alone might settle them; the cities acting independently of your department might settle them; or your department and the several cities acting jointly might settle them.

Which of these methods did the Legislature intend to prescribe?

Clearly, it was not the Legislature's intention that, after the allocation of the appropriation to the several cities, they may proceed to expend their respective shares independently of your department. Had this been the purpose of the Act, the appropriation would have been made to the several cities rather than to your department.

Nor, in our judgment, did the Legislature intend your department to settle these questions without consulting the several cities affected. The Legislature authorized you "to enter into agreements," with the

several cities, thus indicating an intention that you should negotiate with the several cities and seek to arrive at an arrangement, mutually satisfactory, for the expenditure of their several allocations.

This brings us to the question whether, in any case, you are justified in insisting that the specifications for the work shall be at least of the standard which you prescribe for work on State highways, and that before any State money is paid on account of the work, you shall be satisfied, by inspection, that the work has been performed according to the approved plans and specifications.

To this question the answer is clearly in the affirmative. You would, in our judgment, be extremely remiss in the performance of your public duty were you to consent, in any case, to pay money out of the appropriation made by Act No. 409, for work of a lower standard than that which you require in expending the money appropriated to you for the improvement, construction, reconstruction and/or maintenance of State highways; and without inspecting the work to see that it was properly performed, you could not, in any case, properly present a requisition to the Department of the Auditor General calling for the payment of the appropriated money out of the Motor License Fund.

To your second question, the answer is similar: You should endeavor to agree with each city whether the money allocated to it shall be expended for construction, reconstruction or maintenance, or a combination of these purposes. You have a right to refuse to expend the money for a purpose which, in your judgment, is improper or unwise, and you should not, under any circumstances, permit any city to determine how its allocation shall be expended, independently of consultation with and approval by your department.

With respect to your third question, we advise you that, in our opinion, the Legislature did not intend you to deplete the two million dollar appropriation made by Act No. 409 by charging against it any engineering or inspection expenses incurred by your department. You should, in our opinion, meet these expenses out of the general appropriation to your department of the moneys in the Motor License Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

*Bridges—County bridges—Bridges taken over by the State Department of Highways—Ownership of material of old bridges—Act of May 1, 1929.*

Where the Commonwealth takes over a county bridge for State highway purposes under the Act of May 1, 1929, P. L. 1054, the bridge automatically becomes its property, and if such bridge is torn down, the materials thereof do not belong to the county.

Department of Justice,

Harrisburg, Pa., November 7, 1929.

Honorable James L. Stuart, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: Under the provisions of the Act of May 1, 1929, P. L. 1054, the Department of Highways will, on June 1, 1930, take over all county bridges over streams on State highway routes in boroughs, towns, and townships, and thereafter such bridges must be built, rebuilt, repaired, and maintained by the Department of Highways at the expense of the Commonwealth from moneys in the Motor License Fund. Meantime, the Department of Highways is authorized at its option to take over any such bridges, as it may in its discretion decide should be built, rebuilt, or repaired.

Accordingly, you have already arranged to take over certain county bridges and to rebuild the same, and in several such instances the counties which erected the bridges to be replaced and were heretofore responsible for their maintenance, have asked that they be given the old bridges so that they may either salvage the same or use the structural steel work in the construction of other county bridges not on State highway routes. You desire, therefore, to be advised whether the old bridges, to be replaced and rebuilt by the Commonwealth under the provisions of the Act of 1929, become the property of the Commonwealth when they have been dismantled, or remain the property of the respective counties which originally erected them.

- After the passage of the Sproul Highway Act of May 31, 1911, P. L. 468, your Department was advised by First Deputy Attorney General Keller (Opinions of the Attorney General 1915-1916, page 241) that under the provisions of the Sproul Act the Department of Highways must build all bridges along State highway routes which it was formerly the duty of the township authorities to build or maintain. This ruling has been upheld by the Supreme Court in the case of *Commonwealth ex rel. vs. Lehigh Coal and Navigation Company*, 285 Pa. 551.

We are advised by your Department that never has a township laid claim to an old bridge structure along a State highway route when the same has been supplanted by a new bridge constructed by the Department of Highways and paid for out of the Commonwealth's funds.

It is largely because of this fact, we assume, that Paragraph 51 of your present contract Specifications provides in part as follows:

“On State highways, except county bridges, drainage pipes, and guard rails, or as otherwise provided in the Special Requirements, the structure shall become the property of the contractor.”

It is obvious that the exception of county bridges in the foregoing quotation was based on the fact that the Department of Highways had no jurisdiction whatever over county bridges prior to that imposed by the Act of 1929: *Commonwealth ex rel. vs. Grove*, 261 Pa. 504.

The Act of June 3, 1895, P. L. 130, authorized the Commonwealth to rebuild county bridges over navigable rivers and other streams where such bridges have been destroyed by flood, fire, or other casualty. This act provided that all bridges erected pursuant to its provisions shall be maintained and kept in repair by the county in which the same may be located at its own expense, except in cases where such a bridge spans a stream forming the boundary line between two counties, in which event the expense of maintenance thereof must be borne jointly by the two counties concerned.

In 1904 several bridges erected under the authority of the Act of 1895 were destroyed by floods and the question arose whether the structural steel or iron reclaimable from the wreckage belonged to the Commonwealth or to the counties wherein said bridges had been erected. In an opinion rendered April 21, 1904, (13 D. R. 672) Attorney General Carson held that the structural iron or steel, once paid for by the State, had been donated to the county by the provisions of the Act of 1895, and that the Commonwealth accordingly could lay no lawful claim to the parts of the wrecked bridge that could be salvaged.

It will be noted that Section 8 of the Act of 1895 does not specifically provide that the bridges erected under the provisions of said act shall upon their completion become the property of the counties, but provides that they shall be maintained and kept in repair at the expense of the county. This control, in the opinion of Attorney General Carson, was tantamount to ownership.

The provisions of Section 1 of the Act of 1929 are:

“That any county bridges over streams on State highway routes in boroughs, towns and townships *may be taken over*, at any time after the approval of this act, and all such bridges *shall be taken over* by the Department of Highways the first day of June, one thousand nine hundred and thirty, and, *when so taken over*, shall thereafter

be built, rebuilt, repaired, and maintained by the Department of Highways at the expense of the Commonwealth from moneys in the motor license fund."

It thus appears that the terminology of the Act of 1929 more clearly indicates than did the terminology of the Act of 1895 a transfer of actual ownership of the bridges affected by the respective acts.

You are therefore advised that county bridges taken over by virtue of the provisions of the Act of 1929 automatically become the property of the Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROSCOE R. KOCH,

*Deputy Attorney General.*

---

*Bridges—County bridges—Maintenance and lighting—State highways—Act of May 1, 1929—General County Act of May 2, 1929.*

Under the Act of May 1, 1929, P. L. 1054, the Commonwealth must maintain, repair and light all former county bridges over streams on state highway routes, but the maintenance, repair and lighting of all other county bridges must be done by the county, pursuant to the Act of May 2, 1929, P. L. 1278.

Department of Justice,

Harrisburg, Pa., May 12, 1930.

Honorable James L. Stuart, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: We acknowledge receipt of your letter of May 5, 1930, relative to the responsibility for lighting county bridges taken over by the Commonwealth under the provisions of the Act of May 1, 1929, P. L. 1054. The County Solicitor of Allegheny County has taken the position that that county is not liable for the payment for lighting county bridges after June 1, 1930.

Section 1 of the Act of May 1, 1929, P. L. 1054, provides:

"That any county bridge over streams on State highway routes in boroughs, towns and townships may be taken over, at any time after the approval of this act, and all such bridges shall be taken over by the Department of Highways the first day of June, one thousand nine hundred and thirty, and, when so taken over, shall thereafter be built, rebuilt, repaired, and maintained by the Department of Highways at the expense of the Commonwealth from moneys in the motor license fund."

In an opinion rendered to you on November 7, 1929, we advised that by the terms of this act the ownership of the bridges referred to therein was automatically transferred to the Commonwealth. These bridges are therefore no longer "county" bridges after the Commonwealth has taken them over for construction, maintenance, and repair.

The obligation to light county bridges was imposed upon counties by the Act of April 5, 1917, P. L. 52. This act was amended by the Act of March 17, 1927, P. L. 37, to read as follows:

"That wherever considered necessary for the safety and convenience of the traveling public, the county commissioners of any county within which a county bridge is erected, or the county commissioners of two or more counties acting together with regard to any county bridge located partly in one county and partly in another county or counties, may supply and equip any such county bridge with lights of such kind and character as they shall deem necessary. Any such county bridge more than eight hundred feet in length shall be supplied and equipped with lights by the county commissioners.

"To carry out the provisions of this act the county commissioners, severally or jointly, are authorized to contract with any individual, or with any municipal or private corporation for the purpose of supplying the necessary light.

"The cost of the construction, erection, and maintenance of any lights placed upon any such bridge shall be paid by the county, or by the two or more counties as may be agreed upon by the county commissioners of said counties."

The General County Law, approved May 2, 1929, P. L. 1278, provides for lighting of county bridges in Section 722 (P. L. 1388):

"Whenever considered necessary for the safety and convenience of the traveling public, the county commissioners of any county within which a county bridge is erected, or the county commissioners of two or more counties acting together with regard to any bridge located partly in one county and partly in another county or counties, may supply and equip any county bridge within their respective counties with lights of any kind and character as they shall deem necessary. Any such county bridge more than eight hundred feet in length shall be supplied and equipped with lights.

"To carry out the provisions of this act, the county commissioners, severally or jointly, are authorized to contract with any individual, or with any municipal or



private corporation, for the purpose of supplying the necessary light.

“The cost of the construction, erection and maintenance of any light placed upon any such bridge shall be paid by the county, or by the two or more counties, as may be agreed upon by the county commissioners of said counties.”

Section 723 imposes upon the counties the obligation to maintain and repair county bridges “where no other provision is made for the maintenance thereof.”

The two acts in question were passed at the same Session of the Legislature and must be construed together, so as to give full effect to the apparent intent of the Legislature. We are of the opinion that this intent, as expressed in the acts above cited, is that the Commonwealth must maintain and repair the county bridges referred to in the Act of May 1, 1929, P. L. 1054, and that the counties must maintain and repair all other county bridges. We are also of the opinion that the counties are charged only with the obligation of lighting county bridges not taken over by the Commonwealth.

This opinion supersedes Section III of the informal opinion rendered to your Department on March 6, 1930.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROSCOE R. KOCH,

*Deputy Attorney General.*

---

---

OPINIONS TO THE INSURANCE  
COMMISSIONER

---

---

## OPINIONS TO THE INSURANCE COMMISSIONER

*Beneficial societies—Contracts—Limit on amount—Act of April 26, 1929—Retroactive effect—Constitutional law.*

The Act of April 26, 1929, P. L. 805, which limits the amount of payments by beneficial societies, is applicable only to contracts entered into subsequent to its date; if it should be construed otherwise, it would be unconstitutional as violating the obligation of the contract.

Department of Justice,

Harrisburg, Pa., March 6, 1930.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: . We have your request for an opinion as to the application of the Act of April 26, 1929, P. L. 805, to the contracts of beneficial societies entered into prior to its passage, both with respect to the amount of death and benefit payments made thereunder, and to the amount of reserves to be set up under the provisions of the Act.

Section 1 of the Act provides that beneficial societies may enter into contracts for the payment of money or benefits not exceeding \$10.00 per week in the event of sickness, accident or disability, and not exceeding \$250.00 in the event of death, and Section 2 says it "shall be unlawful" to contract for or to pay any sums in excess of those amounts.

Section 3 of the Act provides that:

"Any such corporation shall maintain reserves on the life portion contained in all policies or contracts issued, based upon a standard table of mortality, with interest at three and one-half ( $3\frac{1}{2}$ ) per cent per annum, approved by the Insurance Commissioner of this Commonwealth; and on the disability portion contained in all policies or contracts issued, of fifty (50) per cent of the actual weekly, monthly, or annual premiums or payments in force; and shall also maintain full reserves for all definite and outstanding claims."

Section 4 provides penalties for violation of the Act consisting of fines from \$100.00 to \$500.00, for each contract entered into or payment made in violation thereof.

The question arises as to whether or not the effect of this Act is retroactive. There is nothing in its phraseology which indicates that it is to be retroactive, and for this reason it must be considered as active only in the future. This is the general interpretation of laws made by the Courts.

In *Dewart vs. Purdy*, 29 Pa. 113 (1858), the Court, speaking through Woodward, J., stated as follows:

“Retroactive legislation is not necessarily unconstitutional; but unless it be remedial, it is uncongenial to our institutions, and hazardous to private rights. Nothing short of the most indubitable phraseology is to convince us that the legislature meant their enactment to have any other than a prospective operation; and when they fix a future day for it to take effect, they stamped its prospective character on its face. \* \* \*”

This is repeated in *Commonwealth vs. Bessemer Company*, 207 Pa. 302 (1904) which, like the above case, is cited in *Investors Realty Company vs. City of Harrisburg*, 82 Pa. Sup. 26 (1923), where, in the dissenting opinion written by Judge Linn, it was stated, at page 42:

“\* \* \* ‘There is no canon of construction better settled than this, that a statute shall always be interpreted so as to operate prospectively and not retrospectively, unless the language is so clear as to preclude all question as to the intention of the Legislature: \* \* \*.’” Citing *Neff’s Appeal*, 9 Harris 243.

In *Wolpert vs. Knights of Birmingham*, 2 Pa. Sup. 564 (1896) and *Schoales vs. Order of Sparta*, 206 Pa. 11 (1903) the Act of April 6, 1893, P. L. 7, was interpreted as being prospective in its operation. It was held that its provisions limiting the payment of death benefits by beneficial societies to certain relatives or persons dependent upon the member could not affect the rights of holders of certificates issued prior to that time. In the former case, the Court said: “The language of this statute is too plainly prospective in its operation to admit of any doubt.”

Even though it could be properly determined that the Act of 1929 was intended by the Legislature to have a retroactive effect, it could not be so interpreted if its effect were to result in an impairment of contracts. *Myers vs. Lohr*, 72 Pa. Sup. 472 (1919).

Where an Act in being retroactive effects an impairment of contracts, it is unconstitutional in that it violates Article I, Section 10, of the Federal Constitution and Article I, Section 17, of the Constitution of the Commonwealth of 1873.

Were the Act of 1929 to be interpreted to mean that on contracts written prior to the date of its passage beneficial societies could not pay any amount in excess of \$10.00 per week benefits, or \$250.00 in the event of death, it would be unconstitutional. For the same reason, if its interpretation were to carry with it the setting up of reserves under the Act of 1929 on contracts written prior to its passage, it would likewise be unconstitutional as having the same effect of impairing the obli-

gation of contracts. It would do this for the reason that thereby it would cause a change in method of setting up reserves, a different allocation of portions of the assets of the beneficial society to purposes other than those theretofore existing, and, in all probability, a diminution of the benefits to which holders of such contracts had theretofore been entitled.

You are, therefore, advised that the Act of April 26, 1929, P. L. 805, is applicable only to contracts entered into by beneficial societies subsequent to its passage.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

*Deputy Attorney General.*

---

*Insurance—Life insurance—Exemption of aircraft accident—Riders.*

It is proper for the Insurance Commissioner to approve the application of life insurance companies for inclusion in their policies, with or without total and permanent disability and double indemnity provisions, of a rider exempting from coverage the death or injury as a result of service, travel or flight in any species of aircraft.

Department of Justice

Harrisburg, Pa., March 11, 1930.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We have your request for an opinion on your right to approve the use by life insurance companies doing business in the Commonwealth of a rider or provision in policies of life insurance, with or without disability and double indemnity features, exempting the companies from liability in the event of death or accident due to service or flight in various species of aircraft.

Certain life insurance companies have submitted to you for approval an application for including in their policies a rider in somewhat the following language:

“Death as a result of service, travel or flight in any species of aircraft, except as a fare-paying passenger, is a risk not assumed under this policy; but if the insured shall die as a result, directly or indirectly, of such service, travel, or flight, the company will pay to the beneficiary the reserve on this policy.”

Other companies desire to use a rider not containing the exception in favor of fare-paying passengers. It is the intention of these companies, in the event of receiving your approval, to include such rider in life insurance policies thereafter issued by them, both with and without total and permanent disability provisions and with or without double indemnity provisions.

Section 410 of the Act of May 17, 1921, P. L. 682, prescribes uniform provisions, and Section 411 lists prohibited provisions, for life insurance policies. Section 618 of the Act prescribes standard provisions, and Section 619 prescribes optional standard provisions for policies of health and accident insurance. No part of the several sections referred to is in conflict with the provisions of the above rider. There appears to be nothing in the laws of the Commonwealth prohibiting a life or casualty insurance company from limiting the coverage of its policies in the manner contemplated by the companies requesting your approval.

Section 409 of the Act, as to life insurance policies, and Section 616 of the Act, as to health and accident insurance policies, provide that in the event you notify a company in writing that the form of policy submitted for your approval does not comply with the requirements of the laws of the Commonwealth, you must specify the reasons for your opinion. Your action in this regard is subject to review by the Court of Dauphin County. It is our opinion that were you to refuse approval of the rider in question, or of riders similar in substance thereto, you would be declining to approve policy provisions which are not in violation of the laws of the Commonwealth.

You are, therefore, advised that it is proper for you to approve the application of life insurance companies for inclusion in life insurance policies, with or without total and permanent disability and double indemnity provisions, of a rider exempting from coverage the death or injury of the insured as a result of service, travel, or flight in any species of aircraft.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

*Deputy Attorney General.*

---

---

OPINIONS TO THE SECRETARY OF  
LABOR AND INDUSTRY

---

---

## OPINIONS TO THE SECRETARY OF LABOR AND INDUSTRY

### *Employment Agency.*

Act of May 2, 1929, P. L. 1260, construed.

Department of Justice

Harrisburg, Pa., December 23, 1929.

Honorable Peter Glick, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: On November 26 you wrote this Department asking us to answer fourteen separate and distinct questions stated at length in said letter, all of which arise in connection with the construction of the **Employment Agency Act of May 2, 1929, P. L. 1260**. We shall strive to answer these questions without restating them herein.

### I

Certain universities, colleges, and other bona fide educational institutions within the Commonwealth have established bureaus for the purpose of placing their students in positions in the outside world upon, or soon after, their graduation. These bureaus in many instances also help students who are working their way through school or college to obtain employment during their course at which they may earn money to assist in defraying the expenses of their education. None of these bureaus charge any fee to the student or graduate obtaining employment through their assistance, nor do they charge any fee to the employer with whom the student or graduate is placed. You desire to be advised whether these bureaus, by whatever name they are termed, come within the purview of the Act of 1929.

Section 1 of said act defines the term "employment agent" to mean:

"\* \* \* every person, copartnership, association, or corporation, engaged in the business of, or maintaining an agency for, assisting employers to secure employes, and persons to secure employment, of whatever nature, or of collecting and furnishing information regarding employers seeking employes and persons seeking employment."

It is obvious that a university, college, school or other bona fide educational institution is not engaged in the business of running an employment agency. One of the functions of an educational institution is to prepare its students for a useful and gainful life after graduation. This is a necessary incident of any educational program, but it



is only an incident, and an educational institution cannot by any stretch of the imagination be termed as engaged in the business of an employment agent.

It is true, however, that the educational institutions here under consideration maintain bureaus which have certain characteristics of an employment agency, as the term is generally understood, but we believe it would be ignoring the intent of the Legislature should we hold that the term "maintaining an agency" is to be construed as applicable to bureaus of the type herein under discussion.

This act, like the Act of June 7, 1915, P. L. 888, was enacted for the well-understood purpose of regulating employment agencies. It must be construed with the picture before us of the mischief which it was enacted to remedy. " \* \* \* a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. \* \* \*" *Church of the Holy Trinity vs. United States*, 143 U. S. 457; 36 L. Ed. 226.

The opinion of the Supreme Court of the United States was, in this case, written by Mr. Justice Brewer, who used the following language, which applies with peculiar pertinency to the matter under consideration:

" \* \* \* frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. \* \* \*"

This case also holds that in ascertaining the legislative intent reference may properly be had to the title of the act. The title of the act under consideration is:

"An act regulating the business of assisting employers to obtain employes, and persons to secure employment; providing for the licensing, registration, bonding, and regulation of certain individuals and entities engaged in such business; conferring certain powers and duties upon the Secretary of the Department of Labor and Industry of this Commonwealth, and of said department; and prescribing penalties."

Surely a person reading this title would not be put on notice that the body of the act would apply to universities, colleges, and other educational institutions which crystallize their interest in the future welfare of their students in a bureau, operating within the institution, which assists students in obtaining positions either before or after graduation.

## II

In Section 2 of the act certain employment agencies to which, by general terms, the act may otherwise apply, are specifically exempted from its operation. You have asked whether it is necessary, under the provisions of the act, to issue a license to the bureaus or agencies specifically exempted in Section 2. The concluding words of Section 2 are:

“\* \* \* Provided however, That persons excluded from licensure under this section shall register with the department as herinafter provided.”

This exemption from licensure, read by itself, would clearly answer your question, were it not for the provisions of Section 23, which provide, *inter alia*:

“\* \* \* no person shall operate in this Commonwealth under one or more of the exempted classifications set forth in section two of this act, or under section eleven hereof, without holding a license so to do, or being registered as herein provided. \* \* \*”

Section 20 provides for the registration of persons operating under the exempted classifications set forth in Section 2. Section 11 requires foreign employment agents, under certain circumstances, to take out a license within the Commonwealth. Under certain other circumstances, such foreign employment agents may be exempted from licensure, and in such event they must pay a registration fee to the Secretary of Labor and Industry. It is, therefore, obvious that the language employed in Section 23, and above quoted, was not intended to require the persons exempted by Section 2 to obtain licenses. They are merely required to register under the provisions of Section 20.

## III

Under the provisions of the Act of 1915, all employment agents' licenses expire on September 30 of every year. The Act of May 2, 1929, became effective October 1, 1929, (Section 25).

You desire to know whether the license year must, of necessity, run from October 1 to September 30.

Section 7 of the act requires an answer to this question in the negative. This section provides for the granting of licenses for the period of one year, but does not in any wise indicate that said year must begin or end on any particular date.

## IV

Section 10 provides, *inter alia*:

“Licenses may be renewed from year to year, upon application, payments of license fees, and filing of bonds as in the case of an original application.”

This provision indicates that the annual renewals can only be granted upon compliance with the procedure required by Section 5 in the case of original applications.

## V

Section 11 of the Act of 1929 forbids any foreign employment agent or other person to enter the Commonwealth and attempt to hire, induce, or take therefrom any labor, singly or in groups, for any purpose, without first filing in the office of the secretary, a statement as to where the labor is to be taken, for what purpose, for what length of time as well as such other information as the secretary may require. You have inquired whether this section would require a nonresident of Pennsylvania who came to this State to confer, for example, with a civil or mining engineer with a view of employing him for service in another state to first file with the secretary all the information required under the provisions of Section 11.

Our answer to this question is unhesitatingly in the negative. To hold otherwise would create an utter absurdity. See *Trinity Church vs. United States*, supra.

## VI

In view of our answer to your fourth question, it must follow that we are of the opinion that the Secretary of Labor and Industry, before renewing an employment agent's license for another year, should follow the procedure indicated by Section 5 of the act.

## VII

Section 24 of the act provides that "any person who violates any of the provisions of paragraphs (e), (f), (g), or (h) of Section *twenty-three* of this act, shall be guilty of a misdemeanor," etc.

Section 23 of the act consists of one paragraph. Section 22 consists of nine paragraphs, the first eight whereof are indicated by the letters (a), (b), (c), (d), (e), (f), (g), and (h).

The lettered paragraphs forbid the doing of certain acts by employment agents. It is very clear that the Legislature intended to prescribe in Section 24 penalties for violation of paragraphs (e), (f), (g), and (h) of Section 22 of the act. It could not have meant anything else.

The action of the Legislature is thus plain from the context, and any other construction than that above given would be an absurdity: *Roads vs. Dietz*, 80 Superior Court 507.

## VIII

You have asked whether a licensed employment agent is required in all its activities as such to operate under the name in which it is

licensed or whether it may, after receiving its license, register in accordance with the Fictitious Names Act of June 28, 1917, P. L. 645, and do part of its business under said name. This would constitute an evasion of the spirit of the act. An employment agent should be required to conduct its operation entirely under the name in which it is registered and licensed.

## IX

The Act of May 2, 1929, repeals all acts or parts of acts inconsistent therewith. A careful comparison of the Act of 1929, with the Act of June 7, 1915, P. L. 888, indicates, beyond question, that the only sections of the Act of 1915 remaining unrepealed are Sections 18 and 19.

## X

In our opinion the Act of May 2, 1929, repeals entirely the Act of May 21, 1923, P. L. 298, which act amended Sections 2 and 20 of the Act of June 7, 1915, P. L. 888.

## XI

Section 19 of the Act of 1929 requires every employment agent to file with the Secretary of Labor and Industry a schedule of fees which he charges for any services rendered to employers seeking employes or persons seeking employment. You have asked whether the secretary may prescribe maximum fees. He may not. The Supreme Court of the United States, in the case of *Ribnik vs. McBride*, Commissioner of Labor of the State of New Jersey, 277 U. S. 350; 72 L. Ed. 913, held that the business of an employment agent is not affected with a public interest so as to enable the State to fix the charges to be made for the services rendered.

An employment agent must adhere to the schedule of fees as filed with the secretary, although we see no reason why this schedule may not be changed as often as desired by the employment agent.

## XII

There is no legislation that would prevent the Secretary of Labor and Industry from granting an employment agency license or the privilege of registration to persons not citizens of the United States. The Act of 1929 by its terms does not limit the right to do an employment agent's business to citizens of the United States.

## XIII

Where an employment agent's license has been issued and the holder thereof desires during the license year to change his or its trade name, you ask whether a corrected license may be issued for the balance of the year in the new trade name, provided a corrected bond be filed.

Where there is no change of ownership and no change of location of the agency, I see no reason why you cannot issue an amended or corrected license as requested. However, in such cases should be furnished evidence by the applicant that the provisions of the Fictitious Names Act of 1917, P. L. 645, have been complied with by the applicant and that there has been in fact no changes in ownership or location. You should also see to it that a new bond is filed to take care of the change in trade name.

XIV

In a case where two regularly licensed employment agencies combine or merge during the period for which each holds a separate license, it is our opinion that the provisions of Sections 4 and 5 must be complied with, that a new bond must be given, and a new fee paid. In such event there can be no refund to the merging agencies of a part of the license fee originally paid by each of them for the year for which their separate licenses were issued.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROSCOE R. KOCH,

*Deputy Attorney General.*

---

*Caddies—Child Labor Law of May 13, 1915.*

Under section 2 of the Child Labor Act of May 13, 1915, P. L. 286, minors under fourteen years of age may not be employed as caddies by golf clubs.

Department of Justice,

Harrisburg, Pa., January 29, 1930.

Honorable Peter Glick, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: In your letter of December 12 you have requested us to advise you whether minors under fourteen years of age may be employed as caddies by golf clubs in Pennsylvania.

Section 2 of the Child Labor Act of May 13, 1915, P. L. 286, provides as follows:

“No minor under fourteen years of age shall be employed or permitted to work in, about, or in connection with, any establishment or in any occupation.”

In the first section the term “establishment” is defined to mean “any place within this Commonwealth where work is done for com-

pensation of any kind, to whomever payable: Provided, That this act shall not apply to children employed on the farm or in domestic service in private homes."

In an opinion rendered by this Department to your predecessor we advised that no minor under fourteen years of age may be employed or engaged in any occupation within the Commonwealth of Pennsylvania, irrespective of the state of his residence. 9 D. & C. 779. The subject especially under consideration therein was the employment of children in theatrical work.

On November 4, 1915, in an opinion rendered to the Commissioner of Labor and Industry, Attorney General Francis Shunk Brown makes this comment on the act in question, (Opinions 1915-1916, page 351):

"This Act of 1915 was passed in line with other advanced legislation seeking to safeguard and develop the youth of the State in their health, comfort and intelligence, and should not be so construed as to produce a result to the injury and disadvantage of many of those intended to be so benefited. Legislation of this kind cannot always be enforced strictly according to the letter thereof, but should be interpreted and applied with the fullest measure of sound discretion and judgment, always mindful of basic principles and of the useful ends desired to be accomplished."

Whether the Legislature of 1915 considered children engaged as caddies during vacation time or after school hours we can only surmise. The debates are silent in this regard. The act by its terms is broad enough to forbid minors under fourteen to be employed or engaged as caddies. It is well known that the Act of 1915 was passed in response to a widespread public demand for the protection of children from exploitation in industry. A careful reading of the Act of 1915 impels one to the conclusion that it was intended that children under fourteen years of age were to be protected absolutely from the effects of any kind of employment save only farm work and domestic work in private homes.

While we shall consider this matter in the light of the expression of former Attorney General Brown, hereinabove quoted, we find ourselves confronted with certain decisions that require us to adhere to the general rule announced in 9 D. & C. 779.

At virtually every golf course the caddies are under the jurisdiction and direction of a so-called caddy master. It has been held by the highest court of appeals of Illinois and of California that a caddy is an employe of a golf club irrespective of whether the club or the members pay him for his services: *Indian Hill Club vs. Industrial Commission*, 140 N. E. 871; 309 Ill. 271; *Claremont Country Club vs. Industrial Accident Commission of the State of California*, 163 Pac. 209; 174 Cal. 396; L. R. A. 1918 F, 177. These were decisions under the workmen's compensation laws of the above states, but it would be highly inconsistent to hold that a caddy is an employe of a country club in the

sight of the workmen's compensation law, and not in the sight of the child labor law.

In view of these decisions it cannot avail us to adopt the contention that a school boy who after school or during vacation times acts as a caddy is not engaged in an "occupation." The term "occupation" has been defined to mean and comprehend "that which occupies or engages the time or attention; the principal business of one's life; vocation; employment; calling; trade." *Union Mutual Accident Association vs. Frohard*, 25 N. E. 642. "Occupation" has been defined to mean "regular business;" *Standard Life and Accident Insurance Company vs. Fraser*, 76 Fed. 705. Citations to the same effect might easily be multiplied.

While it can be argued quite convincingly that caddying, in the light of the above definitions, hardly rises to the dignity of an occupation, it is nevertheless true that a caddy is "employed or permitted to work in, about, or in connection with" an "establishment," as defined by the Act of 1915.

Our attention has been called to the opinion of Attorney General Francis Shunk Brown, rendered on September 16, 1915 to the Commissioner of Forestry (Opinions 1915-1916, page 505). In that opinion the Attorney General ruled that the exemption of children employed on the farm applied to children employed at State forest nurseries in the light and easy work of keeping young seedling trees free from weeds. While it is frequently the case that the well kept greensward that now knows the dull thud of divots, in former days was furrowed by the plow, it can hardly be contended that employment on a golf course is employment on a farm. We are therefore constrained to advise that in the present state of the law minors under fourteen years of age may not be employed or permitted to act as caddies. The relief must be sought at the hands of the Legislature.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROSCOE R. KOCH,  
*Deputy Attorney General.*

---

*State Workmen's Insurance Fund—Audit.*

The Auditor General may lawfully employ and designate Main & Company as his agent to make an audit of the State Workmen's Insurance Fund, but he is not authorized to charge the expense of the same to the Fund, but must pay for the same out of the appropriation made to the Auditor General's Department by Appropriation Act No. 354-A, 1929.

Department of Justice,

Harrisburg, Pa., May 26, 1930.

Honorable Peter Glick, Secretary of Labor and Industry, Harrisburg,  
Pennsylvania.

Sir: On March 26 the Auditor General wrote the State Workmen's Insurance Board, advising the Board that in accordance with the provisions of the Act of June 13, 1923, P. L. 698, Main and Company, certified public accountants, have been directed by the Auditor General as his agent to make a complete examination and audit for the calendar year ending December 31, 1929 of the State Workmen's Insurance Fund, including all receipts and expenditures, cash on hand and securities, investments or property held representing cash or cash disbursements. Said letter states further that the expense incurred in making the proposed examination and audit will be certified to the Board as the work progresses.

You have referred this letter to the Department of Justice with the request that we advise you whether the Auditor General is authorized to designate and employ Main and Company as his agent to make the audit in question, and further whether the State Workmen's Insurance Fund will be legally obligated to pay the charges made by Main and Company in connection with the audit.

The State Workmen's Insurance Fund was created by the Act of June 2, 1915, P. L. 762. The second section of said act created the State Workmen's Insurance Board, consisting of the Commissioner of Labor and Industry, the Insurance-Commissioner, and the State Treasurer, the State Treasurer being further designated as the custodian of the fund.

The State Workmen's Insurance Board, by the Administrative Code, approved April 9, 1929, P. L. 177, has been made a departmental administrative board in the Department of Labor and Industry (Section 202). Its membership consists of the Secretary of Labor and Industry, Chairman, the State Treasurer, and the Insurance Commissioner (Section 443); and it is authorized generally to continue to exercise the powers and perform the duties by law vested in and imposed upon the former Board as constituted by the Act of 1915 (Section 2201).

Deputy Attorney General Hargest on December 9, 1915 advised the State Treasurer that the moneys paid by the subscribers into the State Workmen's Insurance Fund are not State funds although the State Treasurer is the custodian thereof (Official Opinions of the Attorney General 1915-1916, page 189). To the same effect is the opinion rendered by former Deputy Attorney General Collins on September 24, 1918 to the Manager of the State Workmen's Insurance Fund (Official Opinions of the Attorney General 1917-1918, page 473). And on February 4, 1924 Special Deputy Attorney General Schnader advised the Secretary of Labor and Industry that automobiles purchased by the State Workmen's Insurance Board for its employes are not the property of the Commonwealth because they have been paid for out of moneys in the State Workmen's Insurance Fund (Official Opinions of the Attorney General 1923-1924, page 262).

In Section 28 of the Act of 1915 the Legislature appropriated three hundred thousand dollars for the expenses of the organization and administration of the Fund. This is the only appropriation the Legislature has ever made to the Fund which has paid its own way out of moneys paid in premiums by the subscribers.

The Act of June 13, 1923, P. L. 698, cited by the Auditor General in his letter, authorizes the Auditor General through such agents as he



may select, during each calendar year, to make a complete examination and audit of the State Workmen's Insurance Fund; and for these purposes the Auditor General is authorized by said act to employ such consultants, experts, accountants, or investigators as he may deem advisable. The expenses incurred in making said examination and audit shall be certified to the State Workmen's Insurance Board by the Auditor General, which Board shall then draw its warrant for the amount thereof, payable out of the State Workmen's Insurance Fund, in the manner provided for payment of other expenses of administering said Fund. The State Workmen's Insurance Board, its officers and employes are commanded, under threat of heavy penalty, to comply with all the demands of the Auditor General or his agents in carrying out the inspection, examination, and audit authorized by the act.

The Fiscal Code, approved April 9, 1929, P. L. 343, provides in Section 402 that it shall be the duty of the Department of the Auditor General to make all audits, which may be necessary, in connection with the administration of the financial affairs of the government of this Commonwealth. At least one shall be made each year of the affairs of each department, board, and commission of the executive branch of the government, and all collections made by departments, boards, or commissions, and the accounts of every State institution, shall be audited quarterly.

Section 301 of the Fiscal Code relates to the deposit by the Treasury Department of moneys of the Commonwealth received by it, including moneys not belonging to the Commonwealth but of which the Treasury Department or the State treasurer is custodian.

In Paragraph 26 of Section 302 the State Workmen's Insurance Fund is specifically designated and recognized as one of the funds of which the State Treasurer is custodian and to which the provisions of The Fiscal Code apply.

Appropriation Act No. 354-A, approved May 16, 1929 (Appropriation Acts of 1929, page 181) appropriated to the Department of the Auditor General the sum of five hundred thirty thousand dollars "for the proper conduct of the work of the department and necessarily incurred by the Auditor General in : \* \* \* Auditing annually, periodically or specially the affairs of departments, boards, commissions or institutions of the State Government and promptly furnishing copies of all audits to the Governor \* \* \*" and for other purposes which need not be here recited.

Reading The Administrative Code and The Fiscal Code together, one is impelled to the conclusion that it was the legislative intent that on and after July 1, 1929, the effective date of The Fiscal Code, it became the duty of the Auditor General to audit the affairs of the State Workmen's Insurance Board, and the appropriation act above cited indicates further that the expense of such audit is to be borne out of the appropriation above mentioned, by the Auditor General. The Act of 1923 must be held to be impliedly repealed to the extent herein indicated.

The suggestion has been advanced that the audit of the affairs of the Board is not essentially or necessarily an audit of the Fund. This contention, if carried to its logical conclusion, would mean that an

audit of the affairs of the Department of Highways is different from an audit of the Motor License Fund, so far as the same is appropriated to and expended by said Department; that an audit of the affairs of the Board of Game Commissioners is different from an audit of the Game Fund; that an audit of the affairs of the Board of Fish Commissioners is different from an audit of the Fish Fund—and so on.

The Fiscal Code of 1929 is entitled, “An act relating to the finances of the State government; providing for \* \* \* auditing the accounts of the Commonwealth and all agencies thereof \* \* \*; affecting every department, board, commission, and officer of the State government \* \* \*” And the audits provided for in Section 402 mean the audits of the *fiscal* or *financial* “affairs” of the departments, boards, and commissions of the Commonwealth. The only financial affairs of the State Workmen’s Insurance Board are its control and administration of the State Workmen’s Insurance Fund—even though said Fund is not strictly State-owned money. Admittedly the Commonwealth is interested in the affairs of the Fund to the extent of seeing to its proper administration by officers and employes of the Commonwealth.

You are therefore advised that while the Auditor General may lawfully employ and designate Main and Company as his agent to make the audit of the State Workmen’s Insurance Fund, he is not authorized to charge the expense of the same to the Fund, but must pay for the same out of the appropriation made to the Auditor General’s Department by Appropriation Act No. 354-A.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROSCOE R. KOCH,

*Deputy Attorney General.*

---

---

OPINION TO THE DEPUTY SECRETARY OF  
PROPERTY AND SUPPLIES

---

---

## OPINION TO THE DEPUTY SECRETARY OF PROPERTY AND SUPPLIES

*State Employees—Claims—Payment—Continuing on Payroll—Insurance Carriers—Vacation allowance—Police—Highway Department.*

Employees of the Commonwealth subject to the Workmen's Compensation Act cannot be retained on the payroll during total disability and are governed by the same rules as other employees during partial disability. It is mandatory upon the Commonwealth to take out compensation insurance, but employees may waive the provisions of the act. Time lost due to accidents has no connection with vacations allowed by law. Payments for compensation must be made directly to claimants and not through the State treasury.

Department of Justice

Harrisburg, Pa., August 12, 1929.

Honorable Walter G. Scott, Deputy Secretary of Property and Supplies, Harrisburg, Pennsylvania.

Sir: We have your letter requesting advice concerning certain questions which have arisen as the result of the purchase by your department of insurance against the Commonwealth's workmen's compensation liability for injuries to or death of its employees. You ask:

1. Whether the insurer should pay compensation directly to State employees or their dependents, or whether the insurer should pay to your department the compensation due to employees or dependents of employees of the Commonwealth;
2. Whether, when an employe is hurt, he should be taken from the Commonwealth's payroll, or continue thereon with a leave of absence covering the period of his disability;
3. Whether the fifteen days' leave of absence, to which every State employe is entitled, and the fifteen extra days which his department head may give him under Section 222 of The Administrative Code, are a personal privilege which may be granted to an employe notwithstanding his absence from employment due to an accident;
4. Whether, if compensation is payable to your department under the policies which have been taken out, you have a right to endorse the compensation checks and transmit them to the several employees or dependents for whose compensation they are received, or whether the compensation must be turned over to the Department of Revenue for payment into the State Treasury;
5. Whether it is permissible for an employe, who is receiving compensation from the Commonwealth's insurer, to receive also his regular pay from the appropriation to the department, board or commission by which he is employed.

Before answering your specific questions, it may be well to review the entire compensation situation as it exists under the legislation now in effect.

In Section 103 of the Act of June 2, 1915, P. L. 736, the term "employer" was defined as including the Commonwealth.

In Section 302 (a) of the same Act it was rendered unlawful for any officer or agent of the Commonwealth to reject the Workmen's Compensation Act.

These provisions have never been modified by subsequent legislation, so that, under the statutes now in force, it is obligatory upon the Commonwealth, either directly or through an insurance carrier, to pay workmen's compensation at the rates specified in the Workmen's Compensation Act, to its employees who are injured, or to dependents of its employees who are killed, in the course of their employment, except in any cases in which such employees have rejected the provisions of the Workmen's Compensation Act.

Prior to 1927 the Legislature uniformly made an appropriation to the Department of Labor and Industry for the payment of compensation which might become due to injured employees, or to dependents of deceased employees of the Commonwealth, whose injury or death occurred while they were in the course of their employment. In 1927 the Legislature made the usual appropriation to the Department of Labor and Industry except that it gave to the Department the alternative right to pay workmen's compensation out of the appropriation as theretofore, or to purchase a policy or policies of insurance insuring the Commonwealth against its workmen's compensation liability. During the biennium which ended May 31, 1929, the Department of Labor and Industry did not exercise its right to purchase insurance, but continued to pay compensation as in former years.

In the 1929 General Appropriation Act the Legislature made an appropriation to your department for the purchase of insurance covering the Commonwealth's workmen's compensation liability. Acting under this authority you have purchased such insurance, so that during the current biennium there will be no payments directly out of the State Treasury for workmen's compensation due to State employees or their dependents, because of accidents occurring on or after June 1, 1929.

The insurance policies which you have purchased are in the same form as insurance policies covering employers other than the Commonwealth. The duties of the insurer are the same as the duties under other policies.

One other fact should be stated, namely that in the appropriations made by the Legislature to the Pennsylvania State Police and to the Department of Revenue for the maintenance of the Highway Patrol the Legislature specifically authorized the payment of money out of the appropriations for "medical attendance and hospital charges for employees of the State Police Force (and in the case of the Department of Revenue, of the Highway Patrol) injured in the line of duty." These appropriations are in addition to the appropriation out of which are paid the premiums on the policies covering the Commonwealth's workmen's compensation liability.

We shall now answer your specific questions as follows:

1. The insurer is obliged, under the law, to make direct payments of workmen's compensation to employees, or dependents of employees,

who are entitled to compensation benefits. It would not be proper for the insurer to turn such payments over to your department.

2. The Legislature having provided that the acceptance of the Workmen's Compensation Act is mandatory upon the Commonwealth, and having made an appropriation for the purchase of insurance covering the Commonwealth's compensation liability, it is impossible to arrive at any conclusion except that it would be unlawful to continue an employe on the payroll while he is receiving from the Commonwealth's insurer, workmen's compensation for total disability; and except in the case of the State Police and Highway Patrol it would not be lawful to pay out of appropriations to any department, board or commission medical expenses or hospital charges for an injured employe, which the insurer is not obliged to pay. In the case of the State Police and Highway Patrol medical expenses and hospital bills may be paid in excess of the amount required to be paid by the Commonwealth's insurer, but such payments should be made only after the insurance carrier has been required to pay the amount for which it is liable.

In cases of partial disability, preventing the employe from working at his usual occupation, the Commonwealth may, just as any other employer might, give the employe other employment at which he can work, notwithstanding his partial disability. In such cases, if the new employment is less lucrative than the former employment, the insurer is required to pay a percentage of the monetary loss sustained by the employe as the result of his partial disability, and the law intends that the employe shall receive workmen's compensation while on the employer's payroll.

It should also be noted that compensation for loss of a member is payable independently of disability and consequent loss of wages.

But in cases of total disability, as previously indicated, the employe cannot receive pay from the Commonwealth while he is receiving workmen's compensation from the Commonwealth's insurance carrier.

Section 222 of The Administrative Code of 1929 (Act No. 175, approved April 9, 1929), provides that each employe of an administrative department, of an independent administrative board or commission or of a departmental administrative board or commission, if employed for continuous service,

“\* \* \* shall be entitled, during each calendar year, to fifteen days' leave of absence, with full pay, and in special and meritorious cases where to limit the annual leave to fifteen days in any one calendar year would work peculiar hardships, the extent of such leave with pay may, in the discretion of the head of the department or of the board or commission, be extended but any such extension shall not be for more than fifteen days, except with the approval of the Executive Board, in case of employes of departments or of independent administrative boards or commissions, and, in the case of employes of departmental administrative boards or commissions, of the departments with which such boards or commissions are respectively connected. \* \* \*”

If an employe injured in the course of his employment desires so to do, he may waive his right to workmen's compensation and elect to take his fifteen days' leave of absence with pay during the period of his disability, and in the discretion of the head of the department or of the employing board or commission, an additional fifteen days' leave of absence with pay may be granted where to refuse it "would work peculiar hardships." A still further extension might be granted by the Executive Board for similar reasons, or in the case of employes of departmental administrative boards or commissions, by the departments with which they are connected. But in any such case, the employe would waive his right to receive workmen's compensation during the period of his leave of absence, and, of course, he would not be entitled during the same year to fifteen days' leave of absence after his disability has been removed.

3. The fifteen days' vacation period is not affected by an employe's absence from duty because of disability resulting from an accident which occurred while he was in the course of his employment, unless the employe elected to waive his right to compensation and take his annual leave of absence during the period of his disability, as outlined in the preceding paragraph. As previously indicated, while an employe is receiving workmen's compensation for total disability he may not be continued on the State payroll; and the fifteen days' leave of absence to which every employe is entitled is not affected by an absence from employment without pay. It is only absence with pay which is chargeable against the annual fifteen days' leave of absence.

4. As we have already stated, compensation is payable directly to the employe entitled thereto and not to your department. You will, therefore, not receive any checks which it would be possible for you to endorse over to such employes, and the question whether these payments should be paid into the State Treasury through the Department of Revenue will not arise.

5. We have also already answered your fifth question by advising you that an employe cannot continue to receive his regular pay from the Commonwealth while he is totally disabled, due to an accident, and is receiving disability benefits from the Commonwealth's insurer.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

OPINIONS TO THE SUPERINTENDENT OF  
PUBLIC INSTRUCTION

---



## OPINIONS TO THE SUPERINTENDENT OF PUBLIC INSTRUCTION

*Public Schools—Student Patrol to Safeguard Pupils on Streets and Highways—Powers and Liabilities—Damages.*

A Board of Education may safeguard its pupils on the streets and highways by establishing reasonable rules for their conduct while passing through the streets and highways going to and from their homes to school, but the board is without authority to otherwise regulate the use of public streets and highways by the general public, or to enforce regulations for traffic movement through a student patrol, nor is it liable in damages for injuries to a pupil assigned to act as a student patrol, or to others, received in the activities of such patrol.

Department of Justice

Harrisburg, Pa., January 9, 1929.

Honorable John A. H. Keith, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: We have your request to be advised to what extent, if any, a Board of Education is responsible in case of an accident to one of the school pupils who has been appointed a Patrol while in the performance of his duties.

In answer to our question: "What are the Duties of a Student Patrol," your department has submitted the following letter, received from one of the school districts of the Commonwealth:

"The board of Education are considering establishing Student Patrols, to afford the school pupils, of the lower grades, better protection at various street intersections which we consider dangerous, also to patrol at various points, along the main streets, at the time schools are dismissed and possibly during the time pupils are going to school, but before taking definite action, the board are anxious to determine if the Board of Education is responsible in any manner in case any of those children that have been appointed Patrols are injured while performing the duties assigned to them.

"We have several very dangerous street intersections, over which a large number of pupils must pass, and in order to afford them all the protection possible, we contemplate establishing Student Patrols. If it can be legally done, we expect to have the children who are appointed to these positions given power to make arrests when their orders are not respected, but in case this can not be done, we shall work very close with the borough Police officers."

The purpose for which the public schools are organized and maintained is the education and improvement of children in learning. A

Board of Education has the power to make suitable rules, regulations, by-laws or ordinances for its own government, and the government of those over whom it may have jurisdiction or control. Such rules, regulations, etc., must be made for the government, good order and safety of our schools, and must be suitably adapted to the purposes for which the school districts are created, and cannot be either inconsistent with the general law or the act creating such school districts, or unreasonable or oppressive. Such rules, regulations, etc., may govern the conduct of the pupils not only while they are upon the school premises, but also from the time they leave their homes to go to school until they return to their homes from school.

The regulation of the general public upon our streets and highways by law or ordinance, and the enforcement of such regulation by the State and various municipalities therein, is an exercise of the police power inherent in the State or delegated to those municipal divisions.

*III Dillion on Municipal Corporations, 2066, Section 1273.*

The municipalities of the State derive such power from constitutional, statutory or charter provisions. Strictly speaking, a municipality has no original or inherent power to control or regulate the use of its streets, and may only exercise such power when it is granted in express words or when it is necessarily or fairly implied in or incident to those powers expressly granted or to those powers which are indispensable to the accomplishment of the declared objects and purposes of a municipality.

*Easttown Township vs. Merion, Etc., Company, 18 Dist. 400.*

*Millerstown vs. Bell, 123 Pa. 151.*

*Pennsylvania Railroad Company vs. Montgomery County, 167 Pa. 62, 71.*

A school district may not lawfully exercise such power in the absence of express legislative authority, or unless the power is necessarily implied in or incident to those expressly granted to it, or those indispensable to the declared objects and purposes of a school district.

*Pennsylvania Railroad Company's Case, 213 Pa. 373, 376.*

We have looked in vain for a constitutional or statutory provision which expressly delegates police powers to a school district extending over the streets and highways of the Commonwealth, and, in our opinion, such power is not implied in or incident to the powers expressly granted, and is not indispensable to the accomplishment of the declared objects and purposes of the school district.

A doubt as to corporate power is resolved against its existence, and

this is no less true of a school district than of a private corporation, for the source of power in each is the same.

*Pennsylvania Railroad Company's Case* 213 Pa. 373, 377.

Attendance at school by children in this Commonwealth is compulsory. The danger to which children lawfully upon the streets and highways are exposed by traffic movement is common knowledge, but the duty to so regulate the use of the streets and highways, and to so enforce such regulations as to promote the safety of the children upon them, rests upon the State or its several municipal divisions to which it has delegated the power to control the streets and highways after they have been opened and to prescribe particular regulations governing their use.

*Easttown Township vs. Merion, Etc., Supra.*

*Ellwood Lumber Company vs. Pittsburgh*, 269 Pa. 94, 95.

*McHale vs. Transit Company*, 169 Pa. 416, 424.

*Pennsylvania Railroad Company vs. Montgomery*, 167 Pa. 70.

*The General Borough Act of 1927.*

*The Vehicle Code of 1927.*

The school district may, by reasonable rules and regulations for the conduct of the pupils, safeguard the children when going to and from the school to their homes. Rules having this purpose as their object have been sustained as a reasonable and valid exercise of the Board's authority, i. e., a rule requiring children to go directly from school to their homes: a rule prohibiting children from fighting en route. Having in mind modern traffic conditions, a rule requiring children to cross streets or highways at certain guarded points would be a reasonable and valid exercise of its authority over its pupils. Such a rule is self-regulation. It acts directly upon the pupil in restraint or constraint of his conduct and does not directly affect the general public. The regulation of the general public upon the streets and highways, and the creation and direction of the agencies necessary to enforce such regulation, is not inherent in a school district nor is it delegated to it by statute. It is not implied in, or incident to its powers, and, in our opinion, it is not essential to accomplish its declared objects and purposes.

We are of the opinion, and so advise, that a Board of Education may safeguard its pupils on the streets and highways by establishing reasonable rules for their conduct while passing through the streets and highways going to and from their homes to school, but it is without authority to otherwise regulate the use of public streets and highways by the general public, or to enforce regulations for traffic movement through student patrol.

There being no power in the Board to impose upon the student the responsibility of patrolling the streets and highways, if a Board of Education undertakes by rule or regulation to direct a pupil to act as a Student Patrol, and he is thereby exposed to danger, and is injured while performing such duty, the school district is not liable in damages, not only because a school district is but an agent of the Commonwealth, for the sole purpose of administering the Commonwealth's system of public education, and, therefore, not liable for the negligence, trespass or tort of its directors or employes:

*School District vs. Fuess*, 98 Pa. 600.

*Ford vs. School District*, 121 Pa. 543,

but also because the exercise of such power is *ultra vires*

*Betham vs. Philadelphia*, 196 Pa. 303, 310.

We express at this time no opinion as to the liability, if any, which may rest upon the individual or individuals who require or direct the student to perform such service:

*School District vs. Fuess*, 98 Pa. 600.

If injury to persons or damage to property result to others than the Student Patrol by reason of the exercise of police powers by the student, the rule of non-liability applies to the *ultra vires* acts because the district cannot confer upon its agents lawful authority to represent it beyond the constitutional or statutory powers, and again, we express no opinion as to the liability, if any, which may rest upon the individual who performs the service or the individual or individuals who require or direct the student to perform such service.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA,

*Deputy Attorney General.*

---

*School Districts—South Whitehall Township.*

Rights, powers, liability and procedure of school districts in regard to bond issue for the purpose of erecting an addition to the consolidated building located at Troxell's Crossing.

Department of Justice

Harrisburg, Pa., January 30, 1929.

Dr. John A. H. Keith, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: I have your request to be advised as to the powers, rights, liability and procedure of a school district under the following facts:

On April 24, 1928, the voters of the South Whitehall Township School District approved a bond loan of one hundred seventy-five thousand dollars (\$175,000.00) for the purpose of erecting an addition to the consolidated building located at Troxell's Crossing, and for the purpose of erecting an elementary school building in the southern part of the township. The Board of School Directors issued bonds in the amount of one hundred thirty thousand dollars (\$130,000.00) for the purpose of erecting an addition to the consolidated school building prior to November 6, 1928.

On November 6, 1928, the voters of the eastern election district of South Whitehall Township School District voted favorably on being annexed to the City of Allentown and the City of Allentown also voted favorably on this resolution.

We are informed that the territory so annexed to the City of Allentown does not include the southern part of the township and we are further informed also that a decree of annexation has been entered by the Court.

Five questions are submitted for our consideration. We will answer the fifth question first:

Why does the State Council of Education not act in this case as required by Section 6306 of the School Code?

Section 6306, Compiled School Laws, refers to the Act of April 7, 1927, P. L. 161, entitled, "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."

Allentown is a city of the third class and annexation by that city is governed by the Act of July 11, 1923, P. L. 1047, entitled "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."

The Act of April 7, 1927, P. L. 161, did not amend the Act of April 11, 1923, P. L. 1047, and therefore consent of the State Council of Education is not a prerequisite to a decree for annexation to a city of the third class of part of a township.

You further submit the following questions:

1. If the Court has issued the final decree of annexation, may the

School District of South Whitehall Township issue the remaining forty-five thousand dollars (\$45,000.00) worth of bonds of the original one hundred seventy-five thousand dollars (\$175,000.00) granted by the voters April 24, 1928, any time during the current school year?

2. If the South Whitehall Township School District may issue the remaining forty-five thousand dollars (\$45,000.00) worth of bonds of the original one hundred seventy-five thousand dollars (\$175,000.00) after the Court has issued the final decree of annexation, will the increase in indebtedness be considered one hundred thirty thousand dollars (\$130,000.00) or one hundred seventy-five thousand dollars (\$175,000.00), when the Allentown School District and the South Whitehall Township School District will adjust the indebtedness?

3. May a fourth class school district, if the final decree of annexation has been issued by the Court, incur an additional indebtedness for the purpose of erecting a school building which has been authorized by the vote of the whole township before the question of annexation was voted upon?

4. If an additional indebtedness may be incurred, does this additional indebtedness enter into the final adjustment of indebtedness?

The Legislature, unless restrained by the Constitution, may alter the boundary lines of a municipality by dividing the same into other municipalities, or by annexing other territory or annexing the municipality itself to another, and even dissolve the municipality itself and create another in its stead, embracing the same, or more or less territory, under another corporate name.

*Pennsylvania Company vs. Pittsburgh*, 226 Pa. 322;

*Troop vs. Pittsburgh*, 254 Pa. 172, 181;

*Moore vs. Pittsburgh*, 254 Pa. 185, 192.

What the Legislature may do with respect to municipal divisions of the State, it may also and does do with respect to the school districts of the State.

Act of May 18, 1911, P. L. 309.

The Legislature of Pennsylvania has provided that the property and indebtedness of a school district affected by such divisions, annexation or change, shall be ascertained and apportioned between or among the respective districts involved, and when the existing debt has been apportioned, has made the respective districts liable one to the other, for their proportionate shares.

Act of May 18, 1911, P. L. 309, Sections 110, 111 and 112, as amended by the Act of July 20, 1917, P. L. 1134 and the Act of May 4, 1927, P. L. 685.

The control of the Legislature of the municipal divisions of the State

is well recognized and when exercised is subject only to the restraints of special constitutional provisions, if any there be, including the provisions of Article I, Section 17 of the State Constitution, which forbids the passage of "any law impairing the obligation contracts."

*Plunkett's Creek Township vs. Crawford*, 27 Pa. 107;

*Brooks vs. Philadelphia*, 162 Pa. 123, 131, 132;

*Sugar Notch Borough*, 192 Pa. 349, 354;

*Moore vs. Pittsburgh*, 254, Pa. 185, 192.

The obligation authorized by the election in the South Whitehall Township School District, of April 24, 1928, and the contracts made pursuant thereto with the bondholders, is affected only by constitutional and legislative provisions in force at the date of the authorization.

*IV Dillon on Municipal Corporations*, 2688, Section 1512;;

*Seibert vs. Lewis*, 122 U. S. 284.

The provisions of the Act of May 18, 1911, and its amendments, in force on April 24, 1928, the date of the election, became a part of the contract between the school district and the vendees of its bonds.

In the absence of statutory provision, a corporate or quasi-corporate municipal district, authorized to incur an indebtedness and issue bonds to secure the same, retains the unexercised authorization until exhausted and remains the obliger on the bonds issued notwithstanding a subsequent division of its territory. The South Whitehall Township School District is the same artificial person now that it was before the detachment of a portion of its territory so that any right which became vested in it before the division must still be held to belong to it, unless expressly taken away which does not appear to be the case here.

*Barnett Township vs. Jefferson County*, 9 Watts 166, 168.

The statutory provisions of Sections 110, 111 and 112, of the School Code, above referred to, do not, by making provision for the adjustment and apportionment of the indebtedness of the district between South Whitehall Township School District and the Allentown City School District, change that principle. Such adjustment and apportionment of the indebtedness does not transfer the obligation to its bondholders from the South Whitehall Township School District to the Allentown City School District to the amount of the indebtedness apportioned to the Allentown City School District. It creates, under existing legislation by agreement of the districts, or by judgment of the Court, an obligation upon one district to pay to the other district that portion of the indebtedness of South Whitehall Township School District outstanding on the date of decree of annexation, which may have

been apportioned to it, and to take or retain property of the district within its territorial limits and to receive or retain its proportionate course, its sinking funds; or by adjustment of these items to impose the net amount thereof upon the one district in favor of the other district.

For the purpose of ascertaining whether the indebtedness of the school district has reached the constitutional or statutory limitation, loans to the amount authorized by the electorate though not then converted into an obligation of the district, in whole or in part, must be considered an indebtedness of the district to the amount of its authorization.

*McGuire vs. Philadelphia*, 245 Pa. 287, 298.

The reason for this is stated in the opinion of the Court in that case as follows:

“\* \* \* If the city’s contention \* \* \* should prevail, it would mean that a municipality’s indebtedness may be authorized by the corporate authorities and electors to an unlimited amount, and that the Constitution permits the authorization of that which it at the same time declares shall not be consummated. \* \* \* The authorization of indebtedness by a municipality is thus clearly limited by the statute to seven per centum of the assessed valuation of taxable property. \* \* \* Every authorization of a municipal loan is, therefore, to be regarded as exhausting pro tanto the municipality’s borrowing capacity. It is not conceivable that the framers of the Constitution, or the people who adopted it, ever intended that an election should be held to authorize that which it may be impossible to carry out; yet this is the anomalous situation contended for by the defendants. If an increase of one million dollars beyond the seven per cent. limit may be authorized because former authorized loans had not been issued when said increase was authorized loans to the amount of a hundred million dollars beyond the limit may be authorized. In such a situation who could declare which loans should be issued?”

The purpose of the constitutional limitation on the power to incur public debts is to protect the taxables ultimately liable therefor and prevent interference with the due administration of public affairs by the demands of importunate creditors holding obligations in excess of the municipality’s capacity or willingness to pay.

*Brooke vs. Philadelphia*, 162 Pa. 123, 126.

It is intended to limit authority in municipal divisions to create indebtedness and its terms are definable in the light of that purpose. The Court in *McGuire vs. Philadelphia*, supra, defines the term “indebtedness” as used in Article IX, Section 8 of the Constitution to mean “authorization to create indebtedness,” but the term “indebtedness” as



used in Sections 110, 111 and 112 of the School Code, *supra*, in our opinion, means that which the district, at the date the decree of annexation becomes effective, is bound to pay. It is not the authorization to create liability by the sale and delivery of bonds in the future. They may never be issued and sold. The district may abandon its authorization as provided by the Act of 1927. Its indebtedness is the ascertainable sum then due or to become due to existing creditors. It can no more include the amount of an obligation which it may incur under an electoral obligation than it may include the amount which it may incur under its so called councilmanic authorization. The power to create either form of indebtedness differs not in degree but in kind.

The electoral authorization creates a present power to obligate the district, and that power is not subject to division with or transfer to the withdrawing territory or the annexing district in the absence of statutory authority. Such authority we do not find.

The debt created under such authorization is subject to apportionment in the manner provided by the Legislature, School Code, *supra*, as between the divided portions of the district holding the authorization. When so apportioned, the outgoing district or the annexing district becomes a debtor, and the remaining district becomes a creditor, to the amount of the indebtedness apportioned to the outgoing or annexing district, without reference or prejudice to the rights of the creditor bondholders.

*Plunkett's Creek Township, supra;*

*Sugar Notch Borough, supra.*

Taking into consideration the relative and reciprocal powers, rights and obligation of the Legislature, the South Whitehall Township School District, Allentown City School District, the existing bondholders, and the potential bondholders, under the electoral authorization, we are of opinion and so advise:

(a) The indebtedness created under the bond issue authorized by the election of April 24, 1928, to be apportioned between the South Whitehall Township School District and the Allentown City School District is one hundred thirty thousand dollars (\$130,000.00);

(b) the electoral authorization to the South Whitehall Township School District to create a bonded indebtedness of one hundred seventy-five thousand dollars (\$175,000.00) is not affected by the division of its territory;

(c) the South Whitehall School District may proceed to issue bonds to the maximum of its electoral authorization and use the proceeds thereof for the purpose of erecting an elementary school building in the southern portion of the township, provided the contractual rights of existing bondholders are not impaired. If their rights are impaired

they have their remedy in equity based upon the impairment of their contract and not upon lack of authority to issue the bonds.

When the bonds were purchased by the existing bondholders, they knew or should have known :

(a) That the Legislature had the power to change the territorial limits of South Whitehall Township School District ;

(b) That where as here a school district loses some of its assessed property taxable for the benefit of bondholders the district can and must provide for an equitable adjustment of the indebtedness as well as the property of the district ;

(c) that such provision is intended to secure to the bondholders a legal equivalent for the revenue of the territory detached from any contracting district whose property may be taxable for payment of their bonds ;

(d) that if such provisions does not under the circumstances of a particular case secure a legal equivalent therefor the creditors' claim or remedy for its collection is not impaired.

It is therefore within the power of the South Whitehall Township School District to fully protect its outstanding bondholders by agreeing only to such division of the property indebtedness of the school districts as will not impair its capacity to pay its bonded indebtedness. It is likewise the right and privilege of the bondholder to protect his claim by objection properly taken to any agreement which would impair the capacity of the South Whitehall Township School District to pay, or to intervene in any proceedings in equity brought pursuant to Sections 110, 111 and 112, School Code, *supra*, for the purpose of securing proper and equitable adjustment of the property and liability of the district without impairment of his contract.

Whether the South Whitehall Township School District shall proceed to erect an additional building is a matter to be determined in its sound discretion in the light of necessity, if any, therefor, and its ability, not its legal authority, to raise money by sale of the unissued bonds. If the marketability of the unissued bonds is affected by the loss of the territory in the district annexed by the Allentown City School District, the South Whitehall Township School District may exercise its right under the Act of April 13, 1927, P. L. 205, Section 5, to abandon its power to increase its indebtedness thereunder.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA,  
*Deputy Attorney General.*

*Public School—Truant and Incorrigible Pupils—Parental Consent—Board of Public Education—Juvenile Court—Authority and Powers.*

The Board of Public Education has the right to transfer habitual truants or persistent and serious offenders against school regulations from any of the public schools to the parental school with the written consent of the parents or guardian of the boy without application to a Juvenile Court. Boys thus transferred may not be removed by parents or guardians from a special school, but may be from a residential school.

The Juvenile Court (School Code of 1911, Section No. 1438) does not have the right to commit boys without the express application or consent of the Board of Public Education, and the Board need not accept boys thus committed by the court at the court's own instance.

The Juvenile Court does not have the right to direct the dismissals from the parental schools of pupils transferred to that school by the Board of Public Education without regard to the Juvenile Court, unless the child is dependent, neglected, incorrigible, or delinquent, and has been committed by a magistrate or justice of the peace, or a petition has been filed in the Juvenile Court by a citizen, resident of the county, as provided by the Act of April 23, 1903, P. L. 274, as amended. In such cases the Juvenile Court may exercise full and exclusive jurisdiction in all proceedings affecting the treatment and control of the child under sixteen years. The Juvenile Court has no authority to commit boys to a parental school, except at the instance of the Board of Public Education.

Department of Justice

Harrisburg, Pa., August 29, 1929.

Doctor John A. H. Keith, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: The Board of Education of the School District of Philadelphia submits, and the Superintendent of Public Instruction requests the opinion of this Department upon the following questions:

"1. Has the Board of Public Education the right to transfer habitual truants or persistent and serious offenders against school regulations from any of the public schools to the parental school *with the written consent of the parents or guardian* of the boy without application to said Court?

"2. May boys thus transferred to said school be removed by the parents or guardian upon the withdrawal by said parents or guardian of the consent indicated in question No. 1, without the approval of the Board of Education?

"3. If the answer to question No. 1 is affirmative, has the juvenile Court (School Code, Section 1438) the right to make similar commitments without the express application or consent of the Board of Public Education, and must the Board of Education accept boys thus committed by the court at the court's own instance?

“4. If question No. 1 be answered in the affirmative, has the Juvenile Court the right to direct the dismissals from parental schools of pupils transferred to that school by the Board of Public Education without regard to the Juvenile Court?

“5. Has the Juvenile Court authority to commit boys to the parental school except at the instance of the Board of Public Education?”

We briefly answer these questions as follows:

1. Yes, whether the school be:

(a) A special school where the pupil resorts daily, or

(b) A residential school, where the pupil remains in residence.

2. No, if the school established is a special school and not a residential school. Yes, if the school established is a residential school and the Board contemplates the detention of the pupil in residence.

3. No.

4. No, unless the child is dependent, neglected, incorrigible, or delinquent, and has been committed by a magistrate or justice of the peace, or a petition has been filed in the Juvenile Court by a citizen, resident of the county, as provided by the Act of April 23, 1903, P. L. 274, as amended. In such cases the Juvenile Court may exercise full and exclusive jurisdiction in all proceedings affecting the treatment and control of the child under sixteen years. In all other instances, the right of custody may only be raised in the usual proceeding by writ of habeas corpus.

5. No.

The school districts of this State are authorized by Section 401 of the School Code to establish parental schools. A parental school is a school where the pupil remains in residence during the school term, under the constant supervision of the instructors and supervisor. It is intended to exercise therein parental custody during the school year of pupils who are beyond the control of the parents and teachers and become irregular in attendance, neglectful of school duties, and persistent violators of the school rules and regulations. Such children are problems not sufficiently serious perhaps to be committed to a reformatory or house of correction, but they do, on the other hand, require continuous supervision and a combination of home and school to restore them to a proper attitude towards school and school attendance.

The Board of Education is authorized by Section 1405 of the School Code, for the purpose of designating the schools to be attended by the pupils in the district, to subdivide the district and classify the pupils in the district, and to assign such pupils to such school or schools therein

as it may deem best in order to properly educate the children of the district. Under these broad powers, the Board may require the attendance of pupils of this type in a special school within the district during the usual hours of the school day. Where, however, their best interests require, and it is proposed to detain them in residence, it may only be done with the consent of the parents, or, in the absence of such consent, by the Juvenile Court, upon the application by the Board of Education of the district, by its superintendent, supervising principal, secretary or attendance officer, to the Juvenile Court of the county, under the provisions of Section 1438 of the School Code and of Section 2 of the Act of April 23, 1903, P. L. 274, as amended by the Act of June 28, 1923, P. L. 898, or, in the County of Philadelphia, to the Municipal Court of Philadelphia County, under the Act of July 12, 1913, P. L. 711, as amended; and, in Allegheny County, to the County Court of Allegheny County, under the provision of the Act of March 19, 1915, P. L. 15; as amended.

Upon such application, the Court may commit a child under sixteen years of age to the school, and when so committed the child is subject to the further order of the Court, as to custody. After commitment by the Juvenile Court, such minor can only be released from the school upon application by the district, by the officers above named, to the Juvenile Court, and order of the Court.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA,

*Deputy Attorney General.*

---

*Public Schools—Treasurer—Corporation—Bank—Trust Company—School Code of 1911 and Its Amendments.*

Unless otherwise specifically provided, the officers of the public school system must be individuals, citizens and residents of the district. Had the Legislature intended that the duties of treasurer of a school district might be discharged by a corporation, bank or trust company, it could have so provided. A corporation, bank or trust company may not serve as treasurer of a school district.

Department of Justice

Harrisburg, Pa., December 12, 1929.

Dr. John A. H. Keith, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Dear Dr. Keith: Replying to your request to be advised whether a

corporation, bank or trust company may be elected treasurer of a school district:

Sections 303, 303 (a), 326, 332, 509, and 519 of the Act of May 18, 1911, P. L. 309, as amended by the Acts of May 20, 1921, P. L. 972, May 9, 1923, P. L. 178, June 18, 1923, P. L. 839 and April 7, 1927, P. L. 170, are material, or, in our opinion, throw some light upon the question submitted.

While the School Code provides that the treasurer of the district shall be a member of the sinking fund committee, it makes no provision for membership on this important committee if such treasurer were a bank, trust company or corporation.

The School Code further provides in Section 332 that, if any school treasurer shall convert the moneys of the district to his own use, etc., or shall prove to be defaulter, etc., such act shall be deemed and adjudged to be an embezzlement, and provides a penalty, upon conviction thereof, of a fine or imprisonment, but makes no provision for the punishment of any officer or agent of a corporation embezzling funds of a school district in the corporation's custody as treasurer of the district.

Section 326 provides that "every person" elected as treasurer shall furnish a bond. Section 303 (a) provides that the same person shall not be secretary and treasurer of any board in districts of the second class that in districts of the third and fourth class, they may be members of the board, and in districts of the first class they shall elect the treasurer of the city as school treasurer.

There is nothing in the School Code which expressly or by implication indicates the intention to permit artificial persons to hold office in the school system, or warrants an extension of the words "person" and "he" used in the sections above noted to include a corporation.

• " \* \* \* although it cannot be denied but that the bank, being a corporation, and therefore a person in contemplation of law, may be included by the use of the term 'person,' yet, in the construction of statutes, the terms or language thereof are to be taken and understood according to their ordinary and usual signification, as they are generally understood among mankind, unless it should appear from the context, and other parts of the statute, to have been intended otherwise; and if so, the intention of the Legislature, whatever it may be, ought to prevail. Therefore, in the case before us, the term 'person' being generally understood as denoting a natural person, is to be taken in that sense, unless from the context, or other parts of the act, it appear that artificial persons, such as corporations, were also intended to be embraced. Besides, it has generally, if not universally been the case, that the legislature in passing acts, when it was intended

that the provisions thereof should extend to corporations as well as to individuals, designate specifically, so as to leave no room for doubt. \* \* \*

*School Directors vs. Carlisle Bank*, 8 Watts 289, at 291.

This case was commented on in *Saving Fund Society vs. Yard*, 9 Pa. 359, where it was said:

“\* \* \* And although there are some of the dicta in that case which I apprehend do not meet the entire approbation of this court, yet the exact point ruled, that is, that the word person does not usually include corporations when used in statutes or common parlance, although in its legal import it embraces them, is well, and of good authority. \* \* \*”

Unless otherwise specifically provided, the officers of the public school system must be individuals, citizens and residents of the district. Had the Legislature intended that the duties of treasurer of a school district might be discharged by a corporation, bank or trust company, it could have so provided, but in the absence of such express legislation, we are of the opinion and so advise, that a corporation, bank or trust company may not serve as treasurer of a school district.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA,

*Deputy Attorney General.*

*Real estate brokers—License Act of May 1, 1929—Auctioneers—Officers of corporation—Place of business—Stenographer—Justice of the peace.*

1. Auctioneers whose transactions in real estate are confined to sales at auction need not be licensed under the Act of May 1, 1929, P. L. 1216.

2. A person who is an officer in a real estate corporation is not required to take out an individual broker's license under the act unless he desires to act as a real estate broker in connection with the business of the corporation “or otherwise.”

3. It is not necessary for a person who is an officer in several real estate corporations to take more than one broker's license in his own name if the several corporations transact business from the same address.

4. If, however, the corporations have separate places of business at different addresses, and the officer desires to engage actively in the business of each of them, he must comply with section 7 (b) of the Act of 1929 and take out a duplicate license for each place of business in excess of one.

5. All that section 9 (a) of the Act of 1929 requires is that each licensed real estate broker shall have and maintain a definite place of business within Pennsylvania, which shall serve as an office for the transaction of business and where the license shall be prominently displayed.

6. The place of business where a license shall be prominently displayed must be one which is open to the broker's clients, and must be an office in the usual sense of that word.

7. Such place of business may be located in any type of building, including a private residence, and it is not necessary that a sign be displayed indicating that the broker is engaged in the real estate business.

8. An employee or stenographer who merely gives information in the absence of the licensed broker or licensed salesman need not take out a license, but this does not apply to a person employed for general work and to wait on the public.

9. An attorney or justice of the peace may negotiate the sale of real estate and divide the compensation with a licensed real estate broker or salesman; not decided whether the converse is true.

10. It is not necessary for each officer of a corporation conducting a real estate business to secure a broker's license.

11. It is necessary for each member of a partnership, other than the one named in the firm's license, to apply for an individual license.

12. A real estate builder is not a real estate broker, and a salesman employed by him need not be licensed.

13. A salesman employed by a real estate owner to sell real estate on a salary must be licensed.

14. A justice of the peace is not required to take out a real estate license, but a salesman of real estate employed by him must be licensed.

15. It is the duty of the Department of Public Instruction to refuse a real estate broker's license if charges are made against an applicant and proved to be true after notice and hearing.

Department of Justice

Harrisburg, Pa., January 2, 1930.

Doctor John A. H. Keith, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: We have your request to be advised upon a number of questions which have arisen in the administration of the Act of May 1, 1929, P. L. 1216, known as the Real Estate Brokers License Act of 1929.

In view of the large number of your questions, we shall answer them as we state them.

### I.

Does an auctioneer who occasionally sells real estate, as an auctioneer, require a broker's license?

Auctioneers must be licensed under the Act of May 5, 1921, P. L. 406. Having been thus licensed, they may, in our opinion, sell at auction property of any character without any further license. This includes real estate as well as personal property.

The Real Estate Brokers License Act does not specifically mention



auctioneers, and, in our judgment, they do not come within the definition of "real estate brokers" contained in Section 2 (a) of the Act, if their transactions in connection with real estate are confined to sales at auction. If, however, they sell real estate or offer it for sale otherwise than at auction, they come within the purview of the Act.

## II.

Does a person who is an officer in several real estate corporations require a separate broker's license for each organization?

The issuance of brokers licenses to corporations is covered by Section 7 (d) of the Act, which provides that:

"\* \* \* Where a real estate broker's license shall be issued to a corporation or association, authority to transact business thereunder shall be limited to one officer of such corporation or association, to be designated in the application, and named in the license. Each other officer of such association or corporation, desiring to act as a real estate broker in connection with the business of the said association or corporation or otherwise, shall be required to make application for and take out a separate license in his or her own name individually. \* \* \*"

Under the language quoted, it is unnecessary for any officer of a real estate corporation to take out an individual broker's license, unless he desires to act as a real estate broker in connection with the business of the corporation "or otherwise."

Clearly, the Legislature contemplated the possibility that an officer of a real estate corporation might also be an officer in other similar corporations, and it obviously intended that, if such an officer took out in his own name a real estate broker's license, he should be free to act as such to the same extent as if he were an individual not connected with the corporation in an official capacity.

It is, therefore, not necessary for a person who is an officer in several real estate corporations to take out more than one broker's license in his own name, if the several corporations transact business from the same address. If, however, the corporations have separate places of business at different addresses, and the officer desires to engage actively in the business of each of them, he must comply with Section 7 (b) of the Act and take out a duplicate license for each office or place of business in excess of one, from which he proposes to carry on his activities.

## III.

Section 9 of the Act states that every broker shall be required to have and maintain a definite place of business within the Commonwealth. Does a broker who trans-

acts his business from a private residence, without any sign indicating that he is engaged in the real estate business, meet the requirements of this provision?

All that Section 9 (a) of the Act requires is that each licensed real estate broker shall have and maintain a definite place of business within Pennsylvania, which shall serve as an office for the transaction of business, under the authority of the license, and where the license shall be prominently displayed.

A place of business where the license shall be prominently displayed must be one which is open to the broker's clients, and must be an office in the usual sense in which that word is used. It may be located in any type of building, including a private residence, and the law does not require that there must be a sign indicating that the broker is engaged in the real estate business.

#### IV.

Referring to Section 2, does the term, "real estate salesman," include an employe or stenographer in an office who, when other members of the firm are out of the office, offers property for sale or rent, or negotiates loans, all in accordance with the established policy of the firm?

Section 2 (b) provides that the term "real estate salesman" shall mean and include any person employed by a licensed real estate broker "to sell or offer for sale, to buy or offer to buy, or to negotiate the purchase, sale or exchange of any real estate, or interest in real estate, the property of another, or to negotiate a loan upon real estate, or to lease or rent or offer to lease or rent or place for rent any such real estate."

A stenographer or office boy is not employed for the foregoing purposes; and the mere giving of information in the absence of the licensed broker and the licensed salesmen of the office would not, in our opinion, be such an act as would require the stenographer or office boy to be licensed as a real estate salesman. However, a person employed for general work in a real estate broker's office, including stenography and receiving and waiting upon the public, would be obliged to have a salesman's license.

#### V.

Section 15 of the Act declares that it shall be unlawful for any licensed real estate broker to pay any compensation to any person other than a licensed real estate broker or salesman. May a licensed broker share a commission with one of those persons mentioned in Section 2. Paragraph C, such as attorneys at law, justices of the peace, etc.?

Section 15 (a) of the Act is as follows:

“It shall be unlawful for any licensed real estate broker, or real estate salesman, to pay any compensation, in money or other valuable thing, to any person other than a licensed real estate broker or real estate salesman, for the rendering of any service, or the doing of any of the acts by this act forbidden to be rendered or performed by other than licensees.”

This section of the Act does not express what the Legislature had in mind with that precision which is desirable in legislation, and it is difficult to construe it consistently with Section 2 of the Act.

Section 15 (a) purports to prohibit the payment of compensation by a licensed broker or licensed salesman to any person, other than a licensed broker or salesman, for the rendering of any service or the doing of any act “forbidden to be rendered or performed by other than licensees.”

In view of the exemptions contained in Section 2 (c), there are no services or acts which the Act forbids any person other than licensees to render or perform. Section 2 (a) specifies the acts which shall constitute an individual, association, or corporation a real estate broker, but Section 2 (c) provides that the term “real estate broker” shall not be held to include “in any way” attorneys at law and justices of the peace, nor shall it include an owner who is selling his own property, a person holding a bona fide letter of attorney from an owner for the disposition of the owner’s property, a receiver, a trustee in bankruptcy, an administrator, an executor, or any other person or corporation acting under the appointment or order of any court, a trustee, or a banking institution operating under the banking laws of Pennsylvania.

Accordingly, all of the acts specified in Section 2 (a) may be lawfully performed by real estate brokers, by attorneys, by justices of the peace, or by any other person specifically mentioned in Section 2 (c).

What the Legislature probably intended to provide in Section 15 (a) was that it would be unlawful for any licensed broker or licensed salesman to pay compensation to any other than a licensed broker or salesman for rendering any service or doing any act forbidden to be rendered or performed by persons other than licensees or those persons specifically exempted by Section 2 (c) from the necessity of obtaining licenses.

Clearly, an attorney or justice of the peace may negotiate the sale of real estate and divide the compensation with a licensed real estate broker or salesman. On the other hand, if Section 15 (a) has any effect whatsoever, it would seem that a licensed broker or a licensed salesman cannot lawfully divide his compensation with an attorney, a

justice of the peace, or any of the other persons, associations, or corporations mentioned in Section 2 (c) as exempt from the necessity of taking out brokers' or salesmen's licenses.

Until this question actually comes before you in the administration of the Act, we shall not answer it decisively.

## VI.

Section 7 (d). Must each and every one of the officers of a corporation conducting a real estate business secure a license? Must each member of a partnership firm apply for individual license, irrespective of whether such persons are actively engaged in the sale of real estate?

It is not necessary for each officer of a corporation conducting a real estate business to secure a broker's license. Officers are required to take out individual licenses only when "desiring to act as a real estate broker in connection with the business of the said \* \* \* corporation or otherwise." With partnerships the situation is different. The law specifically provides that the broker's license issued to a partnership shall confer authority to act as a broker only upon one member of the partnership who shall be designated in the application and named in the license. It then provides that, "All the other members of such copartnership shall be required to apply for and take out individual licenses in their own names." This requirement is not qualified as is the similar requirement in the case of a corporation. It is, therefore, necessary for each member of a partnership, other than the one named in the firm's license, to apply for an individual license.

## VII.

Does a builder who employs a salesman on a salary basis, who sells property which the builder owns, need to be licensed as a broker? Must the salesman of such a building, on a salary basis, be licensed? If on a commissioned basis, must the salesman be licensed?

A builder who sells property which he owns is not a real estate broker. Section 2 (c) specifically provides that he shall not be so regarded.

Under Section 2 (b) a real estate salesman is to be regarded as such only when he is employed by a licensed real estate broker for the purposes therein specified. As the builder is not a real estate broker, a salesman employed by him is not a real estate salesman.

On the other hand, Section 2 (a) defines, "real estate broker," to include all persons, "who, for another and for a fee, commission, or other valuable consideration, shall sell, \* \* \* real estate." This definition clearly brings within its scope a salesman employed by an owner to sell real estate on a salary basis and such salesman must, therefore, take out a *broker's* license.

## VIII.

Does a justice of the peace who employs a real estate salesman need to be licensed as a broker?

A justice of the peace is not required under any circumstances to take out a real estate broker's license but the salesman employed by a justice of the peace must take out a real estate broker's license for the reasons stated in answering your previous question.

## IX.

Must the Department of Public Instruction issue a license to all persons whose applications are properly filled out as indicated in Section 7, Paragraph B; or can the Department investigate complaints, hold hearings, and if necessary, refuse a license under Section 10, Paragraph B? In short, in starting this licensing function, may we refuse a license to any person whose application is properly filled out? In still other words, must we, in starting the matter, license everybody and then proceed to the revocation of licenses?

The Legislature clearly contemplated that your Department should not grant a license to persons guilty of any of the practices specified in Section 10 (a). Section 10 (c) provides that, "The refusal of the department to issue any license, after application properly made, and compliance by the applicant with the requirements of this act, shall be subject to review by the court of common pleas of Dauphin County \* \* \*."

In our judgment, it is your duty to refuse a license if charges are preferred against an applicant and if upon investigation and after notice and hearing your Department believes that the charges have been sustained.

It would be absurd to license all applicants notwithstanding the pendency of serious charges against some of them; and a reading of Section 10 of the Act makes it clear that the Legislature did not intend your Department to pursue this course.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

---

*Taxation—School taxes assessed upon seated lands—Act of May 9, 1929, P. L. 1684.*

The collector of school taxes must exhaust every other means to collect from personal property before he returns the seated lands bound by the tax.

Department of Justice,

Harrisburg, Pa., May 1, 1930.

Doctor John A. H. Keith, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: Your requests for an opinion from the Department of Justice on the subject of the collection of school taxes and the application of the Act of May 9, 1929, P. L. 1684, to their collection, have been referred to me.

This Act refers to the collection, among other taxes, of school taxes assessed upon *seated lands*, and this opinion is confined to a consideration of taxes assessed by school districts upon seated lands.

We have considered the specific questions submitted by you, and will answer them in the light of the following considerations.

The true construction to be placed upon the Act of May 9, 1929, P. L. 1684, and its effect upon the remedies existing at the date of its enactment for the collection of school tax in the school districts of the Commonwealth, is not free from doubt.

Upon its face this Act compels the receiver of tax to return such taxes on or before the first Monday of May in the year following their levy and assessment, but it may be that, in view of the history of taxing legislation in this State, the Courts will interpret the phrase, "it shall be the duty \* \* \* to return," as permissive rather than mandatory, and that they will hold that the Act of 1923, P. L. 207, affords an alternative remedy unimpaired by the Act of 1929, P. L. 1684.

Under another interpretation, the Act of 1929, P. L. 1684, would impose a penalty of one per centum per month beginning January 1, 1930, upon taxes assessed and levied prior to its enactment, without a levy or warrant therefor by the authority levying the tax within the territorial limits of a municipality or district; would reduce the time within which the collectors of county, borough, and township taxes may collect their respective duplicates out of the personal property of the taxable or upon the premises from two years to periods less than one year; would reduce the time within which the collectors of school tax may collect their respective duplicates out of the personal property of the taxable or upon the premises from a period of approximately eleven months to a period of approximately six months; would in effect amend the Act of 1923, P. L. 207, by reducing the time within which a claim may be filed upon a tax lien from a period within the last day of the third calendar year after that in which the tax is first payable to varying periods of less than a year; would either amend the Act of 1911, P. L. 309, (School Code), Section 562, by reducing

the time within which the collector of school taxes in districts of the second, third, and fourth class shall certify to the secretary of the school board all unpaid school taxes assessed and levied upon real property upon which there is no personal property out of which the same can be collected or repeal this Section of the School Code, and by so doing, perhaps, deprive school districts of the benefit of the Act of 1923, P. L. 207.

Such construction would interpret the provisions of Section 1 of the Act of 1929, P. L. 1684, as mandatory, and thus limit the use of the procedure set up under the Act of 1923, P. L. 207, and make it available only between the date the tax duplicate is delivered to the collector and the first Monday of May in the next year. It would materially reduce the time within which the taxable might, by the payment of his tax, escape the sale of his real estate, and it would also substantially limit the period within which the collectors of the various taxes may earn their commissions. Such interpretation would speed up the collection of taxes, and may be the true interpretation. but as we view the questions submitted, the responsibility to construe this Act rests with the Courts, who will have the benefit of passing only upon litigated points and the briefs of counsel. The responsibility of the Department of Justice, in our opinion, under these circumstances is to indicate to you such action as the several school districts and the collectors of their taxes may take and should take until the Act of 1929, P. L. 1684, has been interpreted by the Appellate Court.

Under this view we refrain from expressing our views and suggest that the only safe course for the collector of school taxes to pursue is to return all taxes assessed and levied in 1929 on seated lands and unpaid to the county commissioners of the county in which the real estate lies, and for which no liens have been filed under the Act of 1923, P. L. 207, not later than the first Monday of May. If the collector of school taxes has not certified to the secretary of the school board all unpaid school taxes assessed and levied upon real property upon which there is no personal property out of which the same can be collected, and does not return such taxes to the county commissioners on or before the first Monday of May, 1930, he may thereafter, if the construction last above noted be placed upon the Act of 1929, P. L. 1684, find himself under the necessity of finding personal property out of which he may make the taxes and penalties or personally liable for the amount of the taxes and penalties. We suggest the advisability, for the same reason, of including in such return the penalty of one per centum per month, whether the tax was levied and assessed in 1929 prior to May 9, or after.

Briefly answering your questions not covered by above suggestions:

The Act of 1929, P. L. 1684, applies to seated lands in school dis-

tricts of all classes; does not apply to taxes assessed prior to 1929 so far as to compel or permit return thereof or the imposition of the added penalty, but may apply to taxes assessed prior to 1929 and returned pursuant to the provisions of the Acts of 1913, P. L. 285 and of 1915, P. L. 660 so far as to provide a remedy for the enforcement of the return: See *Bradford County vs. Beardsley*, 60 Superior Court 478. Claims filed pursuant to the Act of 1923, P. L. 207, must be enforced pursuant to the provisions of that Act.

The penalty of one per centum per month authorized by the Act of 1929, P. L. 1684, is added to taxes on seated lands unpaid before January first of the year following the levy and assessment of the tax whether personal property be found upon the premises sufficient to pay the tax or not, and is collectible after January first whether the tax be paid before or after the return to the county commissioner.

You are also advised that, in our opinion, the collector of school taxes must exhaust every other means to collect from personal property before he returns the seated lands bound by the tax, but if he fails to make or to collect such taxes by distress and sale of goods and chattels, or by imprisonment of the delinquent, his failure shall not invalidate any return made or lien filed for the nonpayment of taxes or any tax sale had for the collection of such taxes on such land: Act of May 4, 1927, P. L. 712, amending the Act of April 15, 1834, P. L. 509, Section 21.

You are further advised that if any tax is returned to the county commissioners for collection, the collector is not entitled to receive or collect any fees, commissions, or penalties, and is relieved from responsibility for its collection: Act May 7, 1929, P. L. 1576.

Replying to your specific questions:

“Can school districts require the county treasurer to furnish detailed statements of the tax collected?”

It is the duty of the county treasurer to account to the school district for all taxes assessed and levied by the school district, and all penalties thereon as provided by law, which may be collected by him pursuant to the provisions of the Act of May 9, 1929, P. L. 1684. No detailed statement is required of him other than the report and return to the court of common pleas as required by Section 9 of the Act, where a sale is had. Where no sale is had, it is the duty of the county treasurer to report and transmit the tax and penalty so collected in due course of business.

“Does the additional penalty that is assessed on the first Monday of January apply to taxes which are subsequently paid before the first Monday in May or before the return is made to the County Commissioners?”



Yes.

“What is seated land as relating to unseated land?  
Is there such a thing as unseated land in third class  
cities?”

“Seated land,” as used in the tax laws, is land that is occupied, cultivated, improved, reclaimed, farmed, or used as a place of residence; lands on which are such permanent improvements as indicate a personal responsibility for its taxes.

“Unseated lands,” are those on which there are no such improvements as indicate a personal responsibility for its taxes; lands which are neither in the possession of, nor cultivated by, any person.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA,

*Deputy Attorney General.*

---

*School law—Educational convention—Attendance of school officers—Requirement by directors—Payment of expenses—Funds of district—Expenditures authorized.*

1. The School Code of 1911 does not empower the directors of a school district to require attendance at educational conventions by superintendents, principals or supervisors, nor may the expenses of those officers while attending such conventions be paid from the funds of the district.

2. A school district is liable only for such expenses and charges as are expressly or impliedly authorized by law and such as are necessary and properly incident to the performance of a statutory authority or duty.

Department of Justice,

Harrisburg, Pa., May 2, 1930.

Doctor John A. H. Keith, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: We are in receipt of your request to be advised whether the expenses of a superintendent of schools, city superintendent, principal, or supervisor, while in attendance at educational conventions, may be paid from the funds of the school district.

Superintendents of school, city superintendents, principals, and supervisors are appointed pursuant to, and their qualifications and duties prescribed and defined by, the School Code.

Educational conventions consist of various officials and employes of the educational field who are organized in groups, usually, though not always, limited to certain officers or employes, for instance, school di-

rectors, principals of schools, teachers, etc. These conventions afford an opportunity for those in attendance to exchange ideas upon the management, operation or educational policies of schools in the State and the United States. The practice of superintendents and other employes of the school system attending educational conventions for the reflex benefits which will accrue to the local system has developed throughout the country. No duty is imposed by the School Code of this Commonwealth, however, upon superintendents of schools, principals, or supervisors to attend these conventions, and it cannot be said that such attendance is necessary, or properly incident to the discharge of their specific duties as defined in the School Code.

Under these conditions, may the school district require by rule or regulation, superintendents, principals, or supervisors of schools to attend such educational conventions.

Section 119 of the School Code vests the several school districts with all necessary powers to enable them to carry out the provisions of the Code, and Section 404 provides:

“The board of school directors in every school district in this Commonwealth may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs and the conduct and deportment of all superintendents, teachers, and other appointees or employes during the time they are engaged in their duties to the district, \* \* \*.”

It is submitted that the benefits resulting from attendance at such conventions are twofold: to the individual attending, it enhances his qualifications for the discharge of his professional duties; to the school district, the indirect benefit which results from the enhanced professional qualifications of its superintendents, principals, and supervisors.

The school system is designed for the education of every person residing in the Commonwealth, between the ages of six and twenty-one years, who may attend such schools. It is no part of its purpose to provide for the professional education of its officers or employes. The reflex benefit to the district which may result from the participation of officers and employes in educational conventions depends on the presence of so many conditions, that it may be considered problematical in many instances, and the connection of such conventions with the school system in the local district is too remote to justify a board of school directors in adopting a rule requiring these employes to attend their sessions.

In a proceeding had for the removal of school directors in Parsons Borough, reported in 23 Luzerne Legal Register Reports 455, it was charged that the board had made payments to more than one director

for expenses in attending a convention of school directors in Harrisburg, Pennsylvania, and national conventions of school superintendents in Cleveland, Ohio, and Chicago, Illinois. The Court, Fuller, P. J., in passing upon this charge said:

“This expenditure \* \* \* was not only unlawful, but also, like all expenditure of public money for attendance upon conventions, was absolutely useless and wasted on something which could not possibly be of any value to the public.”

As a general rule, a school district is liable for such expenses and charges, and such only, as are expressly or impliedly authorized by law, and such as are necessary and properly incident to the performance of a statutory authority or duty.

It was felt necessary to secure legislative authority for the appointment of delegates to such conventions of school directors and the payment of their expenses. This was done by the Act of April 8, 1919, P. L. 56. In the absence of similar legislative authority for this expenditure of school funds, we are of the opinion, and so advise, that the board may not require its employes to attend educational conventions and pay their expenses while so attending.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA,  
*Deputy Attorney General.*

---

*School law—Director—Employment by district—School Code of 1911, sec. 226—Resignation from office during term—Effect.*

A school director duly elected or appointed for the legal term of office may not, by resigning his office during that term, render himself eligible to employment in any capacity by the school district of which he was so elected or appointed director, and thus evade the prohibition of section 226 of the School Code of May 18, 1911, P. L. 309.

Department of Justice,

Harrisburg, Pa., July 11, 1930.

Doctor John A. H. Keith, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: You have requested our opinion upon the following question:

May a school director, who is elected for the legal term of office, resign his office during the term for which he has been elected, and

thereafter be employed in any capacity by the school district, during the period for which he was elected school director, and be compensated for his services.

The Act of May 18, 1911, P. L. 309, (School Code), Section 226, provides:

“No school director shall, during the term for which he was elected or appointed, be employed in any capacity by the school district in which he is elected or appointed, or receive from such school district any pay for services rendered to the district except as provided in this act.”

In our opinion, and you are so advised, the school director may not, during the term for which he is elected or appointed, be employed in any capacity by the school district in which he is elected or appointed, and he may not evade the provision of Section 226 of the School Code by resigning his office as school director before the expiration of his term, and thereafter accept appointment or employment by the school district within the period for which he was elected.

Under the plain language of Section 226, the situation presented by the question here submitted does not fall within the rule which is applied where the Constitution or statute forbids one to hold or enjoy an office under certain conditions, and under which it has been held sufficient if the electee or appointee divests himself of his disqualification or becomes qualified before the time arrives for him to assume the duties of his office or appointment:

*Deturk vs. Commonwealth*, 129 Pa. 151;

*Commonwealth vs. Haeseler*, 161 Pa. 92;

*Commonwealth vs. Kelly*, 255 Pa. 475;

*Mosby vs. Armstrong*, 290 Pa. 517;

*Commonwealth vs. Snyder*, 294 Pa. 555.

In the language of *People ex rel. Ellis, Attorney General, vs. Lennon*, (Mich.) 49 N. W. 308, the language used in Section 226 of the School Code of 1911 fixes the period of his ineligibility and excludes a construction which would have attached in the absence of that language.

Section 226 of the School Code has not been construed by the Appellate Courts of this State, but under the language of Article II, Sections 3 and 6 of the Constitution of 1874, which is identical with that of Section 226 of the School Code, this Department (Opinions of the Attorney General, 1923-24, page 173), held that a representative in the General Assembly, during the time for which he was elected, could not be appointed to the office of judge of the court of common pleas, and attempts to remove such ineligibility by resignation of office have been passed upon by the Appellate Courts of other states, and,

in so doing, they have construed the language of statutes identical or similar to the provision of Section 226 of the School Code.

The general law for the incorporation of cities in the State of Michigan contains the following provision:

“\* \* \* ‘No alderman shall be elected or appointed to any other office in the city during the term for which he was elected as alderman, \* \* \*’”,

and the Constitution of the State of Michigan provides that:

“\* \* \* ‘no person elected a member of the legislature shall receive any civil appointment within this state or to the Senate of the United States from the Governor, the Governor and the Senate, from the legislature, or any other state authority during the term for which he is elected, \* \* \*’”.

In *People ex rel. Ellis, Attorney General, vs. Lennon*, (Mich.), supra, the Court held that an alderman whose term of office had not expired by limitation was ineligible to hold the office of chief of police, such officer being appointed by the common council and paid from the city treasury, although he had resigned before the appointment was confirmed.

The Court, in its opinion, said:

“\* \* \* The purpose of these statutes is to prevent officers from using their official positions in the creation of offices for themselves or for the appointment of themselves to place. While the law concedes the right of resignation, it is its policy to take away all inducements to the vacation of office. Statutes should be so construed as to give every word and phrase used its common and approved meaning. If it was the intention of the legislature to limit the prohibition to the term of actual service, or simply to make members of the council or aldermen ineligible to other city offices during the term of actual service, the phrases, ‘during the term for which he was elected,’ and ‘during the period for which he was elected,’ are entirely superfluous. The term for which respondent was elected is clearly defined by the charter, and the language, ‘the term for which he was elected,’ has a clear and well-defined meaning. He was elected to serve for two years whether he served that time or not. The language used in the statutes fixes the period of his ineligibility, and excludes a construction which would have attached in the absence of that language. It follows that at the time of his appointment respondent was ineligible, \* \* \*.”

Article 4, Section 19, of the Constitution of California, which took effect on December 21, 1916, reads as follows:

“No senator or member of the assembly shall, during

the term for which he shall have been elected, hold or accept any office, trust, or employment under this state;  
\* \* \* ”

Chambers was elected as a representative for the term beginning January, 1915, and ending January, 1917, but he resigned on December 19, 1916, to accept another office, and the Supreme Court of that State in *Chenoweth vs. Chambers*, (Cal.), 164 Pac. 428, held that the word “term” referred to the period for which Chenoweth was elected, and not merely to his incumbency, so that he could not evade the constitutional provision by resignation.

The Court, in its opinion, say :

“The word ‘term,’ used in the section, refers, we think, to the period for which the petitioner was elected, and not merely to his incumbency. \* \* \* When we speak of the ‘term’ for which an officer has been elected, we mean the period of time fixed by statute during which he may serve, and not to the time he may happen to serve \* \* \*

\* \* \* \* \*

“We need not consider the effect of petitioner’s resignation prior to the going into effect of the amendment. \* \* \* We do not think that petitioner succeeded in evading its force by his resignation prior to December 21st; for the section deals with a fixed period of time, to wit, the ‘term’ of the officer, and not to the period of his incumbency.”

Under the provisions of Section 5 of Article 3 of the Constitution of Florida, no Senator or Member of the House of Representatives is eligible for appointment or election, during the time for which he was elected to any civil office under the Constitution of this state that has been created, or the emoluments whereof shall have been increased, during such time, and in *In re Members of Legislature*, (Fla.), 39 So. 63, the Supreme Court of that State held that such ineligibility continues during the entire time for which such member was elected, and such member cannot render himself eligible during time by resigning his legislative membership.

These authorities clearly point out with irresistible force the only conclusion to be drawn from the language of the Section under consideration.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O’HARA,  
*Deputy Attorney General.*

*School law—Bids on building work—"Public notice"—Nature and time—School Code of 1911—Duty of school board—Contemporaneous publication with advertisement of bond issue.*

1. The "due public notice" of the taking of bids by a school board for work to be done upon a school building, required by section 617 of the School Code of May 18, 1911, P. L. 309, as amended, may properly be given in the same manner as is required by section 708 of the School Code in the case of bids for supplies, the purpose of such notice being the same in either case.

2. Where the size and scope of a building project so require, it may be the duty of the school board to permit a greater period of time than three weeks for the necessary examination of the site and the plans and specifications and for the preparation of bids.

3. Publication once a week for three weeks means advertisement in each of three successive weeks, although not necessarily on the same day of the week, and the date for opening bids may not be fixed during the last calendar week in which the advertisement appears.

4. Where a bond issue has been authorized for the purpose of financing a proposed school building, the advertisement for bids on the building may be contemporaneous with that for bids on the bond issue, provided the former advertisement expressly makes the award of the contract subject to the issue of the bonds.

Department of Justice,

Harrisburg, Pa., July 11, 1930.

Doctor John A. H. Keith, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request to be advised as to what constitutes "due notice," under the provisions of Section 617 of the Act of May 18, 1911, P. L. 309, (School Code).

This Section, as amended by the Acts of July 10, 1919, P. L. 889, and of May 7, 1929, P. L. 1625, Provides:

"All construction, reconstruction, repairs, or work of any nature, including the introduction of heating, ventilating, or lighting systems, upon any school building or upon any school property, made by any school district in this Commonwealth, where the entire cost, value, or amount of such construction, reconstruction, repairs, or work, including labor and material, shall exceed three hundred dollars (\$300) shall be done under contract or contracts to be entered into by such school district with the lowest responsible bidder, upon proper terms, after due public notice has been given asking for competitive bids: Provided, That if due to an emergency, a school plant or any part of the same becomes unusable during the school term, competitive bids for repairs or replacement may be solicited from at least three responsible bidders, and, upon the approval of any of these bids by the State Superintendent of Public Instruction, the board of

school directors may proceed at once to make the necessary repairs or replacements in accordance with the terms of said approved bid or bids."

Neither the School Code nor any general act prescribes the time and mode of giving such "due public notice" asking for competitive bids.

Under a statute requiring "due notice" of taking depositions out of the state, and not under a commission, it was held that due notice was that notice which would reasonably enable the adverse party to be present at the taking, and depends on the circumstances of each case, and must be settled by the sound discretion of the presiding judge: *Harris vs. Brown*, 63 Maine, 51, 53.

"Due public notice" must be assumed to mean compliance with law, that is, whatever notice the law requires: *Copelan et al. vs. Kimbrough et al.*, (Ga.), 102 S. E. 162, 164.

Under the by-laws of a trade union which provided for fining and otherwise punishing any member violating the law of the association, etc., and providing for a trial with "due notice," it was held that "due notice" means notice that the accused is to be put upon trial at a specified time upon specified charges, and notice must be given in season to afford him reasonable opportunity to make preparation to meet the charges by summoning witnesses in his behalf: *Brennan vs. United Hatters*, 73, N. J. L. 729: 65 Atl. 165, 168; 9 L. R. A., (N. S.) 254; 118 Ann. St. Rep. 727; 9 Ann. Cases 698.

It has been held that a notice in a newspaper is at the best but an uncertain method of communicating the knowledge of a fact, since the party to be affected may never see the paper, or if he does, may not read all the advertisements; but still it is sometimes the only practicable mode, and is therefore either allowed by the principles of the common law, or directed by act of assembly in particular instances: *Watkinson and Another vs. The Bank of Pennsylvania*, 4 Wharton 482.

Section 708 of the School Code provides that the school districts shall purchase supplies of the second class:

"\* \* \* only after public notice has been given by advertisement, published once each week for three weeks in not less than two newspapers of general circulation: Provided, That in any district where no newspaper is published, said notice may, in lieu of such publication be posted in at least five public places. Such advertisement or notice shall give all necessary information, or give notice of convenient access thereto, in such manner that bidders can intelligently make bids for such contracts."

The end to be accomplished by advertisement under the provisions of Section 708 of the School Code is the same as that sought to be accom-



plished under the provisions of Section 617 of the School Code, to wit: to assure competitive bids by informing interested dealers in the one case and building contractors in the other case of the proposed letting of a contract by the school district, and, in the absence of statutory provision for the time and mode of the notice required by Section 617 of the School Code, the school district is justified in adopting the time and mode provided by Section 708 of the School Code, unless the size and scope of the building project suggests the necessity of permitting a greater period of time for the necessary examination of the site, the plans, and specifications, and preparation of the necessary data and bids, to the end that the school districts may be assured of competitive bids.

In this connection, you are advised that "publication once in each week for three weeks," has been interpreted to mean an advertisement in each of the three successive weeks although the advertisements may not have been all on the same day of the week, and there may not have been twenty-one full days between the first day and the last day of such advertisements: *Hollister to use vs. Vanderlin*, 165 Pa. 248; *McKee vs. Kerr*, 192 Pa. 164; but the date for opening the bids may not be fixed during any day in the last calendar week during which the advertisement appears: *Currens vs. Blocher*, 21 Super. Ct. 30.

Where a bond issue has been authorized for the purpose of financing the proposed building project, and where the public interests of the district suggest the early completion of the building, we know of no rule of law which forbids the advertisement for building bids at the same time as the advertisement for bond bids, provided, the advertisement for building bids contains appropriate language reserving the right to award the contract only if the bonds are sold at a price satisfactory to the board of directors, or to reject all bids in event of failure to dispose of the bonds. The board of school directors must be the judge of the necessity and wisdom of such concurrent advertisement, and when the board's judgment is determined by public consideration alone, it will not be reviewed by the court: *Robb, et al. vs. Stone, et al.*, 296 Pa. 482.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA,  
*Deputy Attorney General*

---

---

OPINION IN RE PETITION FOR WRIT  
OF QUO WARRANTO

---

---

## OPINION IN RE PETITION FOR WRIT OF QUO WARRANTO

*Quo warranto—Petitioner—Duty to make out a prima facie case.*

1. A writ of *quo warranto* will not be instituted by the Attorney-General on a petition of a private relator unless a clear *prima facie* case is made out and it is apparent that the litigation would be successful in the courts.

*Constitutional law—Public office—Eligibility—Conviction of crime—Suspension of sentence—Order to pay costs—Effect of—Forgery—Infamous crime.*

2. A suspension of sentence on payment of costs after the entry of a plea of *nolo contendere* to a charge of forgery is not a conviction within the meaning of article ii, section 7, of the Constitution of Pennsylvania, providing that no person convicted of such crime shall be eligible to hold any office of trust or profit in the State.

3. Forgery is an "infamous crime" within the meaning of the above section of the Constitution.

Department of Justice,

Harrisburg, Pa., July 24, 1929.

In re Petition of Joseph A. Wilner, et al. for a writ of Quo Warranto against Frank P. Barnhart, Additional Law Judge, 47th Judicial District.

---

### OPINION.

---

This is an application to the Attorney General to institute proceedings by writ of Quo Warranto against Frank P. Barnhart, Additional Law Judge of the 47th Judicial District of Pennsylvania.

On the 16th day of May, 1929, the Governor appointed Frank P. Barnhart, of the city of Johnstown, Pennsylvania, as Additional Law Judge for the 47th Judicial District. The Secretary of the Commonwealth issued a commission to him and on the 20th day of May, 1929, the said Frank P. Barnhart took the oath as Additional Law Judge, aforesaid, and has since been serving in that capacity.

Shortly after the said Frank P. Barnhart was commissioned and had gaulified as a Judge for the 47th Judicial District, a proposed suggestion for a writ of Quo Warranto was presented to the Attorney General, in which it was averred that the said Frank P. Barnhart was incapable of holding any office of trust or profit in this Commonwealth, and especially of holding the office of Additional Law Judge of the 47th Judicial District, for the reason that on the 19th day of February 1919,

at No. 74 December Sessions 1918, in the Court of Quarter Sessions of Cambria County, Pennsylvania, he was charged with an infamous crime, viz: the crime of forgery; that he entered a plea of not guilty, and proceeded with the trial of the said case; that during the trial the plea of not guilty was withdrawn and a plea of nolo contendere was entered; and that on the 20th day of February, 1919, the Court made the following order:

“We think he (meaning Frank P. Barnhart) has done the manly thing to enter this plea and terminate the cause at this time, and we feel he has fully learned his lesson; and under the circumstances we are going to suspend sentence upon him for this infraction of the law and upon payment of the costs, and that is the sentence of the court.”

This proposed Suggestion for Writ of Quo Warranto was accompanied by an affidavit made by Warren S. Krise and Edwin K. Kintner. Subsequently the affidavit of Warren S. Krise was withdrawn. The proposed Suggestion was not accompanied by any petition. After numerous requests and considerable delay, a certification of the court-record in the case of *Commonwealth vs. Barnhart* was finally submitted to the Attorney General on July 8, 1929, being the time set by the Attorney General, for a hearing of the complaint. At this hearing it was agreed by the Attorneys for both the petitioner and the respondent, that the hearing should be proceeded with and that subsequently a petition and answer would be filed in order that all the questions and facts involved might be fully presented to the Attorney General as a matter of record. This petition was not received until July 17, 1929, petition presents the same facts as were set up in the proposed Suggestion for Quo Warranto, previously referred to. The forgery charged consisted in the fixing of a seal after the last of three names on a judgment note, the word Seal having been printed after the other two names. The respondent in his answer contends that in entering a plea of nolo contendere during the trial, that by said plea he simply admitted a physical act but not an act with any criminal intent to prejudice the rights of any one. However, in my consideration of this case I am restricted to the record as it stands and the merits thereof cannot be material in my determination of this proceeding. He also contends in his answer that he was not “convicted” within the meaning of that term in Article II Section 7 of the Constitution.

Two questions are presented by the petition and answer for my consideration and determination as to whether a Suggestion for a Writ of Quo Warranto should be filed by me in this case. The first question is whether or not Frank P. Barnhart was charged with an infamous offense within the meaning of Article II Section 7 of the Constitution.

However, it was agreed by Counsel for the respondent that the crime of forgery and altering of a written instrument is an infamous crime within the terms of the said Article of the Constitution, so a discussion of this question is unnecessary. This question, however, seems to be clearly settled by the Supreme Court.

The next question is whether said Frank P. Barnhart, defendant, was "convicted" within the meaning of that term as used in Article II Section 7 of the Constitution. This is the vital question in the case. In fact, it is the only issue for my determination here.

Article II Section 7 of the Constitution provides:

"No person hereafter convicted of embezzlement of public moneys, bribery, perjury or other infamous crime, shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this Commonwealth."

The record discloses that upon the plea of *nolo contendere* by the respondent, sentence was suspended by the Court by the use of the language previously quoted in the proposed Suggestion for a Writ of Quo Warranto. This appears from an examination of the record, which was certified as a whole by the Clerk of the Court of Quarter Sessions of Cambria County. According to this certified record,—the accuracy of which was admitted by all parties at the time of the hearing before me,—no sentence, other than the order suspending sentence previously quoted, was ever imposed upon said respondent.

However, it was contended at the time of the hearing before me by Attorney J. J. Kintner, who represented the petitioners, that said suspended sentence was a "conviction" within the meaning of that term in said Article II Section 7 of the Constitution. This contention was based, first on the fact that Judge Quigley, in suspending sentence, said at the conclusion thereof—"and that is the sentence of the court." This contention was made notwithstanding the fact that the Court had just previously stated clearly and concisely that he was *suspending* sentence on the defendant and gave his reasons therefor. This contention of Counsel for the complainants has no merit because of the fact that the Act of March 31, 1860, P. L. 423, Section 169, which makes the fraudulently making or altering of any written instrument a misdemeanor and provides for the punishment thereof, expressly provides that the sentence of the Court in such cases shall be: "to pay a fine, not exceeding one thousand dollars, and to undergo an imprisonment by separate or solitary confinement at labor, not exceeding ten years." It is therefore made imperative by the express mandate of the law that the court, if it had imposed a sentence in this case, must have imposed both imprisonment and fine. Neither fine nor imprisonment was im-

posed in this case, and the mere imposition of costs cannot be construed as the imposition of a sentence. In Pennsylvania, the suspension of sentence on payment of costs is not a sentence or judgment. *Commonwealth vs. Carelli*, 90 Supr. Ct. 416. In *Commonwealth vs. Hamel*, 44 Super. Ct. 464, the record discloses that sentence was suspended upon the payment of costs in the following order:

“June 9, 1909, defendant *sentenced* to pay the costs of prosecution and further sentence-suspended.”

In this case the Court held that this was not a sentence but was a *suspension* of sentence.

The other contention made by Counsel for the petitioners in support of their argument that the suspension of sentence by the Court in this case was a “conviction” within the meaning of that term as used in Article II Section 7 of the Constitution, was that the term “conviction” as used therein must be taken in its popular sense and not in its legal or technical sense. Various Pennsylvania Supreme and Superior Court cases were cited, which I have carefully examined, but they do not support the contention made. The case upon which petitioners chiefly rely and which they feel bears the closest analogy to the situation here presented, is the case of *Wilmoth v. Hensel*, 151 Pa. 200. It may be well to note briefly the facts in that case. That is a case in which a reward was offered for the prosecution and conviction of persons who violated any of the statutes against bribery or corruption at a certain election. The offer of this reward was made in a political speech by the defendant, he being then Chairman of the Democratic State Committee. The plaintiff in that case, pursuant to the offer which had been made at a political meeting in his part of the State, instituted the prosecution of a certain defendant for a violation of the election laws of the Commonwealth at said election, and the defendant entered a plea of guilty, but sentence was suspended by the Court. With respect to the question whether or not there was a “conviction” in this case within the meaning of that term as used by the defendant when he made said offer of reward, the Supreme Court, in its opinion, said:

“It is not needed that we should enter upon a discussion of the meaning of the word ‘conviction’ in its technical sense. We must regard it as it was probably intended to be used, in its popular sense. In common parlance, a verdict is called a conviction: *Smith vs. Commonwealth*, 14 S & R 69. In this case there was more than a verdict. There was a plea of guilty, which was a confession of guilt by the defendant. This was all that it was possible for the prosecutor to do. He had brought the offender to the bar of the court and compelled a plea of guilty. He had no further control of the case. The

sentence was entirely within the power of the court. We are of the opinion that Howard was convicted of an offense against the election laws within the meaning of the defendant's offer."

In the case of *Commonwealth vs. Minnich*, 250 Pa. 363, where the court, in considering the meaning of the term "conviction" as used in the case where the "record of conviction" was introduced in evidence in the trial of an indictment charging the defendant as an accessory to a murder, the record of the conviction of the principal simply showed that a verdict of guilty was rendered but that no judgment was entered thereon, and it was contended by the appellant that such record was inadmissible. The court, in discussing the meaning of the term "conviction," referred inter alia to the case of *Wilmoth vs. Hensel*, aforementioned, in the following language:

"Whatever difficulty we may encounter here will be found due to the fact that the word conviction is of equivocal meaning. It has a popular as well as technical meaning. As popularly used it implies nothing more than a finding of guilty by a jury, and this meaning has been allowed it in several of our cases, notably in *York County v. Dalhousen*, 45 Pa. 372; *Wilmoth v. Hensel*, 151 Pa. 200; while in others, as technically understood, it means the ascertainment of the guilt of the accused and judgment thereon by the court, implying not only a verdict but judgment or sentence thereon, as in *Smith v. Com.*, 14 S. & R. 69; *Cumberland County v. Holcomb*, 36 Pa. 349. The difficulty becomes more apparent than real if we are content to apply the ordinary rules of construction. Technical legal terms are to be taken, in the absence of countervailing intent, in their established common law significance, for the reason that they have a definite meaning which is supposed to have been understood by those who were or ought to have been learned in the law."

In *Shields vs. Westmoreland County*, 253 Pa. 271, the court, in its opinion, interpreted the word "conviction" as used in Article II Section 7 of the Constitution, to the effect that there could not be any conviction until a sentence had been imposed. The Court said:

"By Section 7, Article II, of the Constitution, it is declared that 'No person hereafter convicted of embezzlement of public moneys, bribery, perjury or other infamous crime, shall be eligible to the general assembly, or capable of holding any office of trust or profit in this Commonwealth.' When *Shields* was sentenced May 11, 1912, on the indictments charging him with embezzlement and perjury, he then became convicted of those offenses. The returns of guilty by the jury did not convict him in the

legal sense of that term, but *judgment on the verdicts did*: Commonwealth v. Minnich, 250 Pa. 363; Commonwealth v. Vitale, 250 Pa. 548."

The distinction between the words "convict" or "conviction" as it is commonly used and in its legal sense is found in the case of *People vs. Fabian*, 192 N. Y. 443; 85 N. E. 672; 18 L. R. A., N. S. 684. In this case the indictment charged the defendant with the crime of knowingly voting at an election "not being qualified therefor." The alleged disqualification was based on the fact that the voter had previously been indicted for burglary in the first degree, and upon his trial therefor a verdict had been rendered against him, although no judgment was ever entered upon the verdict, sentence having been suspended. The defendant demurred to the indictment upon the ground that the facts stated therein did not constitute a crime; the specific basis of his objection being that a voter has not been "convicted" within the meaning of the Constitution and the qualifying statutes, unless the verdict against him had been followed by a judgment. Mr. Justice Bartlet, delivering the opinion of the court, said:

"Upon reason, apart from authority, it will hardly be contended that a man should be deprived of the right of suffrage by a less conclusive judicial pronouncement against him than is required to disqualify him or affect his credibility as a witness. The disqualification of a witness on the ground that he has been convicted of a crime is clearly analogous to the disfranchisement of a voter on the same ground. In discussing the rule which thus renders a witness incompetent, in the case of *Faunce v. People*, 51, 111, 311, the supreme court of Illinois has said: 'An examination of the adjudged cases in the various states of the union, where substantially the same laws are in force, will show that it is not the commission of the crime, nor the verdict of guilty, nor the punishment, nor the infamous nature of the punishment, but the final judgment of the court that renders the culprit incompetent. It is true that writers and judges have loosely said that a party is convicted on the finding of a verdict against him. It is true in a sense that he has been convicted by the jury, but not until the judgment is rendered is he convicted by the law; and the statute only, like the common law, refers to the conviction imposed by the law.' It may readily be conceded that the words 'convicted' and 'conviction' are often employed with reference to the verdict in a criminal case, as distinguished from the judgment, without affecting the validity of this argument as to the meaning of 'convicted' in the constitutional provision under consideration and in the legislative enactments adopted in pursuance thereof."



I take it that the language of the Supreme Court in *Shields vs. Westmoreland County*, supra, expressly determines that the term "conviction" as used in Article II Section 7 of the Pennsylvania Constitution must be construed in its legal sense, and not in its popular sense, and can only be so treated. In the light of this decision and the other decisions cited therein by the Court, the "conviction" referred to in this Section and Article of the Constitution, it is a conviction by the law. The framers of the Constitution were not dealing loosely with the term in question, but had no other meaning in mind than a "conviction" in a court of law in the legal sense and significance of that term. The plea of *nolo contendere* is not such a "conviction," nor is a suspension of sentence by the court, upon payment of the costs.

In this case, there was *no* sentence. Without a sentence there could, of course, be no judgment, and without a judgment, there could be no conviction, within the meaning of that term as used in Article II, Section 7 of the Constitution as definitely decided in the case of *Shields vs. Westmoreland County*, supra.

I am of opinion further that a proceeding in *quo warranto*, being an extraordinary remedy, should not be instituted by the Attorney General unless a clear, *prima facie* case is made out, and it is apparent that litigation would be successful in the Court. This position has been taken by former Attorneys General of this Commonwealth. It is clearly the right and the duty of the Attorney General to decline to ask for relief when he believes that, under the law, the petitioner is not entitled to receive it. *Cheethan et al. vs. McCormick*, 178 Pa. 192.

With respect to the application here made, I am clearly of opinion that no *prima facie* case has been made out, and that the proceeding by a writ of *quo warranto* could not be successful in the Courts. The fundamental essential in the proposed proceeding, to wit, that said Frank P. Barnhart was "convicted" of an infamous crime within the meaning of Article II, Section 7 of the Pennsylvania Constitution, does not exist, and a contention to the contrary could not be sustained unless the Supreme Court should reverse a long line of its former decisions.

For the reasons given herein, the prayer of the petition is refused.

CYRUS E. WOODS,  
*Attorney General.*

---

---

OPINIONS TO THE DEPARTMENT  
OF REVENUE

---

---

## OPINIONS TO THE DEPARTMENT OF REVENUE

*State Hospitals—Rates charged for services rendered—Pay patients—Free patients—Bookkeeping—Duties of Boards of Trustees.*

Under Section 2318 of the Administrative Code it is the duty of the Board of Trustees of each State hospital to establish, subject to the approval of the Secretary of Welfare, the rates to be charged by the hospital for services rendered.

It is the duty of the Department of Revenue to collect the amounts chargeable from every person treated, unless such person is exempt from payment.

The books of the institution are to be kept so as to reflect accurately the charges accruing because of service rendered to each patient in the hospital.

It is the duty of the Department of Revenue to determine whether any patient is entitled to free service or at less rates than those established by the Board of Trustees.

. Department of Justice,

Harrisburg, Pa., August 22, 1929.

Honorable Leon D. Metzger, Deputy Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised upon the following questions:

### I

“Upon what State agency, or agencies, devolves the duty of establishing or fixing the rates to be charged in such institutions for hospital, medical and surgical services performed?”

### II

“If your answer to the above question is that such rates should be fixed by the Board of Trustees of the institution with the approval of, or in conjunction with the Department of Welfare, then just what is the duty of the Department of Revenue in respect to such rates?”

### III

“Is it the duty of the agent of the Department of Revenue at the institution to see to it that the institution's books are so kept as to properly reflect the fixed charges in connection with the services performed for each patient?”

### IV

“Upon whom devolves the duty of determining what patients should pay less than the fixed charges, or nothing at all, for services performed?”

Before answering your questions specifically, we shall call attention to the statutory law which must be considered in answering them. All of it was passed at the 1929 Session of the General Assembly.

Section 2318 of The Administrative Code of 1929 (Act No. 175 approved April 9, 1929) provides that the Boards of Trustees of the several State institutions within the Department of Welfare "shall have general direction and control of the property and management" of their respective institutions. Upon each Board is conferred the power, among other things, to make such by-laws, rules and regulations for the management of its institution as it may deem wise "subject to the approval of the Secretary of Welfare."

Section 206 of the Fiscal Code (Act No. 176 approved April 9, 1929) requires your Department in Clause (b) "to collect from patients, or from the persons legally liable therefor, all amounts becoming due for the treatment, care, and maintenance of such patients in State-owned hospitals." Section 210 of the same Act requires your Department to place in every State institution, an agent or agents for the collection of money due the Commonwealth.

Section 1209 repeats the requirement contained in Section 210, specifically providing that your agent shall be placed in every State institution "for the purpose of collecting all moneys due to such institution \* \* \* for care, treatment \* \* \* maintenance, or any other expense, chargeable for or on account of \* \* \* patients \* \* \*."

## I

It is clear under Section 2318 of The Administrative Code that it is the duty of the Board of Trustees of each State hospital to establish, subject to the approval of the Secretary of Welfare, the rates to be charged by the hospital for services rendered. With this function your Department has no concern whatever.

## II

The rates having been established by the Board of Trustees of a State medical and surgical hospital, it is the duty of your Department to collect the amounts chargeable under the established rates from every person treated in the hospital, unless such person is entitled either by statute or by the lawful rules and regulations of the hospital itself, to exemption from payment.

## III

In view of the fact that it is the duty of your Department to make all collection of moneys due the hospital, you are clearly vitally interested in seeing to it that the books of the institution are so kept as to reflect accurately the charges accruing because of services rendered

to each patient in the hospital. Your Department has very definitely a right to insist that this be done and if the Board of Trustees of any institution does not attend to this function satisfactorily, your Department would unquestionably have the right to take it over.

#### IV

It is for your Department to determine whether under any statute or any rule or regulation of the hospital any patient is entitled to free service or to service at less than the rates established by the Board of Trustees with the approval of the Secretary of Welfare.

Whether a patient is entitled to pay less than the full established rates, will in each case depend upon a question of fact. The question will be whether the occupation or financial circumstances of the patient are such as to bring him or her within the statutory provisions or rules or regulations entitling the patient to either free or part pay service. This question your representative must determine. He is not required nor permitted to exempt any patient from payment because either the Board of Trustees or any officer requests him to do so, but only because he finds that under the facts of the case a patient is entitled to exemption under the statutes or rules or regulations providing therefor.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*State Hospitals—Support and Maintenance—Appropriation—Poor Districts—Counties—Court Orders—Personal Estates—Act of April 25, 1929.*

While the legislature by Act of April 25, 1929, No. 303, has appropriated sufficient money to pay in full all the expenses of operating State owned mental hospitals, it was not the intention thereby that the total expense of maintaining patients in these institutions should ultimately rest upon the State, but it is quite apparent that each county or poor district should pay \$3.00 per week for each indigent patient, for which it is liable, while the difference between the actual cost of maintenance and what can be collected from those who are either wholly or partially self supporting is to be divided between the State and the counties or poor districts. It is now the duty of the State to collect these amounts.

Since July 1, 1929, when the Act of April 25, 1929, went into effect, the State Deputy Secretary of Revenue should petition courts for a modification of all orders heretofore made for the maintenance of insane patients in State Hospitals, so that payments hereafter shall be made directly to the State instead of to counties or poor districts.

Neither the State Revenue Department, nor any other agency of the State,

has the right to refuse to receive a patient committed to a State hospital by an order of court for failure to obtain information of the patient's financial ability to pay. This is a matter for later adjustment with the assistance of the court. A patient's admission cannot be delayed for a preliminary financial investigation, but the amount to be collected is to be governed by what a subsequent investigation may show.

Department of Justice,

Harrisburg, Pa., September 12, 1929.

Honorable Leon D. Metzger, Deputy Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised upon a number of questions relating to the administration of the work of your Department in collecting amounts due for the care and maintenance of patients in State-owned mental hospitals.

Due to the number of questions which you have asked, we shall state the questions separately and answer them immediately after stating them.

I

“Under 1929 legislation the State pays for the entire cost of maintenance of patients in State Hospitals for the Insane. Is it now lawful for counties to collect any amount from the estate of an insane patient in a State Hospital for the Insane, or the persons legally liable for said patient's support as they have been doing heretofore?”

The statement in your question, that under 1929 legislation the State pays for the entire cost of maintenance of patients in State hospitals for the insane, is inaccurate. It is true that the legislature has appropriated a sum sufficient to pay in full all of the expenses of operating State-owned mental hospitals, but it was not the Legislature's intention that the total expense of maintaining patients in these institutions should ultimately rest upon the State. This is evident from a reading of Act No. 405, approved April 25, 1929, which provides:

“That the part of the cost of the care and maintenance, including clothing, of the indigent insane, whether chronic or otherwise, in the State hospitals for the insane, payable by the counties or poor districts, is hereby fixed at the uniform rate of three dollars per week for each person, which shall be chargeable to the county or poor district from which such insane person shall have come, and the amount of the aforesaid cost, over and above three dollars per week chargeable to the counties or poor districts, shall be paid by the Commonwealth: Provided, That where

a portion of the cost of the care and maintenance, including clothing, can be collected from said patient's estate, or the person or persons liable for such patient's support, then the uncollectible portion of such cost shall be equally divided between the Commonwealth and the county or poor district liable for such patient's support."

Under this Act, it is quite apparent that the Legislature intended the counties or poor districts, in the case of indigent patients, to pay three dollars (\$3.00) per week for each such patient. In the case of patients whose maintenance can be paid entirely out of their own estates or by persons liable for their support, neither the State nor the county or poor district is intended to pay anything, and in the case of patients, a part of the cost of whose maintenance can be privately paid, the difference between the actual cost of such patients' maintenance and the amount which can be collected from their estates or from persons liable for their support, is to be equally divided between the Commonwealth and the county or poor district liable for their support.

In this connection, it is necessary also to consider Act No. 303, also approved April 25, 1929. This Act amends Sections 309, 504 and 505 of, and adds a new Section numbered 509 to, the Mental Health Act, approved July 11, 1923, P. L. 998.

Under this Act, it is the duty of your Department to make all collections of moneys due for the support of patients in State-owned mental hospitals. This Act supplements and elaborates upon Section 206 (a) of The Fiscal Code, (Act No. 176, approved April 9, 1929).

Clearly it is not any longer lawful for counties to collect any part of the cost of maintaining a patient in a State mental hospital either from the estate of the patient or from the persons legally liable for such patient's support.

Under the 1929 legislation which we have mentioned, all bills of State mental hospitals are paid out of State appropriations in the first instance. At the end of each month your Department, as the State's collecting agency, is required to bill the counties and poor districts for the maintenance of all patients whose maintenance has not been paid for out of their estates or by their relatives. If a patient's maintenance is collectible out of his estate, or from his relatives, it is the duty of your Department to make such collection in full. If only a part of his maintenance can be collected from either or both of these sources, it is the duty of your Department to make collection of the amount which can be collected. You will never bill the counties anything in the case of a patient whose full maintenance can be collected from private sources, and you will bill the counties only for one-half of the uncollectible portion in cases where a part of the maintenance cost can be collected from private sources. Accordingly,

there will hereafter be no occasion to have the counties collect anything to reimburse them, for the reason that they will never be called upon to make payment of any part of the cost of maintaining a patient whose maintenance is fully paid for from private sources, and they will never be called upon to pay more than one-half of the uncollectible portion of the maintenance cost in cases where patients are to be maintained partially at public expense.

## II

“Is it now proper for any Court to order payment of maintenance of patients in State Hospitals for the Insane to be paid to the counties and to the State or should such orders provide for the entire payment to the State?”

In the light of our answer to your first question, it is clear that it is no longer proper for any court to order payment to be made to counties or poor districts of any part of the cost of maintaining patients in State-owned mental hospitals. The court's order should require the total sum payable for the maintenance of the patient to be paid to the Commonwealth.

## III

“At the present time there are many existing Court orders relating to patients in State Hospitals for the Insane which were made in accordance with legislation in effect prior to July 1, 1929, which provide for payments to be made to the counties and the State. Should the Department of Justice, at the request of the Department of Revenue, petition the Court to amend such orders so as to require all amounts payable towards maintenance to be hereafter payable to the State?”

Your Department should, as rapidly as possible, request the Department of Justice to petition the proper courts to modify all outstanding maintenance orders which provide for the payment of any part of the cost of maintaining patients in State-owned mental hospitals to counties or poor districts. All such orders should be modified so as to require the total amounts payable to be paid to the Commonwealth.

## IV

“Under Act No. 305, approved April 25, 1929, where a portion of the cost of care and maintenance including clothing can be collected from the patient's estate or the person or persons liable for such patient's support, should the county be given the benefit of the amount to be collected on the basis of the agreement, or Court Order, before the amount is actually paid, or should the portion of costs of care and maintenance agreed or ordered to be paid for the patient be taken into consideration only when it is collected?”



In submitting bills to counties and poor districts, your Department can consider only amounts which have been actually collected prior to the billing date on account of the maintenance of patients in State-owned mental hospitals. Act No. 305 required "the uncollectible portion" of the cost of maintaining a patient in a State-owned mental hospital to "be equally divided between the Commonwealth and the county or poor district liable for such patient's support." In submitting your bills for the month of August you must consider as uncollectible that portion of the cost of maintaining any patient which has not actually been collected during the month. There is no other procedure under which Act No. 305 could be administered on a workable basis.

This does not mean that if the whole or a part of the cost of maintaining a patient for the month of August is collected by your Department at a later date, the counties or poor districts shall not be given the benefit of fifty per centum (50%) of the amount collected. While the legislation which we have cited is silent on this phase of its administration, the Legislature by speaking of that portion of the cost which is "uncollectible," clearly indicated that it intended the counties and poor districts in cases of partial indigency, to bear one-half of the net cost of maintenance.

Accordingly, in our opinion, you may lawfully, when you render bills for the month of September or subsequent months, credit to any county or poor district one-half of any amounts due for August maintenance, which may have been collected during such later month, thus billing the county or poor district only for the difference between the amount due for that month's maintenance cost and one-half of any amount collected during the month on account of the cost of maintenance of patients from that particular county or poor district for previous months.

## V

"Where a patient is rated as indigent or an agreement has been entered into, or Court Order made, to pay a certain sum toward maintenance, and it later develops that, in the first instance, the estate or the persons legally liable for the patient can pay a certain sum of money or, in the latter instance, pay more than was originally agreed upon or ordered, is the county to be given the benefit of the additional money collected?"

The answer to this question is that indicated in discussing question four. It was clearly not the intention of the Legislature that counties and poor districts should pay more than one-half of the uncollectible part of the cost of maintaining patients in State mental hospitals.

Accordingly, whenever collections are made, credits should be given to the proper counties and poor districts, as we have already indicated.

## VI

“If the petition for commitment fails to give the required information as to the financial ability of the patient’s estate, or the persons liable for his support, to pay for his maintenance and the Court Order nevertheless requires that he be admitted to the Institution, what authority, if any, has the Department of Revenue, or any other State Agency, to refuse to accept such patient for commitment in the Institution until the required information has been furnished?”

Neither your Department nor any other agency of the State Government, has the right to refuse to accept a patient committed to a State mental hospital by an order of Court, for the reason that the Court failed to require information with regard to the patient’s financial ability or the financial ability of the person liable for his support, prior to the execution of the order for commitment. However, in any such case, your Department should call upon the Department of Justice to bring this oversight to the attention of the court which signed the order. Every court will undoubtedly be willing to cooperate to the fullest extent with the proper agencies of the State Government in carrying out the provisions of the Mental Health Act and any other statutes rendering it the duty of the courts to obtain financial information relative to the ability of patients or their relatives to pay in whole or in part the cost of the maintenance of such patients in State institutions.

## VII

“What authority has the Department of Revenue to make a preliminary investigation of the financial ability of the patient’s estate, or the persons liable for his support, to pay for the said patient’s care and maintenance before the patient is finally admitted to the Institution?”

Your Department does not have authority to require the postponement of a patient’s admission to a State mental hospital until you have made a preliminary investigation of his financial status or of the financial ability of his relatives to pay in whole or in part the cost of his maintenance. You may, however, under Act No. 303 of the 1929 Session, conduct such investigation at any time and if you obtain any information indicating that the patient’s estate was misrepresented in connection with the application for admission or that the patient’s relatives have the ability to pay more for his maintenance than they agreed or were ordered to pay, it is your duty immediately to take such steps

as may be necessary in order to collect as much as possible towards the cost of maintaining the patient in the hospital to which he was committed.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*State Mental Hospitals—Collections from full pay patients—Estimated cost.*

The Board of Trustees may make collections on account of the maintenance of full pay patients monthly in advance.

Adjustments between the estimated and actual cost can lawfully be made in rendering bills for subsequent months.

In case a patient dies or is discharged during a month for which full payment was made in advance, the amount of payment which was unearned may lawfully be repaid to the patient, his estate or his relatives.

Department of Justice,

Harrisburg, Pa., September 13, 1929.

Honorable Leon D. Metzger, Deputy Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your letter inquiring whether it is lawful for your Department to make advance monthly collections from full pay patients in State mental hospitals. You state in your letter that it will be a great advantage to the Commonwealth to continue the practice which has heretofore prevailed of making such collections on this basis, but that you question your right to do so because you are not authorized to collect more than the actual cost, and actual cost cannot be definitely determined until the books for any month have been closed.

If, in the judgment of the board of trustees of any State mental hospital, it is advantageous to make collections on account of the maintenance of full pay patients monthly in advance, the board may by rule or regulation, with the approval of the Secretary of Welfare, require such payments to be made, the amount thus to be paid to be the estimated cost.

The adjustments between the estimated cost collected in advance and the actual cost as subsequently determined, can lawfully be made in rendering bills for subsequent months; and, in any case in which a patient dies or is discharged during a month for which full payment

was made in advance, the amount of the payment which was unearned, may lawfully be repaid to the patient, his estate or his relatives, as soon as the actual amount due can be determined.

Such repayments would not be refunds coming within the meaning of Section 503 of The Fiscal Code (Act No. 176, approved April 9, 1929), as we have pointed out in an informal opinion rendered under date of August 30, 1929 to Honorable Charles A. Waters, Auditor General, on a similar question in connection with the operation of State Teachers Colleges.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*Taxation—Liquid fuel—Motor vehicles—Acts of May 1, 1929, and May 3, 1929.*

1. Within the meaning of the Act of May 3, 1929, P. L. 1537, imposing a tax on liquid fuel, the word "motor vehicles" refers to those vehicles which come within the definition of motor vehicles contained in the Act of May 1, 1929, P. L. 1037.

2. Naptha and benzine used exclusively for dry cleaning purposes are subject to tax.

3. The only liquid fuels exempt from tax under the Act of May 1, 1929, are those consumed by the United States or any department board, commission or other agency or instrumentality thereof and those consumed by the Commonwealth of Pennsylvania and paid for out of State funds.

Department of Justice,

Harrisburg, Pa., September 27, 1929.

Honorable Benj. G. Eynon, Deputy Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised with respect to the exemptions from liquid fuels tax which are allowable under Act No. 405, approved May 1, 1929, and Act No. 460, approved May 3, 1929. You ask specifically:

1. Whether Act No. 460 imposes the tax on kerosene, fuel oil, and gas oil, used in any vehicles which do not come within the definition of "Motor Vehicles," appearing in Section 102 of Act No. 403, approved May 1, 1929;

2. Whether naphtha and benzine, used exclusively for dry cleaning purposes, are subject to tax; and

3. Whether liquid fuels sold to the Federal Government, to the Commonwealth of Pennsylvania, to school districts, counties, cities, boroughs, townships, State institutions, State-aided institutions, and volunteer fire companies within Pennsylvania, are subject to tax.

## I

### *What is the Meaning of "Motor Vehicles" as Used in Act No. 460?*

Act No. 460, approved May 3, 1929, exempts from liquid fuels tax kerosene, fuel oil, and gas oil but after making this exemption the Act contains the following proviso:

"\* \* \* Provided, however, that kerosene, fuel oil, and gas oil used in motor vehicles shall be included within the definition of 'liquid fuels.'"

It is our opinion, and you are advised, that the term "motor vehicles," as used in this proviso, includes only such vehicles as come within the definition of "motor vehicles," contained in Section 102 of Act No. 403, approved May 1, 1929, (The Vehicle Code).

Both Act No. 460 and Act No. 403 were passed by the same Session of the Legislature and it must be presumed that when the Legislature used the expression "motor vehicles," in Act No. 460, it was using it as defined in Act No. 403.

## II

### *Are Naphtha and Benzine used for dry Cleaning Purposes Exempt from Tax?*

Nowhere in Act No. 405, approved May 1, 1929, or in Act No. 460, approved May 3, 1929, did the Legislature exempt from tax, naphtha and benzine used exclusively for dry cleaning purposes. Only the Legislature could provide such exemption and the Legislature having failed to provide it, your Department is without authority to allow it.

Accordingly, we advise you that no matter for what purpose naphtha and benzine are used, they come within the definition of liquid fuels as contained in Act No. 405 and are subject to tax.

## III

### *Are Liquid Fuels Consumed by the Federal Government Exempt from Tax?*

Section 3 of Act No. 405, contains the following sentence:

"Until the first day of July, one thousand nine hundred and thirty, a State tax of four cents a gallon, or fraction thereof, and thereafter a State tax of three cents a gallon, or fraction thereof, is hereby imposed and assessed upon all liquid fuels sold by dealers in this Commonwealth,

except for the purpose of resale, and upon all liquid fuels used within this Commonwealth by consumers when no such tax has been collected thereon by a dealer, except liquid fuels purchased, received or consumed by the United States, or any department, board, commission, or other agency or instrumentality thereof."

The next sentence is:

"Duplicate taxation is not intended, but the tax hereby imposed shall apply to all liquid fuels sold or used within this Commonwealth excepting such transactions in interstate or foreign commerce as are not within the taxing power of the State."

No other exemptions appear anywhere in the Act.

Without Specifically exempting liquid fuels consumed by the United States, or any agency thereof, such liquid fuels would have been exempt from the operation of the Act under the decision of the Supreme Court of the United States in *Panhandle Oil Co. vs. Mississippi*, 277 U. S. 218. In that case it was held that a dealer could not be taxed by a State for the privilege of selling gasoline to the United States; and the reasoning upon which the decision was based would, in our judgment, prevent Pennsylvania from imposing a tax upon gasoline consumed by the United States.

It is, therefore, clear that your Department must exempt from the payment of liquid fuels tax liquid fuels purchased, received, or consumed "by the United States, or any department, board, commission, or other agency or instrumentality thereof."

#### IV

##### *Are Liquid Fuels Consumed by the Commonwealth Itself Exempt from Tax?*

On the one hand, it may be argued that the language used by the Legislature is all-inclusive, except as to liquid fuels consumed by the Federal Government, and that by specifically exempting fuels consumed by the Federal Government without exempting those consumed by the State, the Legislature indicated an intention to have the tax paid on liquid fuels consumed by the State.

On the other hand, there is a strong presumption that the taxing power in the enactment of tax legislation did not intend to tax itself. This presumption is so strong as to be overcome only if the tax legislation specifically expresses the intention not to exempt the taxing power from the payment of tax. See *Jones vs. Tatham*, 20 Pa. 398; *Directors of the Poor vs. School Directors*, 42 Pa. 21; *County of Erie vs. City of Erie*, 113 Pa. 360; *Pittsburgh vs. Subdistrict School*, 204 Pa. 635.

In the present instance, a large proportion of the liquid fuels consumed by the Commonwealth is consumed by the Department of Highways, all of the expenses of which are paid out of the Motor License Fund. The proceeds of the liquid fuels tax are payable into the Motor License Fund. For collecting the tax compensation is payable to the dealers who do the collecting. It would be utterly ridiculous to pay compensation to dealers for collecting tax paid out of the Motor License Fund, which is forthwith repayable to the Motor License Fund, less the compensation paid.

Accordingly, we are of the opinion that without expressly providing such an exemption, the Legislature intended to exempt from tax all liquid fuels used by the Commonwealth of Pennsylvania and its agencies, and paid for out of State moneys, in whatever fund of the State Treasury they may be segregated. However, in our opinion this exemption applies only to liquid fuels for which payment is made by the Commonwealth itself, and does not apply to liquid fuels consumed by any agency of the Commonwealth if paid for otherwise than by the Commonwealth. For example, liquid fuels consumed in automobiles owned by the State Workmen's Insurance Board are not exempt from tax, because the expenses of this board are not paid by the Commonwealth but out of moneys paid into the State Workmen's Insurance Fund by the holders of policies issued by the Board.

## V

### *Are Liquid Fuels Consumed by Political Subdivisions of the Commonwealth Exempt from Tax?*

Under date of December 21, 1921, the Attorney General rendered an opinion to the Auditor General, holding that liquid fuels consumed by political subdivisions of the Commonwealth were not subject to the tax imposed by the Liquid Fuels Tax Act of May 20, 1921, P. L. 1021.

The reasoning upon which this exemption was held to exist was that:

“\* \* \* If, \* \* \* the tax be collected upon gasoline sold to a municipality for use in motor vehicles operated by it in the exercise of its public functions, it is paid by the municipality out of public moneys raised by taxation only to be paid out again in taxes to the Commonwealth.”

We are of the opinion that liquid fuels consumed by municipalities, counties, school districts, and other political subdivisions of Pennsylvania, are subject to tax. While all of these political subdivisions are supported out of revenue raised by taxation, the sources of tax from which they derive their revenue are entirely different from the

sources from which the Commonwealth derives its revenue; and, in any event, the proceeds of the collection of the tax on liquid fuels are not, under present legislation, intermingled with the general revenues of the Commonwealth, but are held separate and apart to be used exclusively for highway work.

It is true that in the cases cited in discussing the exemption of the Commonwealth from tax on liquid fuels consumed by it and its agencies, the Supreme Court held that there is a presumption that the Legislature intended to exempt from tax property owned by a municipality and used for public purposes, as well as property owned by the Commonwealth. All of these cases involved the Legislature's intention in the enactment of legislation taxing or authorizing the taxation of *property*. There is no case decided by the courts of this State, holding that there is a presumed like exemption from a tax on sales or a tax on consumption; and in our judgment the principle upon which exemption from a property tax is presumed does not apply in the case of the tax on liquid fuels.

As already stated, in Act No. 405 the Legislature expressly provided that "the tax hereby imposed shall apply to all liquid fuels sold or used within this Commonwealth, excepting such transactions in interstate or foreign commerce as are not within the taxing power of the State."

The imposition of a tax upon liquid fuels sold to or consumed by a political subdivision of the State is within its taxing power; and we cannot find any justification for presuming that the Legislature, notwithstanding the all-inclusive statement quoted, intended to exempt from taxation liquid fuels used by municipalities, counties, school districts, and other political subdivisions.

## VI

### *Are Liquid Fuels Consumed by State-Owned Institutions Exempt?*

All of these institutions are conducted either by departments or by departmental administrative boards and commissions of the State government under the provisions of The Administrative Code of 1929 (Act No. 175, approved April 9, 1929). All of them are supported entirely out of State appropriations. Any liquid fuels consumed by them are, therefore, consumed by the Commonwealth and are exempt from tax for the reasons already stated under subdivision IV of this opinion.

## VII

### *Are Liquid Fuels Consumed by State-Aided Institutions, Pennsylvania State College, and Volunteer Fire Departments Exempt from Tax?*



Only the Legislature could exempt State-aided institutions and volunteer fire companies from liquid fuels tax. It has not done so specifically, and there is no presumption of exemption as in the case of the Commonwealth itself. Accordingly, you cannot allow exemptions in these cases.

Under date of February 7, 1929, this Department, in an opinion addressed to Honorable Virgil E. Bennett, Deputy Auditor General, reached the conclusion that Pennsylvania State College is not a State institution.

As a State-aided institution, Pennsylvania State College is subject to liquid fuels tax just as all other such institutions are subject to tax.

### VIII

To summarize, we advise you :

1. That within the meaning of Act No. 460, approved May 3, 1929, "motor vehicles" refer to those vehicles which come within the definition of motor vehicles contained in Act No. 403, approved May 1, 1929;
2. That naphtha and benzine used exclusively for dry cleaning purposes are subject to tax;
3. That the only liquid fuels exempt from tax under Act No. 405, approved May 1, 1929, are those consumed by the United States or any department, board, commission, or other agency or instrumentality thereof and those consumed by the Commonwealth of Pennsylvania and paid for out of State funds.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*Taxation—Credit to taxpayer—Liquid Fuels tax.*

Neither the Department of Revenue nor the Board of Finance and Revenue may lawfully permit a credit to a taxpayer in his General Fund tax accounts to be utilized to pay a debit owed by the same taxpayer in his liquid fuels tax account, or vice versa.

Department of Justice,

Harrisburg, Pa., November 13, 1929.

Honorable J. Lord Rigby, Deputy Secretary of Revenue, Harrisburg,  
Pennsylvania.

Sir: We have your request to be advised whether your Department or the Board of Finance and Revenue may apply to a taxpayer's gasoline tax account a credit which he may have on the books of your Department on account of overpaid capital stock, loans, or gross receipts tax, or vice versa.

The only distinction between the liquid fuels and any of the other taxes collectible by your Department is that the former is paid into the Motor License Fund, while all other taxes collected are paid into the General Fund of the State Treasury. This, however, is a distinction which is vital as far as the answer to your question is concerned.

Under Section 503 of The Fiscal Code (Act of April 9, 1929, P. L. 343), the Board of Finance and Revenue has the right to hear and determine petitions for refund of taxes alleged to have been paid to the Commonwealth as the result of an error of law or of fact or of both law and fact; and upon the allowance of any such petition, the Board is authorized to refund the taxes out of any appropriation or appropriations made for the purpose or to credit the account of the taxpayer entitled to the refund.

Under Sections 1102 and 1105, your Department with the approval of the Auditor General may make resettlements of tax accounts and upon such resettlements may credit or charge the amounts resulting from such resettlements upon current accounts of the party with whom the resettlement is made.

Sections 1102 and 1105 apply only to General Fund tax collections. The procedure applicable in the case of the collection of the liquid fuels tax is prescribed by the Act of May 1, 1929, P. L. 1037, under which your Department has the right to make redeterminations of liquid fuels tax accounts. Upon any redetermination your Department, of course, has the right to credit or charge the taxpayer's current liquid fuels tax account to conform with the redetermination.

It is our opinion that the Legislature did not intend credits for overpaid General Fund taxes to be used in liquidation of liquid fuels tax accounts or vice versa. Nowhere in The Fiscal Code or the Act of May 1, 1929 or any other Act of Assembly is there any authority which would permit a transfer of funds from the General Fund to the Motor License Fund, or vice versa, to carry out the necessary effect of an interchange of credits or charges between tax accounts of these respective classes. Without legislative provision for a transfer of funds there would be almost hopeless confusion were General Fund tax credits to be applied to liquid fuels tax debits or the reserve.

Accordingly, we advise you that neither your Department nor the Board of Finance and Revenue may lawfully permit a credit to a taxpayer in his General Fund tax accounts to be utilized to pay a

debit owed by the same taxpayer in his liquid fuels tax account, and likewise, that it is not lawful to permit a liquid fuels tax credit to be utilized by the taxpayer against a debit on account of General Fund taxes.

In reaching this conclusion we have not overlooked the effect of the Act of May 9, 1929, P. L. 1690 which provides that:

“\* \* \* whenever a revision of any settlement or resettlement is made by the Department of Revenue, or any other agency of the State Government charged with the settlement or resettlement of State taxes, bonus, penalties or interest, when it may appear from the accounts or from other information that any person \* \* \* has had an erroneous or illegal settlement made against the same, and a settlement or resettlement has been made according to law, and a credit granted therefor, \* \* \* such credit may be assigned \* \* \* to any other person \* \* \* on account of any taxes, bonus, penalties, or interest due or to become due from such person \* \* \* with like force and effect as if the same were paid in money, and such assignment or transfer, upon approval of the Department of Revenue, shall be final and conclusive as to the Commonwealth and the party or parties to such assignment or transfer: Provided, however, That such credit shall not be payable in money to any grantee or assignee out of any funds of the Commonwealth.”

This act is merely an extension of Section 1107 of The Fiscal Code, which permits the assignment of a credit allowed by the Board of Finance and Revenue under Section 1105.

As already stated, Section 1105 permits resettlements to be made upon petition of the Department which made the settlement so that Section 1107 would apply only to such cases.

The Act of May 9, 1929, on the other hand, applies to credits resulting from resettlements made under any circumstances and includes specifically resettlements of bonuses, penalties, or interest as well as of taxes.

The important sentence in the Act of May 9, 1929, as far as this opinion is concerned, is the last one which prohibits the payment in money to any assignee of the amount of an assigned credit.

The Legislature has specifically refused to permit cash to be withdrawn from any fund in the State Treasury for the payment of an assigned credit. There is no possible procedure by which an assigned credit can be employed for the payment of a tax account the proceeds of which are payable into a fund in the State Treasury other than the fund against which the credit is payable.

The Legislature by Section 302 of The Fiscal Code created certain specific funds in the State Treasury requiring the Treasury Depart-

ment to deposit moneys received by it in these funds as directed by the Department of Revenue. The moment money is properly credited to any of these funds it can be withdrawn only as directed by the Legislature. The State Treasurer does not have the power to transfer to another fund money which has been properly credited to any particular fund unless an Act of Assembly specifically directs him so to do.

There being no legislation authorizing transfers from the Motor License Fund into the General Fund, or vice versa, an assigned credit chargeable against the General Fund cannot be used to pay a tax the proceeds of which are required to be paid into the Motor License Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*State Highway Patrol—Employment of physician—Prosecution for driving vehicles when intoxicated—Costs—Acts of June 29, 1923, and May 1, 1929.*

1. The Act of June 29, 1923, P. L. 973, authorizes incurring expenses necessitated in the investigation of crime.

2. The Act of 1923 covers a case where an operator, suspected of driving while under the influence of liquor, is examined by a physician for that purpose, but found not to have been under the influence of liquor, and, therefore, not liable to prosecution for violation of section 620 of the Act of May 1, 1929, P. L. 905.

3. Where, after the prosecution in such case has been instituted and the case has been returned to court, a *nolle pros.* is entered, generally either the costs are paid by the county or the entry of *nolle pros.* is conditioned upon the payment of the costs by defendant. In either case, the doctor's fees can be taken care of in the manner provided by the Act of 1923.

Department of Justice,

Harrisburg, Pa., January 9, 1930.

Honorable Benj. G. Eynon, Deputy Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: This Department has been requested to advise you concerning the right of the officers of the State Highway Patrol to engage physicians as witnesses in prosecutions instituted for violations of Section 620 (f) of the Motor Vehicle Code of 1929, P. L. 905.

This section of the Code makes it a misdemeanor for any person

to operate a motor vehicle while under the influence of intoxicating liquor, or of any narcotic drug, or to permit any person who may be under the influence of intoxicating liquor or any narcotic drug to operate any motor vehicle owned by him or in his custody or control.

Upon the apprehension of a person accused or suspected of a violation of the above section of the Vehicle Code it has been the practice to promptly have a physician examine the person alleged to have been under the influence of liquor or of a narcotic drug, and the opinion of said physician is generally made the basis of the prosecution. If the physician is of the opinion that the operator is not under the influence of intoxicating liquor or of a narcotic drug, no prosecution for the violation of Section 620 (f) is instituted.

Discontent has arisen among the medical fraternity because in many cases it has happened that a physician has examined a defendant, has been subpoenaed to appear in court and testify for the Commonwealth, and then fails to collect his fees. Ordinarily, a physician who is called to testify may be compensated only by the witness fees and mileage provided by statute. Obviously, this is inadequate in the case of the average busy doctor, who is not only financially the loser but much of whose time is wasted by attendance at court, waiting his turn to testify.

The Act of June 29, 1923, P. L. 973, authorizes any district attorney of the Commonwealth, or his assistants, or any officer directed by him, to incur expenses necessitated in the investigation of crime and the apprehension and prosecution of a person charged with or suspected of the commission of crime, and provides that such expense shall be paid by the respective counties, upon the approval of the bill of expense by the district attorney and the court of the county concerned. In a case where a defendant is convicted and sentenced to pay the costs of prosecution, the expenses of the district attorney in connection with such prosecution shall be considered a part of the costs of the case and be paid by the defendant. It seems to us that compliance with the terms of this act furnishes the solution to the present difficulty facing the State Highway Patrol. The co-operation of the several district attorneys of the Commonwealth can no doubt be secured and a workable arrangement be agreed upon between the district attorneys and the commanding officers of the several troops.

You will note that the Act of 1923 warrants the payment of necessary expenses incurred in the investigation of crime. This provision would, in our judgment, cover a case where an operator, suspected of driving while under the influence of intoxicating liquor, is examined by a physician but found not to have been under the influence of intoxicating liquor and therefore not liable to prosecution for a violation of Section 620 (f).

Where, after a prosecution has been instituted and the case has been returned to court, a nolle pros. is entered, generally either the costs are paid by the county, or the entry of the nolle pros. is conditioned upon the payment of the costs by the defendant. In either of these cases the doctor's fees can be taken care of in the manner provided by the Act of 1923.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROSCOE R. KOCH,

*Deputy Attorney General.*

---

*State Mental Hospitals—Patients—Care and maintenance charges—Right of Secretary of Revenue to cancel charges—Act of April 9, 1929, P. L. 177.*

No department, board or commission has the right, without the permission of the Department of Justice, to mark as uncollectible any account which has been properly entered against any person, association or corporation for moneys due the Commonwealth.

Department of Justice,

Harrisburg, Pa., January 31, 1930.

Honorable Leon D. Metzger, Deputy Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised regarding the right of your Department without consulting this Department to cancel charges for care and maintenance in a State-owned mental hospital entered against the estate of a patient, or against the person or persons liable for the patient's support.

You state that frequently when a patient is admitted to a State-owned mental hospital, he is classified as a "part-pay" or "full-pay" patient, while, as a matter of fact, it subsequently develops that he is indigent both in the sense that the cost of his maintenance cannot be collected from his estate and in the sense that he does not have any relatives able to pay it.

You call our attention to the fact that the law permits your Department, when a patient is classified as "indigent," and you subsequently receive information that he or his relatives are not indigent, to collect, in whole or in part, the cost of maintenance both currently and for the period during which the patient was regarded as indigent.

The answer to your question involves a consideration of Sections 512 and 903 of The Administrative Code of 1929 (Act of April 9, 1929, P.

L. 177) and of Sections 503, 504 and 505 of the Mental Health Act of 1923 (Act of July 11, 1923, P. L. 998), the last two sections having been amended by the Act of April 25, 1929, P. L. 700.

Section 512 of The Administrative Code provides that:

“\* \* \* whenever any taxes or other accounts of any kind whatever due the Commonwealth remain overdue and unpaid for a period of ninety days, it shall be the duty of such department, board, commission, or officer, to refer the same to the Department of Justice.”

Section 903 of the same act renders it the duty of this Department “To collect, by suit or otherwise, all debts, taxes, and accounts, due the Commonwealth, which shall be placed with the department for collection by any department, board, or Commission. \* \* \*”

Section 503 of the Mental Health Act provides that whenever any mental patient is admitted; whether by order of a court, or in any other manner authorized by the provisions of the act, to any State-owned mental hospital “the cost of care and maintenance including clothing, of such patient in such hospital shall be defrayed from the real or personal property of such patient \* \* \* 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 the expense shall be paid in whole or in part by the county or poor district liable for his support and by the Commonwealth in such proportions as shall be fixed by law.

As amended, Section 504 of the Mental Health Act provides that it shall be the duty of your Department to investigate the financial ability of patients in State mental hospitals, or the persons liable for their support, to defray in whole or in part the expense of their care and maintenance. Section 505 of the act, also as amended by the Act of 1929, authorizes the courts upon application of this Department, acting for your Department, to make an order conformable to the provisions of Article V of the Mental Health Act for the payment of maintenance to the Commonwealth, either upon the person having charge of the estate of the patient, or against the person liable for his support, the amount of the order to be such as the court in its discretion may deem proper “taking into consideration the ability of the patient, or the person liable for his support, to pay for such maintenance.”

Under these statutory provisions, we have no hesitancy in advising you regarding the procedure to be followed in cases in which your De-

partment believes that the patient's classification as entered on the books of the institution is not correct.

If the patient was admitted upon application without a court order and was classified "part-pay" or "full-pay," and charges have been entered on the institution's books showing an indebtedness on the part of the patient's estate, or of his relatives, to pay either all or a part of the cost of maintaining the patient, and it subsequently develops that the patient and his relatives are totally indigent, your Department should promptly cause the patient to be reclassified and should therefore treat the patient as an indigent case, collecting three dollars a week from the county or poor district in which he resided, as required by law. With respect to charges entered on the books and not collected prior to the patient's reclassification, you should transmit to the Department a statement of the debt owing by the patient, or his relatives, as shown by the books of the institution, together with a complete statement of the reasons which lead your Department to believe the patient and his relatives are indigent and unable to pay the account standing against them on the Commonwealth's books.

Having before us the foregoing information, our Department will be in a position, if it appears proper to do so, to authorize you to charge off the account as uncollectible. Section 903 of The Administrative Code does not require this Department to institute legal proceedings in cases in which it is obvious that such proceedings will involve a useless expenditure of costs.

If the patient was admitted to a mental hospital upon court order and at the time of executing the commitment decree, the court made an order for the payment out of the patient's estate, or by his relatives, of all or a part of the cost of maintaining the patient, and you subsequently obtain information indicating that the patient and his relatives are wholly indigent and cannot pay as per the court order, application should be made to the court to modify the order. This application should, of course, be made by the guardian or committee of the patient, or by the relative or relatives whom the court ordered to pay, in whole or in part, the maintenance charge. Your Department, or, if necessary, this Department, can with full propriety agree to a modification of the court order in such cases. The procedure with respect to unpaid accrued charges due under the court's original order must be the same as in the case of admissions otherwise than upon court order.

In our opinion the Legislature did not intend to grant to any department, board, or commission the right, without the permission of this Department, to mark as uncollectible any account which has been properly entered against any person, association, or corporation for moneys due the Commonwealth. Entries made as the result of an error on the part of the clerk or other employe who made them, may be corrected without



consulting this Department; but, where the entries were not thus made, they can be charged off only if the procedure established by Section 512 of The Administrative Code has been followed.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*Secretary of Revenue—Collection of fees, licenses, etc.*

Responsibility of the Secretary of Revenue in the collection of fees, licenses, etc., under the provisions of Sections 605 and 1210 of the Fiscal Code, Act of April 9, 1929, P. L. 343.

Department of Justice,

Harrisburg, Pa., March 26, 1930.

Honorable Leon D. Metzger, Deputy Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised with regard to the following questions:

1. What is the relation of the Department of Revenue to the departments, boards and commissions that continue to collect certain fees, etc.

2. When a license or other fee is fixed by law, is it the duty of the Department of Revenue, or its agent, to see that all fees for licenses issued and services performed are properly charged or billed, as well as collected.

3. When fees, fines or penalties are to be fixed and assessed by a department, board or commission, is it the duty of the Department of Revenue, or its agents, to see that these fees, fines and penalties are charged or billed in accordance with the rules and regulations of such State agency.

Your questions arise under Section 605 of The Fiscal Code (Act of April 9, 1929, P. L. 343), which provides that:

“Subject to any inconsistent provisions elsewhere in this act contained, every administrative department, every independent administrative board or commission, and every departmental administrative board or commission of the State Government, which is authorized by law to collect any taxes, fees, charges, or other moneys, payable to such department, board, or commission, for its use, or for the use of the Commonwealth, for registrations,

licenses, examinations, inspections, services rendered, permits, or any other purpose or reason whatsoever, shall continue to collect such taxes, fees, charges, or other moneys, and, subject as aforesaid, shall continue to collect all fines, penalties, and bail forfeited, which it is authorized by law to collect, but the Department of Revenue shall assign to any such department, board, or commission, an agent, or designate as its agent an employe of such department, board, or commission, for the purpose of receiving all moneys payable to such department, board, or commission.

Another provision of The Fiscal Code which is relevant is that contained in Section 1210, as follows:

“All collections of every kind and description, which any department, board, or commission of the State Government is by this act authorized to continue to make, shall be turned over immediately upon the receipt thereof to the agent of the Department of Revenue assigned to or designated in such department, board, or commission.”

Under these provisions, it is quite clear that, except in the cases in which The Fiscal Code specifically imposes upon your Department the duty of collecting revenue, the departments, boards, and commissions which were required to collect the same prior to the passage of The Fiscal Code continue to be charged with this responsibility. Their responsibility ceases, however, the moment the revenue is received at their respective offices. They have no right to handle the money thus received, but must turn it over forthwith to your Department, acting through an agent especially appointed for the purpose, or an employe of the other department or board or commission designated to act as your agent.

Your responsibility begins when the revenue reaches the collecting department, board, or commission, and you are chargeable only with the actual amounts received.

Accordingly, it is not the duty of your Department to see to it that the amount collected is that which a statute or a rule or regulation requires to be collected. The responsibility for seeing that the proper amount has been collected is imposed by Section 401 of The Fiscal Code upon the Department of the Auditor General and not upon your Department.

So that there may be no misunderstanding of the effect of the opinion here expressed, we desire to make it clear that your Department has the direct responsibility:

(1) For the collection of all taxes formerly collectible by the Department of the Auditor General and the Treasury Department, or either of them, and by the Insurance Department or the Insurance Commissioner;

(2) For seeing that the proper amount is collected for all motor vehicle registrations, operators' licenses, and other fees formerly collectible by the Highway Department in connection with the licensing of motor vehicles and the operation thereof;

(3) For seeing that the correct amount is collected for hunters', fishermen's, and dog licenses;

(4) For the collection of property escheatable to the Commonwealth;

(5) For the collection of all amounts payable for the maintenance of all inmates or patients of State hospitals and penal and correctional institutions, and for tuition and maintenance of pupils at State educational institutions;

(6) For the collection of amounts payable by political subdivisions of Pennsylvania as their share of the cost of improving and rebuilding highways; and

(7) For all collections of fines and penalties from magistrates, aldermen, justices of the peace, burgesses and mayors.

To state the matter differently, this opinion does not have any bearing upon the duties of your Department, under Sections 202 to 206, inclusive, of The Fiscal Code, but only to collections not embraced within those sections.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*Taxation—Tax settlement—Interest on settlements—Act of April 29, 1929.*

Under section 805 (b) and 806 (a) of the Fiscal Code of April 29, 1929, P. L., 343, interest at the rate of 12 per cent. per annum begins to accrue on tax accounts ninety days after the date of settlement.

Department of Justice,

Harrisburg, Pa., April 16, 1930.

Honorable J. Lord Rigby, Deputy Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request for an interpretation of Sections 805 (b) and 806 (a) of The Fiscal Code, (Act of April 29, 1929, P. L. 343). You desire to know whether interest at the rate of twelve per centum per annum begins to accrue on tax accounts sixty days after the date of settlement, or ninety days after the date of settlement.

Section 805 (b) of The Fiscal Code provides that:

“(b) The amount of every tax and of every foreign bonus settlement shall become due and payable sixty days after the date of the settlement, unless there shall be a resettlement, in which case the amount of the resettlement shall become due and payable sixty days after the date of the resettlement.”

Section 806 (a) provides that:

“(a) In the settlement by the Department of Revenue of all accounts for taxes due the Commonwealth, it shall charge interest upon the amount of tax or balance found due the Commonwealth, at the rate of twelve per centum per annum, from thirty days after the time said tax or balance becomes due and payable to the time of the settlement of the same; and all balances due the Commonwealth on accounts settled by the Department of Revenue shall bear interest from sixty days after the date of settlement, at the rate of twelve per centum per annum, until the same are paid; except where appeals have been taken from settlements \* \* \*”

Section 806 (a) is a reenactment of the Act of March 31, 1927, P. L. 94, which amended Section 30 of the Act of June 1, 1889, P. L. 420, with the exception that the Department of Revenue is substituted in the 1929 law for the Auditor General and State Treasurer, who were mentioned in the prior legislation. The Act of 1889 as amended by the Act of 1927 applied to two distinct classes of settlement, namely, first, the settlement or liquidation of accounts of county officers, acting as the agents for the Commonwealth for the collection of State taxes, and, second, accounts settled against taxpayers themselves by the Auditor General and State Treasurer. In the former case, interest began to run at the rate of twelve per centum per annum thirty days after a county officer ought to have paid over to the Commonwealth, the balance of taxes due from him to it. In the latter case, interest began to run at the rate of twelve per centum per annum sixty days after the date of settlement.

Prior to the passage of The Fiscal Code, the payment of interest on other accounts settled by the Auditor General and State Treasurer was governed by Section 34 of the Act of March 30, 1811, P. L. 145.

Section 806 (a) of The Fiscal Code can not be held to have the same effect as the Act of March 31, 1927, P. L. 94, or the Act of June 1, 1889, P. L. 420. Section 806 (a) has no application whatever to the payment of interest by county officers upon balances of taxes due by them to the Commonwealth. This subject is covered by Section 904 of The Fiscal Code.

Article VIII deals exclusively with “The Settlement of Bonus and Tax Accounts.” Article IX, on the other hand, deals with “Procedure for the Collection of Moneys due the Commonwealth by County or City Officers.”

Applied exclusively to tax accounts as distinguished from accounts due by county officers for taxes collected, Section 806 (a) of The Fiscal Code contains an obvious contradiction. Its first clause must be construed to mean that in accepting payment and receipting for amounts due on tax accounts, the Department of Revenue shall charge interest at the rate of twelve per centum per annum from thirty days after the time the tax becomes due; and under Section 805 (b) the due date of the tax is sixty days after the date of settlement or resettlement, if there be a resettlement. The taxpayer thus has ninety days after the date of settlement or after the date of resettlement, if there be one, within which to pay his tax before interest begins to run. The second clause provides that interest at the rate of twelve per centum per annum shall begin to run sixty days after the date of settlement. It is impossible to administer both of these provisions. Interest begins to run either sixty days after the date of settlement or ninety days after the date of settlement. The Legislature's intention that tax accounts shall bear interest at the rate of twelve per centum per annum is clear, but the date which the interest shall begin to run is not clear. It is a familiar rule of law that statutes imposing taxes must be construed strictly against the taxing power and in favor of the taxpayer; and we take it that a provision charging a high rate of interest for failure to pay taxes promptly is subject to the same rule of interpretation. Therefore, in construing the conflicting provisions of Section 806 (a) of The Fiscal Code, it is necessary to adopt the more liberal alternative and charge interest at the rate of twelve per centum per annum from ninety days after the date of settlement rather than from sixty days after the date of settlement.

Accordingly, we advise you that interest at the rate of twelve per centum per annum begins to run against taxpayers beginning ninety days after the date of settlement or ninety days after the date of resettlement, if there was a resettlement.

While the presence in Section 806 (a) of these contradictory clauses is unfortunate, a period of ninety days in which a taxpayer may pay his taxes without interest, is more consistent with the general scheme of The Fiscal Code than a sixty days' period would be, for the reason that under Section 1102, a taxpayer is allowed ninety days after the date of settlement within which to file a petition for resettlement. Under the construction which we have placed on Section 806 (a), the period for filing a petition for resettlement and the period for payment of tax without interest is identical. This is as it should be.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

*Taxation—Settlement and resettlement—Department of Revenue—Procedure—Fiscal Code of 1929—Power to make second resettlement—Petition for authority——Board of Finance and Revenue—Appeal by taxpayer—Powers of board.*

1. Under The Fiscal Code of April 9, 1929, P. L. 343, the Department of Revenue has no power to entertain a second petition for resettlement of a tax report after it has made a resettlement upon petition of the taxpayer.

2. If the department is convinced that it has made an erroneous or illegal resettlement, it may within one year petition the Board of Finance and Revenue, under section 1105 of The Fiscal Code, for authority to correct its error by making a further resettlement.

3. The taxpayer's remedy, if he is unable to convince the Department of Revenue that it has erred, consists exclusively in the right to file a petition for review by the Board of Finance and Revenue, as provided in section 1103 of the Code.

4. The Board of Finance and Revenue may resettle a tax upon appeal by the taxpayer, but it does not have jurisdiction either to direct or to authorize the Department of Revenue to make a further resettlement.

Department of Justice,

Harrisburg, Pa., June 6, 1930.

Honorable Charles Johnson, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether your Department may entertain a second petition for a resettlement after it has made a resettlement upon petition of the taxpayer.

Your question involves an interpretation of Sections 1101-1103, inclusive, of The Fiscal Code (Act of April 9, 1929, P. L. 343).

Earlier sections in The Fiscal Code establish the procedure for making settlements upon tax reports filed by persons, associations and corporations. Section 1101 requires your Department promptly after the date of any settlement to send a copy thereof to the taxpayer by mail or otherwise and Section 1102 permits the taxpayer within ninety days after the date of settlement to file with your Department a petition for resettlement. Subject to the approval of the Department of the Auditor General your Department must dispose of every such petition within six months from the date of settlement, and it is your duty to notify the taxpayer promptly, of the action taken upon his petition for resettlement.

Section 1103 permits the taxpayer within thirty days after notice of the action taken on his petition for resettlement to file with the Board of Finance and Revenue a petition for review.

You desire to know specifically whether within ninety days after receiving notice of resettlement a taxpayer may file with your Depart-

ment and your Department may entertain a second petition for resettlement.

To this question the answer must clearly be in the negative.

If your Department with the approval of the Department of the Auditor General has resettled a tax account you have no further jurisdiction over it unless and until the Board of Finance and Revenue has given your Department authority to make a further resettlement as provided in Section 1105 of The Fiscal Code, which permits your Department within one year after the date of settlement or of resettlement to petition the Board of Finance and Revenue for authority to make a resettlement upon the ground that on the basis of information in the possession of your Department the settlement or resettlement was erroneously or illegally made.

To state the matter differently if your Department is convinced that it has made an erroneous resettlement it may ask the Board of Finance and Revenue to grant permission to correct the error by making a further resettlement. This, however, is the only case in which your Department can make a second resettlement.

The taxpayer's remedy if he is unable to convince your Department that it has erred in the resettlement consists exclusively in the right within thirty days after receiving notice of the resettlement to file a petition for review as provided in Section 1103. If the Board of Finance and Revenue concurs in his view that the resettlement was erroneous it may resettle the tax but it does not have jurisdiction to return the file to your Department and either authorize or direct you to make a further resettlement.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*Department of Revenue—Functions—Collection of revenue—Fines and penalties imposed—Magistrates in Philadelphia—Constitution, art. v, sec. 13—Courts of record—Payment into state or county treasury—Act of March 31, 1860—Collection by State administrative agencies.*

1. Under article v, section 13, of the Constitution of Pennsylvania, fees, fines and penalties collected by magistrates in Philadelphia, when the collection of such fines and penalties is authorized, must be paid into the county treasury and not through the Department of Revenue into the State Treasury.

2. Fees and fines collected by courts of record, or by courts not of record outside of Philadelphia, unless specifically directed to be paid into the State

Treasury, are payable into the respective county treasuries, in accordance with section 78 of the Act of March 31, 1860, P. L. 427.

3. All fines and penalties collected by administrative agencies of the state government without specific legislative direction as to their disposition are to be collected by the Department of Revenue and paid into the State Treasury.

4. All penalties imposed by law and collected by civil suit either by the Department of Justice or any other administrative agency of the state government are payable into the State Treasury whether or not the act imposing the penalties specifically so provides.

Department of Justice,

Harrisburg, Pa., June 6, 1930.

Honorable Leon D. Metzger, Deputy Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised with respect to the circumstances under which fines and penalties imposed by the courts, including courts not of record, are collectible and payable by your Department into the State Treasury.

Your inquiry arises because the controller of the City of Philadelphia has challenged your right to collect from Philadelphia magistrates, fines and penalties imposed by them. You desire advice respecting this particular situation and also regarding the collection of fines and penalties in general.

A constitutional provision and an old statute have a very definite bearing upon the question in hand.

Article V, Section 13 of the Constitution provides that "All fees, fines and penalties in said courts shall be paid into the county treasury." The section of the Constitution immediately preceding this quotation relates to the organization and powers of the Magistrates' Courts in Philadelphia; and the Supreme Court, in *Commonwealth vs. McGuirk*, 78 Pa. 298, construed Article V, Section 13, as applying only to fees, fines and penalties collected in the Philadelphia Magistrates' Courts. A similar decision had been rendered by Judge Thayer in *Commonwealth ex rel. Levis vs. Randall*, 2 W. N. C. 210.

Two conclusions necessarily follow. Fees, fines and penalties collected by magistrates in Philadelphia must be paid into the county treasury no matter what provision the Legislature may have attempted to make to the contrary in the statute imposing the fines or penalties, or authorizing the collection of fees. The Legislature cannot override a constitutional mandate. This is the first conclusion. The second is equally clear, namely, that the constitutional provision does not have any bearing whatsoever upon the disposition of fees, fines and penalties collected by aldermen or justices of the peace outside of Philadelphia, or collected by courts of record, either in Philadelphia or elsewhere.



With respect to all fees, fines and penalties collected by officers other than magistrates in Philadelphia, the Legislature may validly provide what disposition thereof shall be made.

The statutory provision to which we referred is Section 78 of the Act of March 21, 1860, P. L. 427, which is still in force and provides that:

“All fines imposed upon any party, by any court of criminal jurisdiction, shall be decreed to be paid to the Commonwealth; but the same shall be collected and received, for the use of the respective counties in which such fines shall have been imposed as aforesaid, as is now directed by law.”

This provision was construed by the Supreme Court in *Jefferson County vs. Reitz*, 56 Pa. 44, in which the court took the view that the Act of 1860 “would doubtless be the rule in regard to any new penalties by fine not otherwise distributed by law.”

Accordingly, under this act as construed by the Supreme Court, it is clear that after the Legislature has imposed fines collectible by courts of criminal jurisdiction, such fines are payable into the respective county treasuries, unless the Legislature has specifically otherwise provided by general act subsequent to 1860 or in the acts providing for the imposition of the penalties. It is also clear that the Act of 1860 does not cover the case of penalties collectible through the civil as distinguished from the criminal courts.

We, therefore, advise you that in the collection of fines and penalties, your Department must be guided by the following principles:

1. In Philadelphia, if fines or penalties are collected by magistrates, your Department does not have either the power or the duty to demand that they be turned over to you for payment into the State Treasury. Such fines and penalties are clearly payable to the County of Philadelphia. However, we desire to point out, parenthetically, that magistrates may collect fines and penalties only if and when the Legislature has expressly given them jurisdiction to do so. Otherwise, they can merely hold the defendants for trial in the quarter sessions or other criminal courts of record.

2. On the other hand, fines and penalties collected by the courts of record in Philadelphia are payable into the State Treasury through your Department, if there is legislation distinctly providing that the fines shall be paid into the State Treasury.

3. Outside of Philadelphia, your Department has authority to collect for payment into the State Treasury any fines or penalties, whether imposed by courts of record or courts not of record, in all cases in which the Legislature has provided that such fines and penalties shall be paid into the State Treasury. However, in the absence of specific direction to this effect, the fines and penalties are payable into the respective

county treasuries, if they were collected by the criminal as distinguished from the civil courts.

4. In all cases in which fines and penalties are collected by administrative agencies of the State Government without any specific direction by the Legislature as to the disposition to be made of the moneys collected, it is the duty of your Department to collect the amounts of the fines and penalties and pay them into the State Treasury.

5. Whenever penalties are imposed by law and the collection thereof is committed to either the Department of Justice or any other administrative agency of the State Government and such penalties are collected by civil suit, the amounts recovered are payable into the State Treasury whether or not the act imposing the penalties specifically so provides. There is neither constitutional nor statutory provision to the contrary and the rule which prevails in the absence of specific direction to the contrary is that moneys collected by the State Departments, with or without the aid of the civil courts, is payable into the State Treasury.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

*Insane persons—Mental Health Act of 1923—State mental hospitals—Expenses of maintenance—Collection from county—Commitment awaiting trial or during sentence—Termination of county's liability upon expiration of sentence.*

1. Under the provisions of the Mental Health Act of July 11, 1923, P. L. 998, it is the duty of the Department of Revenue to collect from the counties the full cost of maintenance of patients committed to state mental hospitals while in custody under a charge of conviction of crime or while held as material witnesses to crime.

the full cost of maintenance of persons committed while out on bail awaiting

2. It is the duty of the Department of Revenue to collect in like manner trial for crime, as long as they remain in the institutions.

3. The liability of the county for the full cost of maintenance of a person undergoing sentence for crime ends when the term of sentence expires, and thereafter it is the duty of the Department of Revenue to collect the cost of such maintenance as in the case of patients committed while free from any charge of crime.

Department of Justice,

Harrisburg, Pa., June 6, 1930.

Honorable Leon D. Metzger, Deputy Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised with respect to the rate which it is the duty of your Department to collect from the counties for the maintenance of patients committed to State mental hospitals while awaiting trial for crime.

You call our attention to the fact that Section 308 of the Mental Health Act of July 11, 1923, P. L. 998, expressly provides that the expense of maintaining insane prisoners who have been convicted of crime is payable in full by the county liable for the maintenance of the prisoner in the prison from which he was removed.

This same section of the Mental Health Act clearly applies also to cases in which persons are committed to State mental hospitals while awaiting trial and therefore before conviction.

The first words of the Section are "When any person detained in any prison, whether waiting trial or undergoing sentence, or detained for any other reason (e. g. as a witness)" shall require treatment in a mental hospital he shall be committed according to the procedure set forth in the section. Thus it will be seen that this section applies with equal force to prisoners awaiting trial as to those undergoing sentence.

The section continues:

"The expense of examination, including the fees, of physicians or commissioners, and all costs incident to such removal, and of maintenance in the hospital previous to the expiration of sentence, shall be paid by the county liable for the maintenance of the patient in the prison from which he was removed, without recourse against any poor district."

The words "previous to the expiration of sentence" cannot possibly be construed to limit the quoted paragraph in its application only to cases where persons accused of crime have been convicted and are removed to mental hospitals while undergoing sentence.

You call our attention to Sections 502 and 507 of the Mental Health Act as relevant to the consideration of the question you ask.

Section 502 applies to the commitment of persons accused of crime, but who are out on bail awaiting trial, or of prisoners who before or during trial are found or thought to be insane. This section provides that the expense of commitment and removal to or from a hospital for mental diseases shall be paid for by the county in which the person or prisoner is committed and permits the county to recover the expense

from the estate of the patient or the persons liable for his support but not from any poor district. This section is not in any way inconsistent with Section 308.

Section 507 expressly provides that, "The expenses of the care and maintenance, including clothing, of insane prisoners shall be paid in the same manner as the costs of commitment of such prisoner, as provided in section five hundred and two of this act: Provided, That if the term of sentence of any prisoner shall expire while he is still a patient in any hospital, such expenses shall thereupon become chargeable as provided in section five hundred and three of this act."

This Section also is consistent with Section 308 but it places a limitation upon the application of Section 308 in the case of patients who have been convicted of crime and removed to State mental hospitals while undergoing sentence. The Section expressly provides that after a sentenced prisoner's term has expired if he continues as a patient in a State mental hospital, the cost of maintenance shall be collected after the expiration of the term as in the case of patients committed while not awaiting trial or undergoing sentence for crime.

Therefore, we advise you:

(1) That it is the duty of your Department to collect from the counties the full cost of maintenance of patients committed to State mental hospitals while in custody because they are charged with crime or because they have been convicted of crime or because they are being held as material witnesses to crime. The only exception is that in the case of persons undergoing sentence the county's liability for the full cost of maintenance expires when the term of sentence of the patient has come to an end. Thereafter it is your duty to collect the cost of maintaining the patient as in the case of patients committed while free from any charge of crimes.

(2) That in the case of persons committed to State hospitals while out on bail awaiting trial for crime it is your duty to collect the full cost of maintenance from the counties as long as the patient remains in the institution.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Attorney General.*

---

OPINION TO THE STATE EMPLOYES'  
RETIREMENT BOARD

---

## OPINION TO THE STATE EMPLOYES' RETIREMENT BOARD

*State employe—Membership in employe's retirement fund—Eligibility—Compensation at daily rate—Acts of June 27, 1923, and April 26, 1929.*

Under Act of April 26, 1929, No. 369, amending the Act of June 27, 1923, P. L. 858, an employe of the State whose compensation is based on an hourly rate is not eligible for membership in the State Employe's Retirement Fund under an application made May 23, 1929.

Department of Justice,  
Harrisburg, Pa., July 25, 1929.

Honorable Wilmer Johnson, Secretary, State Employes' Retirement Board, Harrisburg, Pennsylvania.

Sir: I have your request under date of July 20, 1929, for a formal opinion covering the application of George A. Moser for original membership in the State Employes' Retirement System.

We are advised that George A. Moser has been employed by the Pennsylvania State Sanitorium at Mont Alto since 1907. The record of his State service shows that he was employed during the years 1908 to 1928 inclusive during a period of twelve months in each year; that during the years 1913, 1914, and three months of 1915, and the year 1924, and three months of 1925, his compensation was upon a monthly rate; that during the balance of the term of his employment his compensation was based upon an hourly rate; that from January to April in 1929 he was absent on leave without pay and on April 1, 1929, he was again placed upon the payroll and his compensation based upon an hourly rate.

Under date of May 23, 1929, Mr. Moser made application to the State Employes' Retirement Board for membership in the association, created under the provisions of the Act of June 27, 1923, P. L. 858, as an original member. The Board is in doubt as to the applicant's eligibility and requests this opinion.

On May 23, 1929, eligibility for membership as an original member in the association was fixed by Section 1, paragraph 6, and Section 1, paragraph 9, of that Act, as amended by the Acts of April 6, 1925, P. L. 147, April 25, 1927, P. L. 387 and April 26, 1929, No. 369.

Following the passage of Act No. 369, approved April 26, 1929, amending the original Act creating the association, a State employe might become an original member of the association upon application on or before October 1, 1929, and a State employe was defined by the terms of that Act to be:

“\* \* \* any person holding a State office under the Commonwealth of Pennsylvania, or employed *and paid* on a yearly or monthly basis by the State Government of the Commonwealth of Pennsylvania, in any capacity whatsoever; \* \* \*”

Mr. Moser is, and was on May 25, 1929, a State employe but he was not and is not paid on a yearly or monthly basis by the State Government of the Commonwealth of Pennsylvania. It is not necessary under the state of facts submitted to us, and we do not express any opinion as to the eligibility of Mr. Moser had he applied for membership in the association prior to December 31, 1928, but we are of the opinion, and so advise, that he was not eligible for membership either as an original member or as a new member on May 23, 1929, because he was not then employed and paid on a yearly or monthly basis.

The data submitted by you is returned herewith.

Very truly yours,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA,

*Deputy Attorney General.*

---

---

OPINION TO THE BOARD OF TRUSTEES OF THE  
STATE INDUSTRIAL HOME FOR  
WOMEN AT MUNCY

---

---



## OPINION TO THE BOARD OF TRUSTEES OF THE STATE INDUSTRIAL HOME FOR WOMEN AT MUNCY

*Parole—Inmates of State Institutions—Acts of June 19, 1911, and July 25, 1913.*

1. The Act of June 19, 1911, P. L. 1055, which confers upon judges of Courts of Quarter Sessions and Oyer and Terminer the right to parole prisoners, is limited to convicts in the county jail or workhouse of their respective districts; it does not confer the right to parole inmates of State institutions.

2. The Act of July 25, 1913, P. L. 1311, confers upon the Board of Trustees of the State Industrial Home for Women an exclusive right to parole inmates.

Department of Justice,

Harrisburg, Pa., May 7, 1929.

Honorable Frank Smith, Board of Trustees of the State Industrial Home for Women at Muncy, Philadelphia, Pennsylvania.

Sir: We have your request to be advised whether the Court which sentences a woman to the State Industrial Home for Women at Muncy has the right to release her on parole without consulting the Board of Trustees of the Home.

The Act of June 19, 1911, which confers upon judges of courts of quarter sessions and of oyer and terminer the right to parole prisoners, is limited in its scope to convicts "confined in the county jail or workhouse of their respective districts." This Act has never been amended so as to confer upon judges of quarter sessions or of oyer and terminer the right to parole inmates of State institutions.

In addition, Section 19 of the Act of July 25, 1913, P. L. 1311, specifically confers upon the Board of Trustees of the State Industrial Home for Women the right to parole inmates. In our judgment, the power of parole granted to the Board by Section 19 confers upon the Board an exclusive power. No other agency has any right to parole any inmate of the Home.

Accordingly, we advise you that the courts which sentence women to the State Industrial Home for Women do not have any power to parole them, either with or without the consent of the Board of Trustees of the Home. Any order of parole issued by a judge is, in our opinion, void and should not be recognized by the Board of Trustees of the Home.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

OPINION TO THE TOWNSHIP LAW  
REVISION COMMISSION

---

## OPINION TO THE TOWNSHIP LAW REVISION COMMISSION

*Township Law Revision Commission—Expenses of Commission, secretary and clerk in attending convention of Second Class Township Supervisors.*

The Commonwealth's fiscal officers are not authorized to pay such expenses.

Department of Justice,

Harrisburg, Pa., December 10, 1930.

William H. Whitaker, Esquire, Secretary, Township Law Revision Commission, 211 Suburban Title and Trust Building, Upper Darby, Pennsylvania.

Sir: I have your letter of November 28th, inquiring whether the Auditor General and State Treasurer may lawfully approve requisitions drawn against the appropriation made by the Act of April 26, 1929, P. L. 842, for expenses incurred by the Commission subsequent to February 1, 1921. You particularly desire to know whether it would be lawful to pay the expenses of the Commission, its Secretary and Clerk, in attending the convention of Second Class Township Supervisors to be held in February, 1931, and in attending sessions of the Legislature for the purpose of explaining and advocating the passage of the bill or bills presented by the Commission in its report to the Legislature.

In our opinion, the Commonwealth's fiscal officers could not lawfully pay expenses incurred in either of these ways. It is the duty of the Commission to make its report to the Legislature not later than February 1, 1931, and the submission of that report concludes the work of the Commission as specified in the Act of April 26, 1929.

The Commission's only duty is to prepare legislation. It is under no duty to appear either before the Legislature or before a convention of township supervisors in an effort to explain, justify or advocate the passage of the legislation proposed. If the Legislature desires to impose these additional duties upon the Commission, it will be in session and can supplement the Act of 1929 accordingly; but until the Legislature does so, the Commission cannot assume to extend its sphere of activity beyond that outlined in the Act of 1929.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

---

OPINION TO THE WATER AND POWER  
RESOURCES BOARD

---

## OPINION TO THE WATER AND POWER RESOURCES BOARD

*Rivers and streams—Obstruction—Water and Power Resources Board—Necessity of permit—Act of June 25, 1913—Scope of consideration—Effect on public and private interests.*

In considering an application for permit for a dam or other obstruction in a stream or body of water, under the Act of June 25, 1913, P. L. 555, the Water and Power Resources Board is not limited to a consideration of the structural and engineering features of the proposed obstruction, but it may determine whether such construction will injuriously affect public or vested private rights in the stream and whether navigation, flood control or use of the stream for other legitimate purposes will be adversely affected.

Department of Justice,

Harrisburg, Pa., May 12, 1930.

Honorable Charles E. Dorworth, Chairman, Water and Power Resources Board, Harrisburg, Pennsylvania.

Sir: We have your request to be advised regarding the extent of your Board's power in administering the provisions of the Act of June 25, 1913, P. L. 555.

You inquire specifically whether your Board, in passing upon an application for a dam, is limited to the consideration of the dam from a structural or engineering standpoint; or whether broader powers are conferred upon your Board by the act, making it the Board's duty to consider the effect of the proposed structure upon the regimen and use of the stream. You would like to know whether your Board has the power to issue a conditional permit or disapprove an application if it is convinced that the proposed dam will injuriously affect navigation, increase the height of floods in built-up communities or be prejudicial to the best interests of the Commonwealth for reasons not actually related to the stability of the structure.

The Act of 1913 is entitled, "An act providing for the regulation of dams, or other structures or obstructions, as defined herein, in, along, across, or projecting into all streams and bodies of water wholly or partly within, or forming part of the boundary of, this Commonwealth \* \* \*." Its first section defines the words "water obstruction" as including "any dam, wall, wing-wall, wharf, embankment, abutment, projection, or similar or analogous structure, or any other obstruction whatsoever, in, along, across, or projecting into any stream or body of water \* \* \*." "Construct" is defined as meaning "construct, erect, build, place, or deposit."

Section 2 provides that:

“\* \* \* it shall be unlawful for any person or persons, partnership, association, corporation, county, city, borough, town, or township to construct any dam or other water obstruction; or to make or construct, or permit to be made or constructed, any change therein or addition thereto; or to make, or permit to be made, any change in or addition to any existing water obstruction; or in any manner to change or diminish the course, current, or cross section of any stream or body of water, wholly or partly within, or forming a part of the boundary of, this Commonwealth, except the tidal waters of the Delaware River and its navigable tributaries, without the consent or permit of the Water Supply Commission of Pennsylvania, in writing, previously obtained, \* \* \*.”

Section 3 requires every application for a consent or permit to be accompanied by complete maps, plans, profiles and specifications of the proposed obstruction or the changes or additions to be made therein “and such other data and information as the commission may require.”

Section 4 empowers the Commission “to grant or withhold such consent or permit, or may incorporate in and make a part of said consent or permit such conditions, regulations, and restrictions as may be deemed by it advisable.” It then provides that it shall be unlawful to commence the construction of any water obstruction or any change or addition thereto, “except in accordance with the terms, conditions, regulations, and restrictions of such consent or permit, and such rules and regulations, with regard to said constructions, changes, or additions, as may be prescribed by the commission.”

Section 7 renders it a misdemeanor for any person or entity subject to the provisions of the act, to do or cause to be done, or to fail, neglect or refuse to do, or cause to be done, any act or thing contrary to the provisions of the act.

By Section 202 of The Administrative Code of 1923 (Act of June 9, 1923, P. L. 498) the name of the Water Supply Commission was changed to Water and Power Resources Board, and the Board was constituted a departmental administrative board within the Department of Forests and Waters. By Section 1608 of the same act it was provided that the Water and Power Resources Board shall have the power and its duty shall be:

“(a) Subject to any inconsistent provisions in this act contained, to continue to exercise the powers and perform the duties by law vested in and imposed upon

the Water Supply Commission of Pennsylvania with regard to:

\* \* \* \* \*

"4. Consents or permits for the construction of dams and other water obstructions or of any change therein or addition thereto, and consents or permits for changing or diminishing the course, current, or cross section of any stream or body of water;"

Section 1808 of The Administrative Code of 1929 (Act of April 7, 1929, P. L. 177) repeats in the same language the last quoted provision.

There has, therefore, been no change in the authority conferred upon your Board by the Act of 1913, as the result of the passage of The Administrative Codes of 1923 and 1929. Your Board has the same power and the same duties as were vested in and imposed upon the Water Supply Commission when the Act of 1913 was originally enacted.

There has been no court decision or opinion of this Department which has specifically answered the inquiry under consideration. There have, however, been several expressions of our appellate courts with reference to the effect of the Act of 1913, which indicate the judicial attitude towards the scope of the Act of 1913.

In *Pennsylvania Power Company vs. Public Service Commission*, 66 Pa. Sup. Ct. 448, Judge Henderson said at 457:

"\* \* \* the Act of June 25, 1913, P. L. 555, regulates the construction of dams and provides that none shall be erected without the consent or permit of the Water Supply Commission in writing previously obtained. It is further provided that the commission shall have power not only to grant or withhold consent but may incorporate and make a part of said consent or permit such conditions, regulations and restrictions as may be deemed by it advisable; and no construction of such works shall be undertaken or prosecuted except in accordance with the terms, conditions, regulations and restrictions of such consent or permit and such rules and regulations with regard thereto as may be prescribed by the commission. It will be seen, therefore, that the matter of definite plans for the development of the work of a water power company is subject to the control of the Water Supply Commission which control is to operate after the incorporation of the company and when its work is undertaken. The Public Service Commission is approving the charter did not include the approval of a plan for the development of the company's business. It is not invested with authority to regulate the erection of dams or the development of the water power resources of the State. That is a subject over which the Water Supply Commission has jurisdiction. The suggested change in the plan as to

the number of dams or the height of the dams as made to the Public Service Commission was not a matter of consequence, therefore, nor in any sense illegal. The authority of the Water Supply Commission to impose regulations and conditions to be observed by a corporation proposing to develop the water power of a stream is broad as shown by the language of the statute. It is unnecessary to here consider its extent. *It has undoubted authority to attach any of the conditions necessary to carry out the purposes of the legislation on the subject with a view to the protection of the rights of the public and of individuals or companies having vested interests.*"

The opinion of the Superior Court in this case was affirmed by the Supreme Court in a per curiam opinion at 261 Pa. 211.

In *Commonwealth vs. Pennsylvania Railroad Company*, 72 Pa. Sup. Ct. 353, Judge Head said at page 357:

"\* \* \* By this we understand the learned counsel to mean that, because of the passage of the Act of 1913, *giving to the Water Supply Commission of the Commonwealth certain regulatory powers over the use of the streams of the Commonwealth* and making disobedience to its orders or a violation of its provisions a misdemeanor, it is no longer possible to successfully indict a person or corporation for the creation and maintenance of a common nuisance in such streams, \* \* \*."

In *Commonwealth vs. Pennsylvania Railroad Co.*, 78 Pa. Sup. Ct. 389, Judge Trexler said, speaking of the Act of 1913, "The Act of 1913 is a regulatory act."

These quotations indicate that our appellate courts have not been inclined to place a narrow construction upon the powers granted by the Act of 1913 to the Water Supply Commission and now exercisable by that Commission under its new name, "The Water and Power Resources Board."

In our judgment there is no basis for the view that the Act of 1913 merely conferred upon your Board the right to pass upon and disapprove, or approve conditionally or unconditionally, the structural and engineering features of a dam proposed to be constructed. As you point out in your letter of inquiry, there are a number of types of obstructions over which your Board has jurisdiction under the act which do not involve engineering or structural questions. A fill or other form of stream encroachment is one of these. Here there is no question of safety as far as the fill or encroachment is concerned; but the question is bound to arise whether the fill or encroachment will reduce the flood-carrying capacity of the channel or adversely affect the use of the stream for navigation or other proper purposes. Simi-



larly, when your Board is requested to pass upon the construction of a bridge across a stream, it is scarcely conceivable that the Legislature intended your Board to determine whether, from an engineering standpoint, the plans for the bridge contemplated a structure safe for travel. The question which the Legislature undoubtedly intended you to consider was whether the location of the piers or other features of the bridge in the stream would be likely to cause ice jams or affect navigation, and whether the height of the bridge above the stream was sufficient not to interfere with the use of the stream for navigation, etc.

If, in considering an application for a fill or an encroachment or a bridge, your Board is not confined to the study of engineering and structural features,—and clearly it is not,—there is no justification for holding that you are thus limited in determining whether to grant a permit for the construction of a dam in a stream. Accordingly, in our judgment, your Board has authority when considering an application for the construction of a dam, to determine whether the proposed structure will injuriously affect public or vested private rights in the stream, including the questions whether navigation, flood control and use of the stream for other legitimate purposes will be adversely affected.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

*Special Deputy Attorney General.*

# INDEX

## A.

ACTS OF ASSEMBLY.	Page
Preparation of list of titles by Secretary of the Commonwealth within thirty days after final adjournment of General Assembly, .....	81
<b>ANIMAL INDUSTRY, BUREAU OF</b>	
Dogs.	
Killing domestic animals. Payment of damages by State. Act of May 11, 1921, .....	7
<b>APPROPRIATIONS.</b>	
Pennsylvania State College. Purposes for which appropriations may be used, .....	20
<b>ARCHITECTS, BOARD OF EXAMINERS OF</b>	
Interior architects. Registration. Act of July 12, 1919, .....	15
<b>AUDITOR GENERAL.</b>	
Appropriations.	
Pennsylvania State College. Purposes for which appropriations may be used. Act of 1911, P. L. 736 and 1927, App. Acts p. 71, .....	20
Judges.	
Assignment to other districts. Compensation. Report to Auditor General, .....	23
State Contracts.	
Certificate of Department of Property and Supplies. Duties of Auditor General. Acts of 1929, P. L. 343 and 177, .....	29
Taxation.	
Gasoline tax. Reports. Certification. Examination of books and papers by Auditor General, ..	19
Taxes from foreign fire insurance companies. Relief funds for firemen, .....	25
Capital stock. Gulf Oil Corporation, .....	27

## B.

### BANKING, DEPARTMENT OF

Banks.	
State and national. Consolidation. Surrender of charter by state bank, .....	35
Christmas Clubs. Violation of banking laws, ....	44
Corporations.	
Charters. Title insurance, .....	42
"Thrift Plan." Duties of Secretary of Banking. Individuals, firms, partnerships, associations or corporations are subject to the provisions of the Act of May 5, 1921, .....	52
Mortgage Guaranty Companies.	
Right of Secretary of Banking to examine and supervise, .....	55
Trust Companies.	
Merger. Powers of merged companies. Continuation of trusts, .....	47
Investment of trust funds. First mortgage on real estate. Participation certificates, .....	54
Minimum number of directors, Act of 1926, P. L. 30, .....	56
Surety on tax collector's bond. Act of 1923, P. L. 248, .....	58

<b>BANKS.</b>	State and national. Consolidation of, .....	35
<b>BANKS AND BANKING.</b>	Christmas Clubs. Violation of Banking laws, ...	44
<b>BENEFICIAL SOCIETIES.</b>	Contracts. Limit on amount. Act of 1929, P. L. 805, .....	151
<b>BRIDGES.</b>	County Bridges.	
	Taken over by State Highway Department, .....	143
	Responsibility for lighting of, after June 30, 1930, .....	145
<b>C.</b>		
<b>CHILD LABOR.</b>	Caddies. Act of 1915, P. L. 286, .....	162
<b>COMMONWEALTH, SECRETARY OF</b>	Acts of Assembly.	
	Approved after adjournment of Legislature. Preparation of list of titles, .....	81
	Corporations.	
	Individuals. Registration of fictitious names. Act of 1917, P. L. 645, .....	76
	Election Laws.	
	Voting machines. Approval by Secretary of the Commonwealth. Revocation. Change in device. Procedure. Petition of elector. Security required. Act of 1929, P. L. 549, .....	82
	Justice of the Peace.	
	Election. Commission. Borough of Plymouth. Acts of 1839, P. L. 376; 1851, P. L. 320, ....	71
<b>CONTRACTS—STATE.</b>	Certificate of Department of Property and Supplies. Duties of Auditor General, .....	29
<b>CORPORATIONS.</b>	Charters. Title insurance .....	42
	Mortgage Guaranty Company. Right of Secretary of Banking to examine and supervise, .....	55
	Thrift. "Thrift Plan." Duties of Secretary of Banking, .....	52
	Registration of fictitious names, .....	76
<b>D.</b>		
<b>DAMS.</b>	Construction of. Powers of Water and Power Resources Board, .....	271
<b>DOGS.</b>	Killing of domestic animals by dogs. Payment of damages by State, .....	7
<b>E.</b>		
<b>ELECTION LAWS.</b>	Voting machines. Approval of by Secretary of the Commonwealth, .....	82
<b>EMPLOYMENT AGENCIES.</b>	Act of May 2, 1929, P. L. 1260, construed, .....	157
<b>EXECUTIVE DEPARTMENT.</b>	Budget Secretary.	
	State employes. Temporary employment. Approval of Governor. Section 214 of Administrative Code of 1929, P. L. 177, .....	65
	State Moneys. Investment by administrative department or board. Approval by Governor. Administrative Code, 1929, Sec. 701, .....	67

## Governor.

Page

Elections. Representatives in Congress. Special election. Issue of writ by Governor, . . . . .	94
Justices of the peace. Newly created borough. Election. Special or municipal election. Appointment by Governor, . . . . .	91
Notaries Public. Term of office. Computation. Reappointment, . . . . .	90
Railroad policemen. Qualifications. Dual capacity. Incompatible offices, . . . . .	87
United States Department of Commerce. Population bulletin. Form of certificate issued by Governor, . . . . .	96

## F.

**FEES, LICENSES, ETC.**

Responsibility of Secretary of Revenue in the collection of, . . . . .	245
--	-----

**FINANCE AND REVENUE, BOARD OF**

## Taxation.

Inheritance tax. Refunding. Appraisement. Appeal. Fiscal Code of 1929, P. L. 343, . . . . .	101
Tax settlement. Procedure. Fiscal Code, 1929, P. L. 343, . . . . .	104
Work of the Board under the provisions of the Fiscal Code, . . . . .	114

**FINES AND PENALTIES.**

Collection of. Courts of record. Courts not of record. Philadelphia magistrates, . . . . .	251
--	-----

**FOREST RESERVES.**

Payments by Commonwealth in lieu of taxes, . . .	127
--	-----

**FORESTS AND WATERS, DEPARTMENT OF**

Forest Reserves. Payments by Commonwealth in lieu of taxes, . . . . .	127
---	-----

## G.

**GAME COMMISSION.**

Game Laws. Ownership by State. Individual rights of ownership. Municipality. Rearing and sale of game. Necessity of license. Game Code of 1923, . . . . .	133
---	-----

**GULF OIL CORPORATION.**

Taxation. Capital stock, . . . . .	27
------------------------------------	----

## H.

**HIGHWAYS, SECRETARY OF**

## Bridges.

County bridges taken over by State Department of Highways. Ownership of material of old bridges. Act of 1929, P. L. 1054, . . . . .	143
County Bridges. Maintenance and lighting. State highways. Acts of 1929, P. L. 1054 and 1278, . .	145

## Motor Vehicles.

Non-residents. Delivering goods from other states. Act of 1927, P. L. 886, . . . . .	137
--	-----

## State Highways.

Through municipalities. Construction and maintenance. Appropriation by State. Approval of plans and work by Highway Department. Payment of expenses. Act of 1929, No. 409, . . . . .	139
--	-----

## I.

**INSURANCE COMMISSIONER.**

## Beneficial Societies.

Contracts. Limit on amount. Act of 1929, P. L. 805, ..... 151

## Life Insurance.

Exemption of aircraft accident, ..... 153

**INSURANCE.**

Beneficial Societies. Contracts. Limit on amount, . 151

Foreign Fire Insurance Companies. Taxes from.

Relief funds for firemen, ..... 25

Life Insurance. Exemption of aircraft accidents, .. 153

## J.

**JUDGES.**

Assignment to other districts, ..... 23

**JUSTICES OF THE PEACE.**

Election. Commission. Borough of Plymouth, .. 71

Election. Newly created borough. Appointment by Governor, ..... 91

## L.

**LABOR AND INDUSTRY, DEPARTMENT OF**

## Child Labor.

Caddies. Act of 1915, P. L. 286, ..... 162

## Employment Agency.

Act of 1929, P. L. 1260, construed, ..... 157

## State Workmen's Insurance Fund.

Audit, ..... 164

## M.

**MOTOR VEHICLES.**

Non-residents. Delivering goods from other States, 137

**MORTGAGE GUARANTY COMPANIES.**

Right of Secretary of Banking to examine and supervise, ..... 55

## N.

**NOTARIES PUBLIC.**

Term of office. Computation. Reappointment, .... 90

## P.

**PAROLE.**

Inmates of State Institutions. Industrial Home for Women at Muncy, ..... 263

**PROPERTY AND SUPPLIES, DEPARTMENT OF**

## State Employees.

Claims. Payment. Vacation allowance. Insurance carrier. Workmen's Compensation Act. Highway Department, ..... 171

**PUBLIC INSTRUCTION, DEPARTMENT OF,**

## Public Schools.

Student Patrol. Powers and liabilities. Damages, 177

Election of corporation, bank or trust company as treasurer, ..... 189

Truant and incorrigible pupils. Juvenile Courts. Authority and powers, ..... 187

## Real Estate Brokers.

Auctioneers. Officers. Place of business, ..... 191

## School Districts.

South Whitehall Township, ..... 180

Expenses of school officers attending educational conventions, ..... 201

Director. Resignation. Employment in other capacity by school district, ..... 203

# INDEX

281

Page

School Law.	
Bids on building work. "Public Notice." Nature and time. Duty of school board. Act of 1911, P. L. 309, .....	207
Taxation.	
Collection of school taxes assessed upon seated lands, .....	197
<b>PUBLIC SCHOOLS.</b>	
Student patrol. Powers and liabilities. Damages, Truant and incorrigible pupils. Juvenile Court. Authority and powers, .....	177
Election of corporation, bank or trust company as treasurer, .....	189
<b>Q.</b>	
<b>QUO WARRANTO.</b>	
In re Petition of Joseph A Wilner et al for a writ of Quo Warranto against Frank P. Barnhart, Additional Law Judge, 47th Judicial District, ....	213
<b>R.</b>	
<b>RAILROAD POLICEMEN.</b>	
Qualifications. Dual capacity. Incompatible offices,	87
<b>REAL ESTATE BROKERS.</b>	
Auctioneers. Officers. Place of business, .....	191
<b>REVENUE, SECRETARY OF</b>	
Fees, Licenses, etc.	
Responsibility of the Secretary of Revenue in the collection of, under the provisions of the Act of 1929, P. L. 343, .....	245
Fines and Penalties.	
Collection of. Courts of record. Courts not of record. Philadelphia magistrates, .....	251
State Hospitals.	
Rates charged for services rendered. Pay patients. Free patients. Duties of Board of Trustees, ...	223
Support and maintenance. Appropriations. Poor Districts. Counties. Court orders. Personal estates, .....	225
State Mental Hospitals.	
Collections from full pay patients. Estimated cost, Patients. Care and maintenance charges. Right of Secretary of Revenue to cancel charges, ....	242
Collection from counties for maintenance of patients committed while awaiting trial for crime, .....	254
State Highway Patrol.	
Employment of physician. Prosecution for driving while intoxicated. Costs, .....	240
Taxation.	
Liquid fuel. Motor vehicles, .....	232
Credit to taxpayer. Liquid fuels tax, .....	237
Second resettlement of taxes. Act of 1929, P. L. 343, .....	250
Tax settlement. Interest on settlements, .....	247

# S.

## SCHOOL DISTRICTS.

South Whitehall Township, .....	180
Expenses of school officers attending educational conventions, .....	201
School director. Resignation. Employment in other capacity by school district, .....	203

	Page
<b>STATE EMPLOYEES.</b>	
Temporary employment. Approval of Governor,	65
Claims. Vacation allowance. Insurance carriers.	
Highway Department, .....	171
Membership in Retirement Fund. Eligibility.	
Compensation at daily rate, .....	259
<b>STATE EMPLOYEES' RETIREMENT BOARD.</b>	
State Employees.	
Membership in Retirement Fund. Eligibility.	
Compensation at daily rate, .....	259
<b>STATE HIGHWAYS.</b>	
Running through municipalities. Construction and maintenance. Appropriation by State, .....	139
<b>STATE HIGHWAY PATROL.</b>	
Employment of physicians. Prosecution for driving while intoxicated. Costs, .....	240
<b>STATE HOSPITALS.</b>	
Rates charged for services rendered. Duties of Board of Trustees, .....	223
Support and maintenance. Appropriation, .....	225
<b>STATE INDUSTRIAL HOME FOR WOMEN AT MUNCY.</b>	
Parole. Inmates of State Institutions, .....	263
<b>STATE MENTAL HOSPITALS.</b>	
Collections from pay patients. Estimated cost, ..	231
Patients. Care and maintenance charges. Right of Secretary of Revenue to cancel charges, .....	242
Collection from counties for maintenance of patients committed while awaiting trial for crime, .....	254
<b>STATE MONEYS.</b>	
Invested by Administrative department or board.	
Approval by Governor, .....	67
<b>STATE WORKMEN'S INSURANCE FUND.</b>	
Audit, .....	164
<b>T.</b>	
<b>TAXATION.</b>	
Gasoline tax. Reports. Examination of books and papers by Auditor General, .....	19
Taxes from foreign fire insurance companies. Relief funds for firemen, .....	25
Capital stock. Gulf Oil Corporation, .....	27
Inheritance Tax. Refunding. Appraisment. Appeal,	101
Tax Settlement. Procedure, .....	104
Tax settlement. Interest on settlement, .....	247
School taxes. Collection of, assessed upon seated lands, .....	197
Credit to taxpayer. Liquid fuels tax, .....	237
Liquid Fuels. Motor vehicles. Second settlement of taxes, .....	232
Second settlement of taxes, .....	250
<b>TOWNSHIP LAW REVISION COMMISSION.</b>	
Expenses of Commission, its secretary and clerk, in attending the Convention of Second Class Township Supervisors, .....	267
<b>TRUST COMPANIES.</b>	
Merger. Powers of merged companies, .....	47
Investment of trust funds, .....	54
Surety on tax collector's bond, .....	58
Minimum number of directors, .....	56

## INDEX

283

Page

### V.

#### VOTING MACHINES.

Approval of Secretary of the Commonwealth, . . . . 82

### W.

#### WATER AND POWER RESOURCES BOARD.

Powers of Board in administering the provisions  
of the Act of June 25, 1913, P. L. 555, : . . . . 271