Commonwealth of Pennsylvania

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

PENNSYLVANIA

FOR THE YEARS

1931 and 1932

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DEPARTMENT OF JUSTICE
1931-1932

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TABLE OF OPINIONS

1931-1932

OPINION NO. 1

Public Schools—County Superintendent—Salary—Population—Decennial Census —Act of 1911, P. L. 309, Sec. 1210.

The change in population of any county of this Commonwealth, became effective on Dec. 13, 1930, the day on which the 1930 census figures were officially promulgated.

No increase may be allowed in the salary of any county superintendent of schools who was elected or appointed prior to Dec. 13, 1930.

Department of Justice,
Harrisburg, Pa., January 30, 1931.

Honorable James N. Rule, Acting Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request under date of January 23, 1931, to be advised whether the minimum salaries prescribed by the Act of May 18, 1911, P. L. 309, Section 1210, (8), for county superintendents of schools are affected where there has been an increase in population in any county of this Commonwealth, as evidenced by the last decennial census, and if affected thereby, the date when such change became effective.

In our view of the law it is not necessary for the determination of the question submitted to decide when any such change in population became effective. In view, however, of the necessity of determining this question in many instances in the administration of the school law by your department, you are advised that it is not the mere existence of the fact of population which will govern its application, but its legal and official ascertainment. A county once having its status as to population settled retains it until it is legally and officially ascertained to have been changed. Such change in population of any county of this Commonwealth became effective on December 13, 1930, the day on which the Census Bureau of the United States Department of Commerce officially promulgated the 1930 census figures for Pennsylvania:

Lewis v. Lackawanna County,
200 Pa. 590, reversing
Lewis v. Lackawanna County,
17 Superior 25;
Commonwealth, ex rel. v. Walter,
274 Pa. 553, 556.

County superintendents of schools were elected pursuant to the Act of May 18, 1911, P. L. 309, as amended, on the second Tuesday of April, 1930, to serve from the first Monday of July, 1930 for a term of four years from that date. Their duties are fixed by statute. After qualifying by subscribing to or taking a prescribed oath or affirmation, they may not be removed from office, except in the manner therein set forth and for statutory cause.

Under the principles stated by the Supreme Court in *Commonwealth, ex rel. v. Moore,* 266 Pa. 100, they are public officers within the meaning of Article III, Section 13, of the Constitution of Pennsylvania, which provides that:

> "No law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment."

The salary of a public officer is fixed as of the date of his election and if the change in a classification affecting his office postdates his election, an increase in salary cannot be allowed. This has been flatly determined by the Supreme Court in a number of cases, among which are *Commonwealth, ex rel. v. Walter, supra; Commonwealth, ex rel. v. Moore, supra.*

Therefore, no increase may be allowed in the salary of any county superintendent of schools who was elected or appointed to office prior to December 13, 1930.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION NO. 2

Public Schools—Asst. Co. Supt.—Appointment—Removal—Expiration of term—Act of 1911, P. L. 309, Secs. 1129, 1131, 1132.

The term of an assistant county superintendent of schools does not end automatically with the resignation of his county superintendent; he is entitled to serve until the end of the term for which the county superintendent was elected unless sooner removed under the provisions of Section 1129 of the School Code.

Department of Justice,
Harrisburg, Pa., February 20, 1931.

Honorable James N. Rule, Acting Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether an assistant county superintendent of schools holds office during the entire term for which the county superintendent who appointed him was elected or whether the term of the assistant superintendent expires if and when the county superintendent resigns during the term for which he was elected.

Assistant county superintendents are appointed under Section 1127 of the School Code (Act of May 18, 1911, P. L. 309), which provides that they shall be nominated by the county superintendents, and that the nominations, when confirmed as therein provided by the officers of the county school directors' association, shall be appointments "until the end of the county superintendent's term of office."

Section 1129 of the School Code deals with the removal of assistant superintendents. It provides that:

> "Upon the written charges and recommendation of the county superintendent, or of the majority of the members of each of three boards of school directors whose schools are under the jurisdiction of the county superintendent, assistant county superintendents of any county, may, after a hearing be removed by the Superintendent of Public Instruction, for the same cause and in like manner as a county superintendent is removed."

The removal of county superintendents is governed by Section 1119 of the School Code, which is as follows:

> "Any county superintendent may be removed by the Superintendent of Public Instruction, at any time for neglect of duty, incompetency, intemperance, immorality, or other improper conduct as well as for the violation of any of the provisions of this act: Provided, That before any county superintendent shall be removed, he shall be given a hearing, of which he shall have reasonable notice, together with a statement of the charges preferred against him."

Does the language of Section 1127 mean that the appointment of the assistant county superintendent ends with the incumbency of the county superintendent making the appointment, or does it mean that the assistant's term is that for which the appointing county superintendent was elected as provided by Section 1105 of the School Code, as amended by the Act of April 23, 1923, P. L. 349?

While the office of assistant county superintendent is filled by conditional appointment by the county superintendent, nevertheless, the power vested in the county superintendent to appoint, in this instance, does not imply the power to remove such assistant county superintendent. Such removal must be in accord with the provisions of Sec-

tion 1129 above quoted. That is to say, after appointment by the county superintendent, confirmation by the officers of the school directors' association, and issuance of his commission by the Superintendent of Public Instruction, an assistant county superintendent may be removed only by the quasi-judicial method provided by Section 1129 and for due cause shown.

There is reasoned authority for holding that an appointment during the term of the appointing officer, ends with the incumbency of the appointing power: See State, ex inf., *Major v. McKay,* 249 Miss. 249: 155 S. W. 396, where, an official court stenographer was appointed to "hold his office during the term of the judge appointing him", and it was held, by a divided court, that "the official term of the stenographer for such judge is the term of actual service of the appointing judge."

However, that case differs from the situation we are discussing, for in this instance the statute creating the office, providing the manner of filling it, and the term of office, also provides that the appointee may be removed only for certain specified causes, upon information and recommendation of the county superintendent or of the majority of each of three school boards of the county, and after hearing, by the Superintendent of Public Instruction.

In addition, the assistant county superintendent owes a trifold duty under Sections 1131 and 1132 of the School Code, as follows:

(1) To the county superintendent, to supervise and direct the work of the schools;

(2) To the boards of directors to inspect school property, grade the schools, and secure uniformity in courses of study:

(3) To the Superintendent of Public Instruction to direct or conduct examinations, etc., when required.

His duties are, therefore, prescribed by law: he is subject to direction or request of officers other than the county superintendent and his responsibility is not single and personal to the county superintendent.

Accordingly, we advise you that the term of an assistant county superintendent of schools does not end automatically with the resignation of his county superintendent; he is entitled to serve until the end of the term for which the county superintendent was elected unless sooner removed under the provisions of Section 1129 of the School Code.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION NO. 3

Judges—Salaries Dependent upon Population—Census of 1930—Act of May 16, 1929, P. L. 1780.

The salaries of common pleas judges are fixed by Sec. 4 of the Act of 1929, P. L. 1780, and until further action of the legislature, salaries at higher rates than those payable during that part of the current biennium which preceded the taking of the 1930 census, cannot lawfully be paid.

Department of Justice,
Harrisburg, Pa., February 27, 1931.

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

Sir: I have your favor of January 28, relative to the effect of the 1930 United States Census upon the amounts of the salaries respectively payable to the judges of those judicial districts in which the salary payable is dependent upon the population.

You state that several judges have called to your attention the fact that under the 1930 census, as published by the Census Bureau of the Department of Commerce of the United States, their judicial districts have advanced to a class in which higher salaries are paid to judges. The census was taken as of April 1, 1930 under an Act of Congress, which did not provide upon what date the enumeration should become official. However, the Director of the Census advises that on December 13, 1930 the Bureau of the Census of the United States Department of Commerce officially issued a population bulletin entitled, "Pennsylvania Number and Distribution of Inhabitants."

You desire to know as of what date, if any, salaries of judges of our courts of common pleas were increased as the result of the 1930 census.

The salaries of our common pleas judges are fixed by Section 4 of the Act of May 16, 1929, P. L. 1780, which provides definite salaries for judges of the first and fifth judicial districts (Philadelphia and Allegheny respectively) regardless of population, and then provides that the annual salary of each common pleas judge learned in the law, in judicial districts having a population of one hundred thousand (100,000) or more, shall be twelve thousand dollars ($12,000); in districts having a population of sixty-five thousand (65,000) or more, but less than one hundred thousand (100,000), ten thousand dollars ($10,000); and in districts having a population of less than sixty-five thousand (65,000), nine thousand dollars ($9,000).

The act does not make any provision for any change subsequent to 1929 in the determination of the population of the respective districts.

Whether under these circumstances the executive officers of the Commonwealth are justified in recognizing a change in the population of judicial districts for the purpose of increasing judges' compensation is one which is not free from difficulty.

A number of cases have arisen in our courts under somewhat similar circumstances, none of which, however, involved judicial salaries.

In *Lewis v. Lackawanna County,* 200 Pa. 590, the Supreme Court had before it for construction the Act of March 31, 1876, P. L. 13, which fixed the salaries of county officers in counties with more than one hundred fifty thousand (150,000) inhabitants, but, as Mr. Justice Mitchell stated, the act "unfortunately made no provision for determining the population in case of change or dispute." It was claimed that as the result of the census of 1900 Lackawanna County had come into the class in which county officers' salaries were governed by the Act of 1876. The census taken as of June 1, 1900 was first announced in a press bulletin from the Census Bureau on November 19, 1900 and was, on December 13, 1900, submitted to Congress through an official bulletin giving the population of the several states by counties.

The question was whether on November 6, 1900 Lackawanna County's status was that disclosed by the 1900 census. The Supreme Court held that it was not, as the earliest possible date at which the fact of population, on which the status of Lackawanna County was to be changed, could be considered as legally ascertained was December 13, 1900.

In reaching this conclusion, Mr. Justice Mitchell called attention to the fact that the Supreme Court had previously determined that Article V, Section 5, of the Constitution, directing that every county containing forty thousand (40,000) inhabitants should constitute a separate judicial district, and Article V, Section 12, directing that in Philadelphia there should be established a magistrates' court for each thirty thousand (30,000) inhabitants, were not self-executing and could not be enforced by the courts without legislative action, citing *Commonwealth v. Harding,* 87 Pa. 343; *Commonwealth v. Handley,* 106 Pa. 245; and *Cahill's Petition,* 110 Pa. 167.

Other cases have held that the passage of a county into a higher class by an increase in population will not entitle existing officers to receive the compensation fixed for officers of counties of the higher class: *Guldin v. Schuylkill County,* 149 Pa. 210; *Commonwealth v. Comrey,* 149 Pa. 216; and *Commonwealth v. Walter,* 274 Pa. 553; but these cases rest upon Article III, Section 13, of the Constitution, which provides that:

> "No law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment."

And the Supreme Court has held in *Commonwealth v. Mathues,* 210 Pa. 372, that within the meaning of this section of the Constitution judges are not "public officers."

Accordingly, there is no constitutional inhibition against the payment of increased compensation to judges serving in judicial districts the population of which was shown by the 1930 census to have increased so as to advance certain judicial districts into higher classes.

The only question before us is a question of construction.

Did the Legislature by the Act of 1929 intend to fix the compensation of judges of the several judicial districts as they existed on the date of the passage of the act and to permit this compensation to remain until modified by subsequent legislative action, or did the Legislature intend that the salaries specified by the Act of 1929 should apply from time to time as the population of the several districts should appear after the latest decennial census?

If the latter was the Legislature's intention, it knew how by apt language to express it. In the County Code, enacted at the same Session (Act of May 2, 1929, P. L. 1278), the Legislature provided for determining the classification of counties according to population. In Section 31 it fixed the classification as of 1929, and in Section 32 it provided 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 made it the duty of the Governor after each census by certificate under the great seal of the Commonwealth to certify the fact that any county had advanced in classification as the result of such census.

We are forced to the conclusion that the omission of such a provision in the act of the same Session fixing judicial salaries evidences the Legislature's intention to permit salaries to continue to be paid to judges on the basis of the population as known in 1929 until further action by the Legislature. In confirmation of this intention is the further fact that no provision was made in the General Appropriation Act for any increase in the amount set apart for the payment of salaries to common pleas judges as the result of an increase in the salary rate due to the census enumeration which it was known would be taken in 1930.

Accordingly, you are advised that until further action by the Legislature, you cannot lawfully pay to common pleas judges salaries at

rates higher than those payable during that part of the current biennium which preceded the taking of the 1930 census.

Very truly yours,

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

OPINION NO. 4

Governor—Witness—Legislative Investigating Committee—Precedent.

The Governor is advised that while he may appear before a legislative investigating committee to present information or make recommendations, he cannot properly submit to examination as a witness before the General Assembly or any committee thereof.

Department of Justice,
Harrisburg, Pa., February 28, 1931.

Honorable Gifford Pinchot, Governor of the Commonwealth, Harrisburg, Pennsylvania.

Sir: I have your request to be advised whether in my opinion your appearance as a witness before the Committee constituted by Resolution of the Senate to investigate The Public Service Commission would establish an objectionable precedent.

As I understand the Resolution creating the Senate Committee, its primary purpose is to investigate certain charges which you have made against The Public Service Commission of the Commonwealth of Pennsylvania as the basis for recommending to the General Assembly that the Commission be abolished.

In conducting its investigation the Committee has thus far been calling witnesses who have been examined and cross-examined by members of the Committee and by the Committee's counsel, one of whom was selected by the Committee of its own accord, and the other of whom is an employe of your office loaned to the Committee at its request. Presumptively, the Committee in inviting you to appear contemplated that you should be examined and cross-examined like other witnesses who have appeared before it.

The Constitution of this Commonwealth in Article IV, Section 2, provides that:

> "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed; * * *"

This constitutional expression was discussed and construed by the Supreme Court in *Hartranft's Appeal,* 85 Pa. 433. At page 444, Mr. Justice Gordon, speaking for the Court, said:

> "* * * It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, the *supreme executive power* is vested in the Governor and *he is charged with the faithful execution of the laws,* and for the accomplishment of this purpose he is made commander-in-chief of the army, navy and militia of the state. Who then shall assume the power of the people and call this magistrate to an account for that which he has done in discharge of his constitutional duties? * * *"

In this case the Supreme Court held that neither the Governor, the Secretary of the Commonwealth, nor the Adjutant General was subject to attachment for refusing to obey a subpoena ordering him to appear before the Grand Jury of Allegheny County.

At page 445 of its opinion the Supreme Court said:

> "* * * We had better at the outstart recognize the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts. * * *"

The line of demarcation between the functions of the legislative and executive branches of the government is just as clear as is the distinction between the functions of the judicial and executive branches.

In an earlier case, *De Chastellux v. Fairchild,* 15 Pa. 18, Chief Justice Gibson said at page 20:

> "* * * The functions of the several parts of the government are thoroughly separated, and distinctly assigned to the principal branches of it, the legislature, the executive, and the judiciary, which, within their respective departments, are equal and co-ordinate. Each derives its authority, mediately or immediately, from the people; and each is responsible, mediately or immediately, to the people for the exercise of it. When either shall have

> usurped the powers of one or both of its fellows, then will have been effected a revolution, not in the form of the government, but in its action. * * *"

Article IV, Section 11, of the Constitution provides that the Governor:

> "* * * shall, from time to time, give to the General Assembly information of the state of the Commonwealth, and recommend to their consideration such measures as he may judge expedient."

There is no power conferred upon the General Assembly by the Constitution at any time or under any circumstances to call the Governor before it for the purpose of interrogating him as to the reasons underlying any action which he has taken; and, particularly, the Constitution does not authorize the General Assembly to call upon the Governor to justify his reasons for recommending to their consideration such measures as he may judge expedient.

In all the history of Pennsylvania I have been unable to find any instance in which a Governor submitted himself to examination before either the General Assembly or any committee or subcommittee thereof. Clearly, your examination by the Senate Committee at this time would establish an unparalleled precedent.

I cannot escape the conclusion that it would be a serious mistake for any Governor by such a precedent to break down the time-honored distinction between the functions of the legislative and executive departments.

There cannot be any objection to the submission by you in writing of such information as you care to furnish, laying before the Senate Committee the reasons which moved you to recommend to the General Assembly that The Public Service Commission be abolished. You may also, without establishing a dangerous precedent, voluntarily appear in person before the Committee to read your statement.

However, to submit yourself to examination by the Committee or by counsel for the Committee, or anyone who has appeared before it, would in my judgment be an entirely different matter, which it is impossible to justify. As Chief Justice Gibson indicated, the Governor for the performance of his official duties is answerable not to the General Assembly or any committee thereof, but to the people of this Commonwealth. It would be a mistake for you to attempt to answer to any one else for the recommendations which you have made to the General Assembly.

Accordingly, I am firmly of the opinion that while he may appear before a committee to present information or make recommendations,

the Governor cannot properly submit to examination as a witness before the General Assembly or any committee thereof.

Very truly yours,

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

OPINION NO. 5

Highways—Construction and Improvement—Allocation of Moneys set Aside for—Motor License Fund—Contracts—Act of May 1, 1929 P. L. 1052.

Any part of the $23,500,000.00 set apart by the Act of May 1, 1929, P. L. 1052, which is not expended or encumbered by contract prior to June 1, 1931, will be available for the purposes for which the Motor License Fund is appropriated, without any obligation on the part of the Highway Department to allocate it as provided in the first four sections of the Act.

Department of Justice,
Harrisburg, Pa., March 6, 1931.

Honorable Samuel S. Lewis, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether under the Act of May 1, 1929, P. L. 1052, any part of the $23,500,000.00 set apart for allocation among the counties for construction and improvement of State highways and bridges will lapse unless encumbered by contract prior to June 1, 1931. The Act to which you refer is the so-called *"Wheeler-Flynn Act"* which provides in Section 1 that out of such sum as shall hereafter be specified by the Legislature for the purpose your Department shall apportion money to the several counties for highway construction work "in the ratio that the unimproved mileage of State highways in any county bears to the total unimproved mileage of State highways in the Commonwealth." This same Section established a maximum allocation for any county of $600,000.00 and a minimum of $200,000.00, but provided for reallocations from time to time to use up any surpluses accruing because of the fixing of a maximum of $600,000.00 to any county.

After establishing the basis for apportioning the money among the counties, Section 1 provided that "the moneys thus available for expenditure in any county shall be expended by the Department of Highways for State highway and bridge construction and improve-

ment in boroughs, towns and townships, on any State highway * * *." Section 4 provided that "no portion of the moneys specifically required in any fiscal biennium to be used for the construction and improvement of State highways and bridges under the provisions of this Act shall be used for reconstruction, resurfacing, widening or maintenance * * * but shall be devoted entirely to new construction."

Section 5 set apart $23,500,000.00 of moneys in the Motor License Fund with the direction that this amount "shall be allocated by the Department of Highways among the counties for the construction and improvement of State highways and bridges in accordance with this Act, during the two fiscal years beginning June 1st, one thousand nine hundred and twenty-nine."

We are of the opinion that the Legislature intended by this Act to direct the expenditure during the current fiscal biennium of $23,500,000.00 for the purposes specified in the Act. The language of Section 4 is particularly enlightening. The Legislature there spoke of the money specifically "required in any fiscal biennium to be used" for the purposes of the Act.

Under an extremely narrow construction, it would be possible to hold that the Legislature intended all of the money set apart to be actually expended during the biennium and that any amounts not actually expended would lapse into the general balance of the Motor License Fund on June 1, 1931.

However, such a narrow interpretation would render the Act difficult if not impossible to administer. It would be extremely impracticable to endeavor to award contracts in such a way that all payments must become due before June 1, 1931; and we do not believe that the Legislature intended such a result.

It is, however, clear that the Legislature directed your Department to encumber during the biennium the entire $23,500,000.00 and that it did not intend to permit the allocation or reallocation of any of the $23,500,000.00 after June 1, 1931.

Accordingly, we advise you that any part of the $23,500,000.00 set apart by the Act of May 1, 1929, P. L. 1052, which is not expended or encumbered by contract prior to June 1, 1931, will be available for the purposes for which the Motor License Fund is appropriated, without any obligation on the part of your Department to allocate it as provided in the first four sections of the Act.

Very truly yours,

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

OPINION NO. 6

School Districts—Third and Fourth Class—Borrowing Capacity—Assessed Valuation—Occupation Tax—Act of 1921, P. L. 508.

Since the passage of the Act of 1921, P. L. 508, occupations have not been taxable for school purposes in school districts of the third and fourth classes.

The assessed value of occupations may not be included in the total assessed valuation upon which the borrowing capacity of school districts of third and fourth class school districts is determined.

Department of Justice,
Harrisburg, Pa., March 23, 1931.

Honorable Edward B. Logan, Budget Secretary, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether occupations may lawfully be included as property in determining the total assessed valuation upon which depends the borrowing capacities of school districts of the third and fourth classes.

By Section 506 of the Act of April 11, 1929, P. L. 497, school directors are authorized to create and incur indebtedness, or increase indebtedness, and issue bonds therefor, subject to the limitation that the total indebtedness shall not exceed seven per centum (7%) "upon the assessed value of the taxable property for school purposes therein."

The question, therefore, is whether occupations are taxable property for school purposes, in school districts of the third and fourth classes.

Section 540 of the School Code of 1911, P. L. 309, provided that in all school districts of the third and fourth classes, the school taxes should be levied and assessed "upon all the property upon which the county taxes are levied and assessed." The section was amended by the Act of April 26, 1923, P. L. 102. The amendment provided that in districts of the third class which are coextensive with cities of the third class, the school taxes should be levied and assessed on "the real estate and personal property therein as contained in the assessment made for city tax purposes." No change was made from the original provisions of the section in regard to other school districts of the third class, or districts of the fourth class.

Cities of the third class and counties may tax occupations: Act of April 29, 1844, P. L. 486, Section 32; Act of May 13, 1925, P. L. 649.

Section 541 of the School Code of 1911 provided that:

> "In order to enable the board of school directors in each school district of the third or fourth class in this Commonwealth to assess and levy the necessary school taxes required by such district each year, the county com-

> missioners in each county shall, on or before the first day of April in each year, at the expense of the county, furnish to each school district of the third or fourth class therein, for its use, to be retained by it, a properly certified duplicate of the last adjusted valuation of all real estate, personal property, and occupations made taxable for county purposes in such school district, stating the name of each taxable, and the valuation, description, and kind of property or occupation assessed, all of which real estate, personal property, and occupations are hereby made taxable for school purposes in each school district of the third or fourth class."

It is evident that under these statutory provisions, occupations were taxable for school purposes in third and fourth class districts.

In Brown's Appeal, 111 Pa. 72, the Supreme Court held that occupations were taxable property, and as such, were properly included in calculating the limits of the borrowing capacity of a county.

If the statutory provisions we have cited stood alone, under Brown's Appeal the assessed values of occupations would properly be included in determining the limits of the borrowing capacity of the school districts in question. But there are other statutory provisions which must be considered.

By Section 3 of the Act of May 11, 1921, P. L. 508, Section 541 of the School Code was amended to read as follows:

> "In order to enable the board of school directors in each district of the third or fourth class in this Commonwealth to assess and levy the necessary school taxes required by such district each year, the county commissioners in each county shall, on or before the first day of April in each year, at the expense of the county, furnish to each school district of the third or fourth class therein for its use, to be retained by it, a properly certified duplicate of the last adjusted valuation of all real estate, personal property, and residents or inhabitants made taxable for county purposes in such school district, stating the name of each taxable, and the valuation, description, and kind of property, and a list of the residents or inhabitants assessed; all of which real estate, personal property, and residents or inhabitants are hereby made taxable for school purposes in each school district of the third or fourth class."

By this amendment, all reference to a tax on occupations was eliminated, and a per capita tax was created in its place. Section 542 of the Code, as originally enacted, had imposed on each adult male resident "in addition to any tax he may pay on any real estate or other property," an annual "occupation tax of at least one dollar." This

section was amended by the Act of July 17, 1919, P. L. 997. In that amendment the tax was designated only as "a tax," and the requirement that it be paid "in addition to any other tax," was omitted. The Act of 1921, P. L. 508, again amended Section 542, and expressly designated the tax as a per capita tax.

The other provisions of the Act of 1921 indicated clearly that its purpose was to complete the elimination of the occupation tax for school purposes in these districts, and to substitute the per capita tax in its place.

It is our opinion that since the passage of the Act of 1921, P. L. 508, occupations have not been taxable for school purposes in school districts of the third and fourth classes. Consequently, their assessed value may not be included in determining the limits of the borrowing capacity of these districts.

Therefore, we advise you that the assessed value of occupations may not be included in the total assessed valuation upon which the borrowing capacity of school districts of third and fourth class school districts is determined.

Very truly yours,

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

OPINION NO. 7

School Districts—Buildings—Appraisal for Insurance Purposes—Advertising—Competitive Bidding—Act of 1911, P. L. 309, Secs. 617, 706, 707, 708.

School districts may award to individuals or corporations, without advertising for bids, contracts for appraisal of school buildings and contents for the purpose of determining the amount of fire insurance to be placed thereon.

Department of Justice,
Harrisburg, Pa., March 30, 1931.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have examined the letter addressed to your department by Mr. William T. Budd, Secretary of the School District of the City of Carbondale, Carbondale, Pennsylvania, under date of February 24, 1931, in which he requests to be advised whether a school district may award a contract, without advertisement or competitive bids,

for appraisal of school buildings and contents for the purpose of determining the amount of insurance against fire to be placed thereon and to assist the district in settlement of fire losses, if any may occur:

(a) Where the appraiser is an individual, and
(b) Where the appraiser is a corporation.

Property appraisals require knowledge, experience and skill in ascertaining and determining the value of labor and materials in building construction, construction costs, ascertainment and determination of land values as established or conditioned by location and other circumstances, ascertainment and determination of sound values and replacement costs, and they likewise involve skill in analyzing and stating the component parts of appraisal values, capacity to present the results of appraisal, as well as integrity and known responsibility. Similar qualifications are requisite in the ascertainment and determination of appraisal values of personal property.

The Act of May 18, 1911, P. L. 309, in Sections 617, 706, 707 and 708, as amended, provides for competitive bids on construction, etc. contracts and purchase of supplies. There are no other provisions in the School Code relative to awarding contracts.

Statutes requiring competitive bidding have been construed not to apply to contracts for services which depend for their value on scientific knowledge and personal skill, or for supplies of a peculiar character, depending for their value upon the personal skill of the manufacturer.

Contracts of the first class have been held to include services of accountants, architects, attorneys, engineers, surveyors, supervising engineers, stenographers, and tax assessors' assistants: and contracts of the second class have been held to include the purchase of fireworks and patented articles.

The reasons for these exceptions to the statutory rule are stated in II Dillon on Municipal Corporations, (Fifth Edition), Sections 804 and 1203, and the cases there cited: *Stratton v. Allegheny County*, 245 Pa. 519.

We are of opinion and advise that contracts for appraisals of property are within the class excepted because they require scientific knowledge and personal skill, whether the contract for such appraisal is made with an individual or with a corporation incorporated to furnish such service.

We are not to be understood as advising that professional services which can lawfully be furnished only by a person licensed to practice an art or profession may be furnished by a corporation, nor are we

here undertaking to express an opinion as to whether a corporation may be created in Pennsylvania for the purpose of making appraisals of real or personal property.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION NO. 8

Veterinary Medicine and Surgery—Castrators—Necessity for license—Act of May 5, 1915, P. L. 248.

Persons engaged in the practice of castration are practicing veterinary surgery within the meaning of the licensing Act of May 5, 1915, P. L. 248, and must be licensed as veterinary practitioners, whether or not they were practicing before that act became effective.

The Board of Veterinary Medical Examiners has no authority to register unlicensed castrators and to permit them to practice upon such registration.

The opinion of the Department of Justice dated Sept. 25, 1915, and reported in 24 Pa. Dist. 1117, has become obsolete by reason of subsequent decisions of the Supreme Court and the Superior Court, and must be over-ruled.

Department of Justice,
Harrisburg, Pa., April 1, 1931.

Doctor H. W. Barnard, Secretary, State Board of Veterinary Medical Examiners, Lancaster, Pennsylvania.

Sir: We have your request to be advised relative to the status of castrators who were engaged in the practice of castration and in no other form of veterinary medicine and surgery prior to the approval of the Act of May 5, 1915, P. L. 248, and those engaging in such practice since that date.

You have informed us that there are about fifty castrators from whom the Board has been collecting a yearly registration fee, and that the auditors, directed by the Auditor General of the Commonwealth to make an audit of the accounts of your Board, inquired what right you have to collect such fees. This is the occasion for your inquiry.

The history of the statutory regulation of the practice of veterinary medicine and surgery in this Commonwealth begins with the Act of April 11, 1889, P. L. 28, which in turn was followed by the Acts of April 29, 1891, P. L. 36, May 16, 1895, P. L. 79, April 18, 1905, P. L. 209, April 29, 1909, P. L. 277, and May 5, 1915, P. L. 248.

The first Act provided for the registration of persons practicing veterinary medicine or surgery or any of the branches thereof. The amending Act of 1891 added a proviso—"That nothing in this act shall be taken or construed to apply to persons who practice castration of domestic animals and no other form of veterinary medicine and surgery." The same exception was made by Section 10 of the Act of 1895. The Act of 1915, however, repealed all of these prior Acts, and failed to provide any exemption or exception for those who were engaged in the practice of castration of domestic animals.

The title to the Act of 1915 is as follows:

> "An Act Regulating the practice of veterinary medicine, including veterinary surgery and veterinary dentistry, or *any branch thereof;* and establishing, as incidental thereto, a State Board of Veterinary Medical Examiners, and defining its powers and duties."

The Act defined "veterinary medicine" to include veterinary surgery and veterinary dentistry or any branch of veterinary medicine, and established a full and complete system for the regulation of its practice. It is clear that the Legislature intended to set up a comprehensive definition of veterinary medicine and desired it to include all branches of the profession.

Section 12 of the Act of 1915 provided for the licensure and registration, as existing practitioners, of all persons who had been legally licensed to practice veterinary medicine and for their lawful continuance in practice.

Section 13 provided that any person not authorized to practice at the time of the passage of the Act would have to possess certain qualifications and submit to an examination by the Board before entering upon the practice of veterinary medicine.

In *Commonwealth v. Heller,* 277 Pa. 539, the Supreme Court affirmed a decision of the Superior Court (80 Pa. Super. 366) holding the Act of 1915 to be a valid exercise of the police power, not in conflict with the Fourteenth Amendment to the Constitution of the United States, nor with Article 1, Section 9, of the Constitution of Pennsylvania, and holding that veterinary dentistry is a branch of veterinary medicine. The Court specifically stated at page 540 that castration was a branch of veterinary surgery.

> "The amending Act of 1891 extended the time for registering as a practitioner to January 1, 1902, and added a proviso that the act should not apply to persons who practiced castration of domestic animals 'and no other form of veterinary medicine and surgery,' showing that even that humble branch of veterinary surgery had to be specially excluded from the operation of the statute."

Therefore, it is clear that castration is a branch of veterinary surgery, and that it is regulated by the Act of 1915, no exemption or exception having been provided by the Legislature.

The pursuit of a profession or the exercise of a lawful occupation may be regulated by the Legislature in the interest of public health, or to secure safety to the citizens; and the Act of 1915 is a constitutional exercise of the police power: *Commonwealth v. Palmer,* 71 Pa. Super. 188; *Commonwealth v. Heller,* supra.

> "* * * It has been deemed wise by the legislature to give to our domestic animals the same scientific care and attention that we do to human beings, * * *. With the wisdom of the legislation we have nothing to do.* * *"
> *Commonwealth v. Palmer,* supra, p. 190.

The right of the Legislature to regulate a business or profession in the interest of the public health or safety of the citizens has been frequently upheld in this Commonwealth. See *Harris v. State Board of Optometrical Examiners,* 287 Pa. 531; *Commonwealth v. Howard C. Long,* 15 Pa. Super. Adv. (Unof'l) 167, (No. 57 April Term 1931) citing *Collins v. Texas,* 223 U. S. 288; *Dent v. West Virginia,* 129 U. S. 114; and *Graves v. Minnesota,* 272 U. S. 425.

The State may in the exercise of its police power restrict and regulate the practice of such professions and work at such occupations as may be termed quasi public or such as require special skill and preparation. If the public good demands, the State may at any time prohibit persons from further engaging in such professions or occupations under a license previously granted. *State of Minnesota v. W. J. Horvorka,* 100 Minn. 249, 110 N. W. 870; *Reetz v. Michigan,* 188 U. S. 505, 47 L. Ed. 563.

The fact that castrators were exempted under the early Acts dealing with the practice of veterinary medicine and surgery, did not give them an incontestable right to further exemption or exception. Even a license once issued does not give the licensee an absolute right to renewal. A license confers no right whatever upon the licensee in the nature of a contract with the State. The State may impose further restrictions and regulations even though such regulations deprive those hitherto licensed of the right to continue the practice for which they were licensed.

Mr. Justice Kephart, in *Harris v. State Board of Optimetrical Examiners,* supra, at pages 538 and 539, succinctly stated the rule on this question, as follows:

> *"A license once issued does not give a licensee an incontestable right to a renewal, otherwise the very purpose of license acts would be defeated.* As stated in

> *Butcher v. Baybury*, 8 Fed. (2d) 153, 'no person can acquire a vested right to continue, when once licensed, in a business, trade or occupation which is subject to legislative control and regulation under the police power. The rights and liberty of the citizen are all held in subordination to that governmental prerogative, and to such reasonable regulations and restrictions as the legislature may from time to time prescribe. Regulations so prescribed and conformed to by the citizens may be subsequently changed or modified by the legislature wherever public interest requires it, without subjecting its action to the charge of interfering with contract or vested rights. This is elementary.' As further stated, in a note on page 1273 of vol. 8, L. R. A. (N. S.), 'The granting of a license in such cases is merely the means taken by the State, in the exercise of the police power, to regulate and restrict the engaging in certain professions and occupations for the public good, and confers no right whatever, in the way of a contract with the State, upon the licensee. He takes the same subject to the right of the State, at any time that the public demands, to make further restrictions and regulations thereto; and, if such restrictions and regulations are reasonable, they will be upheld, even though they actually prohibit some people from further engaging in such occupations or professions under a license previously granted.' ''

It is, therefore, our opinion, and we advise you that those persons engaged in the practice of castration of domestic animals are engaged in the practice of a branch of veterinary surgery and are subject to the provisions of the Act of 1915. Persons engaged in the practice of castration prior or subsequent to the Act of 1915 must meet its requirements or subject themselves to criminal prosecution for practicing veterinary surgery without a license. Your Board has no authority to register unlicensed castrators annually in accordance with Section 21, as no provision is made for the licensure and registration of anyone practicing a limited form or branch of veterinary medicine and surgery.

This opinion conflicts with and reverses an earlier opinion of this Department, reported in 24 Pa. D. R. 1117. That opinion was rendered prior to the decisions of the Supreme and Superior Courts of this State herein cited, which in our judgment compel us to reach a different conclusion.

In view of the fact that your Board has been registering certain castrators annually under the prior opinion of this Department, be-

fore you institute any criminal prosecutions against them, you should advise them that they may no longer engage in such practice without securing a license.

Very truly yours,

DEPARTMENT OF JUSTICE,
PENROSE HERTZLER,
Deputy Attorney General.

OPINION NO. 9

School Districts—Providing Instruction to Inmates of Penal Institutions—Board of Education, Phila.—School Buildings—Works of Art—Competitive Bidding—Advertising—Safety Patrols.

1. The public school system of the State cannot be used, in the absence of statutory authority as an aid in the administration of penal institutions or the rehabilitation of persons convicted of crime.

2. Works of art designed solely for ornamental purposes may be furnished the Board of Education of the City of Philadelphia, without the necessity of advertising or competitive bidding. Commercial reproductions of the originals, not the result of the handiwork of the artist, require advertising for competitive bids before contracts can be awarded.

3. Student Patrol. (See O'Hara-Pub. Inst. Op. 1929-30. P. 177.)

Department of Justice,
Harrisburg, Pa., April 7, 1931.

Honorable James N. Rule, Acting Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request under date of March 5, 1931, for our opinion upon certain questions which we state and answer seriatim.

> "1. The School Board has been requested by the Trustees of the Philadelphia County Prison to provide instruction at the prison for persons under the age of 21. Has the School Board the right, under the code, to send teachers to the prison (a) for the instruction of persons under the age of 21, and (b) if subsequently requested so to do, for the education of persons over the age of 21 years?"

The public policy of this State as evidenced by its Constitution, statutes, and judicial decisions, clearly distinguishes between the purposes, objects and administration of its public schools and the regulation and discipline of the students therein, on the one hand, and the

purposes, objects, and administration of its penal institutions and the regulation and discipline of prisoners therein. The rehabilitation of those convicted of crime to the end that they may return to the free society of their fellowmen fortified against temptation to further criminal acts, by discipline, education, and vocational training, is commendable; is in harmony with penological philosophy; and is a partial insurance against future crime and its attendant social and economic burden.

Notwithstanding the desirability of the attainment of these objects, the public school system of the State cannot be used, in the absence of express statutory authority as an aid in the administration of penal institutions or the rehabilitation of persons convicted of crime. Our attention has been called to Section 906 of the School Code (Act of May 18, 1911, P. L. 309) as furnishing such statutory authority. In our opinion it does not. The term "institution" as used in that section includes only schools having as their primary object the education of their inmates, i. e. deaf, blind, physically or mentally handicapped persons.

> "2. The Board of Public Education of the City of Philadelphia, in connection with its buildings, both old and new, is met from time to time with the question of the purchase of works of art, in the form of mural decorations and modeling and carving. (a) Is the Board required, in the purchase of murals, in the buildings owned and erected by it, to advertise for bids and let the contract to the lowest responsible bidder, or may the Board select the artist to execute the works of art and enter into contracts with the artist without advertising. (b) Is the same rule to be applied in connection with the sculptor whose work is to be installed or incorporated in the buildings?"

It has been held that contracts which call for the exercise of technical training and professional skill are excepted from statutory provisions requiring advertising and competitive bids: *Stratton v. Allegheny County*, 245 Pa. 519.

Works of art are the products of technical training and professional skill, but may be divided into two classes:

1. The first class comprises those works which are designed solely for ornamental purposes, including paintings in oil and water upon canvas, plaster, or other material and original statuary of marble, stone or bronze. Here the handiwork of an artist embodies something more than the mere labor of an artisan.

2. The second class includes those works which are commercial reproductions of originals, and not the result of the creative genius or handiwork of the artist.

The first class has been held to be within the exception to the statutory requirements for advertisement and competitive bids, but the second class is clearly within the statutory requirement for competitive bids.

> "3. Has the Board the right to organize safety patrols among the school children, in order to assist in preventing accidents to school children entering and leaving the school buildings and crossing the adjacent streets? (a) Is the organization of the patrol a proper function of the Board? (b) If a child who is a member of the safety patrol is injured, is there any liability on the School Board as a Board, or on the individual members of the Board?"

This question has been fully answered in an opinion of this Department directed to Honorable John A. H. Keith, Superintendent of Public Instruction, under date of January 9, 1929.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION NO. 10

School Districts—Bond Issues—Levying of Tax for Payment of Principal and Interest—Sinking Fund.

Where a tax is raised for a particular purpose, the fund when collected cannot be applied, in the absence of statutory authorization, to any other purpose than that specified.

Department of Justice,
Harrisburg, Pa., April 23, 1931.

Honorable James N. Rule, Acting Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: Upon your request, we have examined the extracts from the minutes of the Board of Directors of the Hollidaysburg School District, pertaining to the bond issue of forty thousand dollars ($40,000.00), the levying and assessing of a tax for the payment of principal and interest thereon, and a sinking fund therefor.

We note that this school district now has in the sinking fund, created pursuant to the provisions of these resolutions, an amount slightly in

excess of forty thousand dollars ($40,000.00); that the amount of said bond issue which now remains unpaid is thirty-nine thousand five hundred dollars ($39,500.00).

The school district proposes, if it be lawful, to transfer all moneys in excess of nineteen thousand five hundred dollars ($19,500.00), (being the amount which, based on flat tax fixed in resolutions authorizing the bond issue and levying the tax, should be in the sinking fund at this time), from the sinking fund to the general operating account of the district.

You desire to be advised whether, under the provisions of the Act of May 18, 1911, P. L. 309, (School Code), and its amendments, such transfer may be made.

An examination of the resolutions and form of bond discloses that the issue is for forty thousand dollars ($40,000.00), covering eighty (80) bonds in the sum of five hundred dollars ($500.00) each, payable to bearer, and redeemable at the option of the school district on and at any interest-paying period after May 28, 1935, and payable to bearer thereof in any event on May 28, 1945, with interest at four and one-half per centum (4½%) per annum, free of all taxes.

The bond recites that it is issued for the purpose of enlarging, equipping, and furnishing the central school building of the district, establishing therein a high school, and the improvements of grounds and the present site, under the authority, etc., of the Act of April 20, 1874, its amendments and supplements, the Act of May 18, 1911, P. L. 309, and pursuant to the several resolutions of the board of directors of the district adopted at a meeting of the board held on April 19, 1915. and the assent of the qualified electors of the district at an election held on May 25, 1915, and of certain resolutions adopted May 28, 1915. It also certifies that the indebtedness covered by this issue of bonds was incurred at the time of assessing and levying the annual school taxes; that provision has been made for the collection of the annual taxes sufficient to pay the interest and also the principal thereof at maturity.

An examination of the resolution therein referred to and adopted by the school district on May 28, 1915, discloses that it thereby levies on all taxable property within the district a tax amounting to one thousand eight hundred dollars ($1,800.00) per annum, to be collected annually for the purpose of paying the interest on these bonds, and that it likewise assesses and levies on all taxable property within the district a tax amounting to seven hundred fifty dollars ($750.00), to be collected annually for the purpose of providing a sinking fund to make payment of these bonds within thirty (30) years as provided by law. The resolution provides that these taxes shall be collected the same as other taxes of the district and shall be applied exclusively for the pur-

pose aforesaid; that in order to raise the amounts above stated a rate of one and one-half (1½) mills is fixed.

An examination of the amended resolution, adopted September 27, 1915, at a special meeting of the board held for the purpose of adopting a resolution to amend a resolution adopted on May 28, 1915, authorizing this issue of bonds, and for the further purpose of adopting a resolution to amend a resolution adopted May 28, 1915, levying a tax to pay the principal and interest on this issue, discloses that the form of bond is the same as that set forth in the resolution of May 28, 1915: that a levy is therein made upon all taxable property within the district of a tax amounting to one thousand eight hundred dollars ($1,800.00) per annum, to be collected annually for the purpose of paying the interest on these bonds, and a levy is likewise made of a tax for the fiscal year beginning July 1, 1916 of one thousand nine hundred sixteen and sixty-eight one-hundredths dollars ($1,916.68), and for the fiscal years beginning July 1, 1917 to July 1, 1944 inclusive, of a tax amounting to one thousand three hundred thirty-three and thirty-four one-hundredths dollars ($1,333.34), to be collected annually for the purpose of providing a sinking fund to make payment of these bonds; that the tax of one thousand eight hundred dollars ($1,800.00) for the purpose of payment of interest, and the tax of seven hundred fifty dollars ($750.00), for the purpose of providing a sinking fund for these bonds, as levied and assessed for the fiscal year beginning July 1, 1915, were ratified, approved and confirmed. It further provided, that "the said taxes shall be collected the same as other taxes of the school district * * * and shall be applied exclusively for the purpose aforesaid."

The obligation of the district created by this issue must be determined by an examination of the resolutions, as well as the form and terms of the bond.

The enabling resolution and bond provide that the tax when collected shall be applied exclusively to the purpose of paying the principal and interest of said bonds, and the application of tax levied and collected under its terms to the payment of other debts of the district would constitute a breach of contract.

Where a tax is raised for a particular purpose, the fund when collected cannot be applied, in the absence of statutory authorization, to any other purpose than that specified: *Coler et al. v. Board of Commissioners of Stanly County et al.*, 89 Fed. 257, 260; affirmed in 47 L. Ed. 1126; 190 U. S. 437; *Clark v. Sheldon*, (N. Y.), 12 N. E. 341. In the present case, the transfer as proposed, cannot be made because such transfer would be not only a breach of the terms of the obligation, but also because there is no statutory authorization for transfer of moneys raised by tax levied and assessed for a particular purpose to

the general fund of the district subject to disbursement for general purposes: *City of Chicago et al. v. Brede,* (Ill.), 75 N. E. 1044, 1046.

Neither may the fund be subdivided or reapportioned so as to make a part of it unavailable for the purpose for which it was raised: *Carter v. Tilghman,* (Cal.), 51 Pac. 34. Nor may a statute authorizing the transfer of moneys from a sinking fund created for a particular purpose to the general fund of the district enacted subsequent to the issue of the bonds, authorize such transfer in prejudice of the rights of bondholders.

We note, however, that there is now in the sinking fund an amount in excess of thirty-nine thousand five hundred dollars ($39,500.00), the amount required for the payment of the principal amount covered by such issue. In such case the tax may not be continued after the purpose for which it was authorized has been accomplished. That portion of the fund accumulated by the annual tax of one thousand three hundred thirty-three and thirty-four one-hundredths dollars ($1,333.34), which is in excess of thirty-nine thousand five hundred dollars ($39,500.00), may be applied in reduction of the annual levy of the tax for the payment of interest or for the loan tax due the Commonwealth on this issue, but, in our opinion, may not otherwise be applied at this time: *Louisville v. Murphy,* (Ky.), 5 S. W. 194, 197.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION NO. 11

Forests and Waters—Water Works—Time Within Which to Complete—Supply of Water Outside of Charter Limits—Acts of June 15, 1911, P. L. 990 and May 21, 1901, P. L. 270.

Where a charter has been granted to a water company for construction of its works, but fails to begin its construction within two years and complete its work within five years, unless an extension has been applied for within the presented period, the company ceases to exist.

The Water and Power Resources Board may approve a certificate authorizing a water company to supply water outside the territory designated in its charter, if those being supplied on the outside have complied with the provisions of the Act of May 21, 1901, P. L. 270.

Department of Justice,
Harrisburg, Pa., June 9, 1931.

Honorable Lewis E. Staley, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Sir: You ask to be advised; (1) Whether the charters to seven water companies which you have named in your inquiry are valid and whether the Water and Power Resources Board can approve a certificate validating the purchase of these companies by the Silver Creek Water Company, and (2) Whether the Board may approve a certificate designating the sources of supply of the Silver Creek Water Company, after its purchase of certain other designated companies, if water from such sources is being supplied outside of the territory specified in the charter.

The facts which give rise to the inquiries are as follows:

The Silver Creek Water Company was incorporated May 21, 1889, to supply water to Blythe Township, Schuylkill County. On December 23, 1930, it acquired by purchase all the rights and franchises of the Crystal Water Company of Cass Township, incorporated July 2, 1890, and of the Moss Glen Water Company of Schuylkill Township, the Middleport Water Company of Middleport Borough, the Glendower Water Company of Foster Township, the Frailey Water Company of Frailey Township, and the Otto Water Company of Reilly Township, each of which was separately incorporated on April 14, 1905, and of the Rock Water Company of Tremont Township, incorporated on April 27, 1905.

The Silver Creek Water Company after the purchase of the companies named filed a certificate designating its source of supply, which certificate provided that the rights theretofore existing in any of the companies to take or use water from any source not named in the certificate should revert to the Commonwealth. It also filed an acceptance of the Acts of 1905 and 1907.

The Failey Water Company, the Otto Water Company and the Rock Water Company, are not supplying water in their respective municipalities. Each of them failed to begin construction of its works within two years and complete the same within five years.

The Silver Creek Water Company and the Crystal Water Company set forth in their charters the purpose to,

> "Supply water to the public in * * * and to such persons, partnerships, associations and corporations residing therein and adjacent thereto as may desire the same * * *"

The purpose set forth in the charters of the other companies was:

> "Supplying water to the public in the township of * * * and to such firms and corporations residing therein who may desire the same. * * *"

Your first inquiry is whether these charters are valid, and whether you may approve a certificate validating the purchase of these companies by the Crystal Water Company.

The Act of April 29, 1874, P. L. 73, entitled, "An act to provide for the incorporation and regulation of certain corporations," was followed by an act providing further regulations of such corporations approved April 17, 1876, P. L. 30, Section 11 of which is as follows:

> "Section 11. If any company incorporated under this act, * * * shall not proceed to carry on its work, and construct its necessary * * * improvements within the space of two years from the date of its letters patent, and shall not within the space of five years thereafter complete the same, the rights and privileges thereby granted to said corporation shall revert to the Commonwealth."

This act was construed in *Commonwealth v. The Lykens Water Company,* 110 Pa. 391, 397, wherein it was said:

> "When the legislature reserves to itself the right to repeal a charter on the happening of a certain event, it may enact the repeal whenever the event happens, without first invoking the judgment of a court: *Crease v. Babcock,* 23 Pick., 334. The Act of 1876 did not specifically require any action of the legislature to cause the franchises granted to revert to the Commonwealth.
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> * * * * * * * *
>
> "The injustice of permitting a corporation to retain, unused, the exclusive right to a power intended to be used for the benefit of the public, is so contrary to public policy that the relator must present a clearer case than he has now shown to justify a reversal of the judgment."

But the Legislature of 1889 by act approved May 16, P. L. 241, amended the Act of 1876, supra, adding a proviso, that if application is made previous to the expiration of the five years, showing that the corporation has acted in good faith, an extension of time may be granted.

This enactment was construed by this Department in an opinion of Assistant Deputy Attorney General Cunningham, 10 Dauphin County Reports 74, wherein it was held that forfeiture of charters may be enforced by the Attorney General on application of any citizen, and in *Chester County Gas Company v. The Marion and Radnor*

Gas and Electric Company, 16 Pa. District 214, it was decided, that while the court could not in a collateral proceeding determine a forfeiture, it could determine that the corporation had no right to exercise a particular franchise, which had been lost by reason of the company's failure to commence or complete its work.

The foregoing legislation was generally supplied and supplemented by the Act of June 15, 1911, P. L. 990, wherein it is provided that any water company or water-power company which

> "* * * shall not have begun the construction of its works within two years after the date of its incorporation, or which shall not have completed the same or placed the same in operation within five years thereafter, may, at any time previous to the expiration of said two years or five years thereafter, make application to the Water Supply Commission of Pennsylvania for an extension * * *"

But it will be observed that this Act, like the Act of 1889, applies only to applications for extensions when made *within the period of the two or five years.*

The principle laid down in Eastman on Corporations, Section 80a, and Section 610, cited by Deputy Attorney General Cunningham in 10 Dauphin County Reports 74, is that

> "It is now well settled by numerous authorities that it is a tacit condition of a grant of a corporation, that the grantees shall act up to the end or design for which they were incorporated, and hence, through neglect or abuse of the franchises, a corporation may forfeit its charter, as for condition broken, or for a breach of trust."

but

> "No charter to a corporation for public purposes can be forfeited except by the Commonwealth in a direct proceeding for that purpose." *Hinchman v. Philadelphia and West Chester Turnpike Road,* 160 Pa. 150.

and

> "* * * While it has been held that the attorney general must move to forfeit lapsed rights such as these, nevertheless when it appears to a commission that such corporation is attempting to exercise such rights, its denial of a certificate of public convenience because of such an attempt would not be such an unreasonable exercise of its regulatory control as would warrant this court in interfering. The commission should not be a party to what is manifestly an open violation of the law. * * *" *Relief Electric Light, Heat and Power Company's Petition,* 63 Pa. Superior Court 1, 16; *Jenkins Township v. Public Service Commission,* 65 Pa. Superior Court 122.

It may be noted that the "Commission" referred to in the last quotation is The Public Service Commission. However, the principle invoked applies with equal effect to the Water and Power Resources Board, formerly known as the Water Supply Commission.

The second question relates to the supply of water to territory outside of the territory designated in the charter. This problem was a source of much perplexity for many years and a subject much litigated. It has been solved in a great measure by the Act of May 21, 1901, P. L. 270, which provides that companies regularly organized for the purpose of supplying water to the public may upon written request from lot or land owners in adjoining territory, supply water within such territory if such written request contains a description of the land and is filed in the office for the recording of deeds and a certified copy thereof is transmitted to the Secretary of the Commonwealth.

Therefore we advise:

1. That the Frailey Water Company, the Otto Water Company and the Rock Water Company having failed to begin the construction of their works within two years and complete the same within five years, and not having procured an extention within the prescribed period, ceased to exist. Their purchase by the Silver Creek Water Company could not imbue them with life, nor may the Water and Power Resources Board approve such certificate because all rights under the charters had passed before the attempt to take them over by the Silver Creek Company.

2. That the other companies acquired were performing services and using their franchises for the public. Their purchase was lawful and valid.

3. That your Board may approve the certificate authorizing the supplying of water to territory outside that designated in the charters, if those being supplied on the outside have complied with the provisions of the Act of 1901. This does not, of course, apply in the cases of the three companies whose franchises have been forfeited.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAS. W. SHULL,

Deputy Attorney General.

OPINION NO. 12

Department of Banking—Duty to Supply Information to Department of Revenue—Banking Act Sec. 12—The Administrative Code of 1929.

Under the provisions of Sections 501 and 502 of The Administrative Code of 1929, the Department of Banking has the power and it is its duty to furnish to the Secretary of Revenue or his duly authorized agent such information regarding institutions under the supervision of the Department of Banking as is necessary to assist the Secretary of Revenue in the performance of his official duties, notwithstanding the provisions of Section 12 of the Banking 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., June 10, 1931.

Honorable William D. Gordon, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have requested an opinion on your right to give to the Department of Revenue to assist it in collecting taxes due the State, information in your possession secured as a result of the examination of institutions under your supervision or appearing in reports of such institutions filed with you.

Section 501 of The Administrative Code of 1929 reads as follows:

> "The several administrative departments, and the several independent administrative and departmental administrative boards and commissions, shall devise a practical and working basis for cooperation and coordination of work, eliminating, duplicating, and overlapping of functions, and shall, so far as practical, cooperate with each other in the use of employes, land, buildings, quarters, facilities, and equipment. * * *"

Section 502 of the same Act further provides:

> "Whenever, in this act, power is vested in a department, board, or commission, to inspect, examine, secure data or information, or to procure assistance, from any other department, board, or commission, a duty is hereby imposed upon the department, board, or commission, upon which demand is made, to render such power effective."

These sections of The Administrative Code evidence the desire of the Legislature to secure full and complete co-operation between, and co-ordination of the work of, the several administrative departments. Therefore, your Department should assist the Department of Revenue and any other department, board or commission of the administrative branch of the government wherever possible.

However, the question arises whether you may properly divulge, even to another department, information which you have in your possession, in view of the following provision of Section 12 of the Act of June 15, 1923, P. L. 809, as amended by the Act of May 5, 1927, P. L. 762:

> "Neither the Secretary nor any deputy, examiner, or employe of the Department shall, directly or indirectly, wilfully exhibit, publish, divulge, or make known, to any person or persons, any record, report, statement, letter, or other matter, fact, or thing, contained in said Department, or ascertained from any of the same, or from any examination made under the provisions of this act, excepting in such manner as is expressly authorized by this act, and excepting when the production of such information in a proceeding in any court is duly required by subpoena issued by special order of the court, or other legal process, and excepting also in the case of prosecutions or other court actions instituted by the Department; * * *"

For violation of this provision penalties are provided.

It is obvious that the purpose of this legislation is to prevent improper disclosure to the public and to parties not entitled thereto of confidential information. In our opinion the Act was not intended to prohibit giving such information to an administrative department, board, or commission of the Commonwealth, where the information is essential to the proper and legal functioning of such agency; and in any event The Administrative Code of 1929 is a later enactment.

The Department of Revenue is responsible for the assessment and collection of taxes due by certain institutions doing business in the Commonwealth, some of which are under your supervision. Section 1601 of The Fiscal Code of 1929 provides as follows:

> "The Secretary of Revenue and the Auditor General, severally, and any agent appointed by either of them, is hereby authorized to examine the books and papers of any corporation, association, or individual, made taxable for State purposes by any act of Assembly, to verify the accuracy of any return or report made under the provisions of this act or any other act requiring the filing of such return or report."

The Secretary of Revenue, acting personally or through an agent, has the right to examine copies of reports of any institution filed with you as Secretary of Banking. As he may demand from the institution itself any data you may have regarding it, by permitting the Secretary of Revenue to have access to the information in your possession you are not disclosing anything which is confidential as far as he is concerned.

Therefore, you are advised that it is lawful for you to disclose to the Secretary of Revenue, or his duly authorized agent, such information in your possession respecting any institution as is necessary to assist him in the performance of his official duties.

Very truly yours,

DEPARTMENT OF JUSTICE,
HAROLD D. SAYLOR,
Deputy Attorney General.

OPINION NO. 13

School Districts—Computation of Population—Exclusion of Indigent Nonresident Inmates of State Institutions and Private Owned Schools for Deaf and Dumb Children Which Receive State Aid—Act of 1911, P. L. 309, Sections 102 to 107, construed.

For the purpose of computing the school district population as provided for by Sections 106-107 of the School Code, indigent nonresident inmates of tax supported institutions located in the district and nonresident pupils of a privately-owned school for deaf and dumb children which receives state aid to the full amount of cost and maintenance of such children, may be excluded.

Department of Justice,
Harrisburg, Pa., June 17, 1931.

Honorable James N. Rule, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request to be advised upon the interpretation of Sections 102 to 107 of the Act of May 18, 1911, P. L. 309, and its amendments, in the application of the School Code to the following questions:

(a) Should inmates of institutions for indigent poor, insane and tubercular persons be included as part of the population of a school district within which the institutions are located, for the purpose of classification of the district as provided in Section 102 of the Code?

(b) Should the transient population of a privately-owned school for deaf and dumb children, which receives State aid to the full amount of the cost of tuition and maintenance, be included in the population of a school district within which it is located, for the purposes of classification?

In our opinion, and you are advised, if nonresidents of the district, they should not. The provision of this section does not appear to

have been passed upon by the Courts of this State. However, we base the conclusion here expressed on the following reasons:

The school districts of the State are classified upon the basis of population into four classes. Distinctions are made by law as to the administration of the districts of the several classes: for instance, the minimum salaries which shall be paid to teachers, supervisors, principals, and superintendents vary as to the class of the district; the percentage of salaries to be paid to the district by the Commonwealth for its teachers, supervisors, principals and all other members of the teaching and supervisory staff in the schools of any given district is determined by the class of the district; the number of the officers of the district and the functions to be performed by its officers, as well as the manner of their election or appointment, vary in districts of different classes. Therefore, the ascertainment of the class of the district has important consequences financial and otherwise.

For the purpose of such ascertainment, the School Code has provided, Sections 106-107, that, "the last United States census as set forth in the official report thereof shall be the basis on which the population of the several school districts shall be computed * * *," and "after the taking of each United States census, the Superintendent of Public Instruction shall canvass the same so far as it relates to the population of the several school districts in this Commonwealth, and * * * if it appear in any of said cases that the population of any school district in this Commonwealth by said census or said annexation, is such that it should be included in another class of school districts, the Superintendent of Public Instruction shall issue a certificate to said school district to that effect, and such school district shall, with the beginning of the next school year after said certificate has been issued, become a school district of the class to which it properly belongs."

In considering the intent and purpose of the language here quoted, we have examined the definitions given by standard dictionaries to the words "population", "basis", "compute", and "canvass", and find them defined as follows:

Population—the whole number of people in a place or a given territorial area; also, any specific portion of that number; as, the foreign *population* of New York.

Basis—the foundation of anything: that on which a thing stands or on which anything is reared; a foundation, groundwork, or supporting principle; the principal constituent of a compound; a fundamental ingredient.

Compute—to determine by calculation; count; reckon; calculate.

Canvass—to examine; to scrutinize; to sift or investigate by inquiry; examine as to opinions, desires, or intentions; apply to or address for the purpose of influencing action, or of ascertaining a probable result.

The last United States census, as set forth in the official report thereof, is the "basis" or foundation which the Superintendent of Public Instruction shall "canvass" or examine and upon which he shall "compute" or determine by calculation the population of the school district.

The decennial census does not of itself determine the class of the school district, but merely indicates a certain basis upon which the Superintendent of Public Instruction may compute the population and declare the classification.

An indigent person cannot gain a settlement outside the district of his domicile. In all other districts he is but a transient. In so far as he is an indigent resident, in a school district, having no domicile therein, he neither contributes to the school population of the district nor is he subject to property or per capita tax in support of its schools. He is not an elector within the district and is not eligible to office in the school system. The institution wherein he is housed is exempt from tax as a charitable institution or public building. An examination of the Constitution of Pennsylvania, Article VIII, Section 13, the various provisions of the School Code, and the general laws applicable to the school system indicates that for political, financial and administrative purposes, the school system is based upon taxables resident within the district.

The term "population" as used in Section 106 of the School Code, must be defined in the light of these and other provisions of the School Code and general laws affecting the administration of the school system.

Population is not to be reckoned by numbers only. As used in Section 106 of the School Code, it is, in our judgment, to be confined to those who are actual residents of the district. See *In Re Silkman,* 84 N. Y. 1025-38-42; 88 Appellate Division, 102.

It is our opinion that the Superintendent of Public Instruction, in canvassing the decennial census for Collier Township, Allegheny County, may exclude indigent nonresident inmates of a tax-supported institution located in the district. For this purpose he may ascertain the number of nonresident indigent inmates by affidavit of the superintendent or other officer having custody of the records of the inmates thereof. Having computed the population of the district, excluding such persons, he may issue a certificate accordingly. It is our opinion also that the pupils of a privately-owned school for deaf

and dumb children which receives State-aid to the full amount of cost and maintenance of such children, who are nonresidents of the district, may be determined by the Superintendent of Public Instruction, and having been determined, may be excluded in computing the population of the school district wherein the school is located.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION NO. 14

Firearms—Possession of, by Foreign-born Resident—City Ordinance—Game Law Act of 1923, P. L. 359.

When a city or borough ordinance provides a penalty for violation on the same subject as that which has been regulated by statute, the statute is paramount, and the proceeding for violation under the ordinance must abate.

Department of Justice,
Harrisburg, Pa., July 13, 1931.

Board of Game Commissioners, Harrisburg, Pennsylvania.

Gentlemen: You ask to be advised whether the City of Pittston may recover a fine for violation of a city ordinance prohibiting an unnaturalized foreign-born resident within the city to own or be in possession of a shot-gun, rifle, pistol or other firearms. The ordinance to which you make reference was passed by the city council April 6, 1931. An examination of the ordinance will disclose that the four sections of which it is comprised, are almost verbatim reproductions of Sections 902, 903 and 904 of the Game Law Act of 1923, P. L. 359. The ordinance attaches precisely the same penalty provided by the statute.

The passage of such ordinance would be an attempt by the city to usurp the prerogatives of the Legislature in the imposition of a fine where the Legislature had previously occupied the entire field upon the subject of such violation. Does a municipality have such authority? Two laws should not run concurrently when each has attached to it a penalty for a violation—that is, no one should be twice punished for the same offense. Such conditions could arise only under a dual sovereignty, as for example our State and Federal Governments.

The State is sovereign because it represents the will of the people. The Federal Government is sovereign because the States have yielded to it certain of their powers of sovereignty, whereby both have inherent powers and both may legislate. But in the case of a state on one hand and a city or other municipality on the other, the former is the creator and the latter is the creature. The one is necessarily dominant and the other servient. The people as a body constitute the sovereignty of a state. The municipality through its council derives its powers from the state; hence it possesses and may exercise only such powers as are vested in it by the sovereignty, the will of the people of the state.

> "A municipal corporation is merely an agency instituted by the sovereign, to carry out in detail the objects of government; revocable and having no vested right to any of its powers or franchises.
>
> "The charter of a municipal corporation is not a contract with the state and is subject to the control of the legislature, * * *:" (Syl.) *Philadelphia v. Fox et al.* 64 Pa. 169.

A stream can rise no higher than its source. The source of all city authority is in legislative enactments, and ordinances cannot supersede such enactments.

> "'* * * A borough is a mere agency of the state for governmental purposes, and it has no vested right to its power and franchises, and the legislature can take away at its pleasure any of them.'": *Webster v. Hopewell Borough,* 19 Pa. Superior Court 554.

No special power has been delegated to the city by the Legislature to pass the ordinance referred to, or to collect a fine under the provision of the ordinance. The conclusion is incontrovertible, that the statute must prevail and the ordinance is null and void.

This principle is stated in Dillon on Municipal Corporations, Volume II, Section 632, 5th Edition, as follows:

> "* * * A general grant of power, such as mere authority to make by-laws, or authority to make by-laws [ordinances] for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act—for example, an assault and battery—which is made punishable as a criminal offence by the laws of the State. The intention of the State that the general laws shall not extend to the inhabitants of municipal corporations, or that these corporations shall have the power, by ordinance, to supersede the State law, will not be inferred from grants of power general in their character * * *."

For a further reason, if one need be assigned, Article I, Section 10, Constitution of Pennsylvania, provides that:

> "* * * No person shall, for the same offence, be twice put in jeopardy of life or limb; * * *."

It may be conceded, that arrest for a violation such as here prescribed by the ordinance, is not placing the culprit in jeopardy; but the result is very like unto it, if he is made liable to prosecution before two tribunals for the same offense and must twice respond for a fine which takes his property or in default subjects him to imprisonment. As well might a city pass an ordinance fixing a penalty for one guilty of larceny or arson within its limits.

Therefore, you are advised that the Legislature having made the ownership or possession of the designated firearms a crime, attaching thereto a penalty for its violation, the city has no power to divert the fine into a different channel, nor under the guise of an ordinance subject him to prosecution and fine for the same offense.

Very truly yours,

DEPARTMENT OF JUSTICE,
JAS. W. SHULL,
Deputy Attorney General.

OPINION NO. 15

Forests and Waters—Inland Lakes—Permit—Prosecutions—Injunction—Acts of June 25, 1913, P. L. 555 and April 9, 1929, P. L. 177.

The waters of an inland lake may not be appropriated or diverted for public or private use without first making application for a permit from the Water and Power Resources Board.

The Water and Power Resources Board, may institute prosecutions against persons, who without a permit lower the waters of lakes, or it may institute proceedings in a court of equity by injunction to restrain continuous violations.

Department of Justice,
Harrisburg, Pa., July 13, 1931.

Honorable Lewis E. Staley, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Sir: You asked to be advised whether it is the duty of the Water and Power Resources Board to make investigations, conduct hearings, and determine, under the Act of June 25, 1913, P. L. 555, to what ex-

tent Sandy Lake has been lowered and who are the parties responsible therefor, so that suit may be brought to have the lake restored to its former level.

In the recital of the facts concerning this lake, you inform us that it covers about one hundred and fifty (150) acres in Mercer County, and that the records of the Department of Internal Affairs show that title to the lake passed from the Commonwealth to private individuals under a warrant issued in 1794. You say that it appears that the lake has been lowered about two and one-half (2½) feet as the result of excavations at its outlet made by the Stoneboro Park Association, which owns a bathhouse and operates a bathing beach along the lake.

We find from the "Water Resources Inventory Report" Part IV, Gazetteer of Lakes and Homes 1917, that ownership is private and corporate and not limited to the store line; that Lakeside Park Company is the largest owner; that the drainage area of the lake is 4.5 square miles; that the inlets to the lake consist of several small streams fed by springs, and its outlet is a stream flowing approximately one (1) mile through marshlands to its confluence with Sandy Creek.

This small inland body of water, not being navigable, would be classified under water divisions as private waters in contradistinction to public waters, such as the Great Lakes, which are under the jurisdiction generally of the Federal Government. Being a private lake the owners of the bed of the lake and of land bordering it have the same rights as riparian proprietors on a water course, including the right to make a reasonable use of the water for domestic, agricultural and mechanical purposes: *Turner v. James Canal Company,* 99 Pac. 520 (Cal.), 22 L. R. A. (N. S.) 401.

But no one may appropriate or divert the entire body of water or make such an excessive use of it as to deprive others of their right to a reasonable participation in its benefits: *Valparaiso City Water Company v. Dickover,* 46 N. E. 591; *Syracuse v. Stacey,* 161 N. Y. 231.

> "* * * the use of water, flowing in its natural channel, like the use of heat, light, or air, has been held * * * to be common by the law of nature, and not merely public, * * *": *Mayor v. Commissioners of Spring Garden,* 7 Pa. 348, 363.
>
> "* * * There can be no such thing as ownership in flowing water; the riparian owner may use it as it flows; * * * but so long as it flows it is as free to all as the light and the air. * * *": *Appeal of Frank Haupt, et al.,* 125 Pa. 211, 224.

Therefore, if any riparian owner has exceeded his rights in respect to the waters of the lake, any individual or corporation injuriously af-

fected may seek injunctive relief, as well as proceed for the recovery of damages.

But what are the powers and duties vested in the Water and Power Resource Board? Under The Administrative Code of April 9, 1929, P. L. 177, this Board has all the powers and duties of the former Water Supply Commission. These powers and duties, in so far as they relate to your present inquiry, are found in the Act of June 25, 1913, P. L. 555. That Act contains the following provisions:

> "Section 2. * * * after the passage of this act, it shall be unlawful for any person or persons, * * * in any manner to change or diminish the course, current, or cross section of any stream or body of water, wholly or partly within * * * this Commonwealth, without the consent or permit of the Water Supply Commission * * * in writing, previously obtained, upon written application to said commission therefor."
>
> "Section 4. * * * It shall be unlawful to * * * begin * * * any change or addition aforesaid, except in accordance with the terms, conditions, regulations, and restrictions of such consent or permit, * * *."
>
> "Section 7. Any person * * * that shall do or cause to be done; or that shall fail, neglect or refuse to do, or cause to be done, any act or thing contrary to the provisions of this act; or that shall violate, or fail to comply with, any order of the commission, * * * or that shall violate any of the provisions of this act, shall be guilty of a misdemeanor; * * *."

The subsequent provisions of the Act relate to enforcing compliance with and restraint of violations of the Act by proceedings in equity.

The Act of 1913 is limited in its application to bodies of water having a drainage area greater than one-half square mile. Since the drainage area of the lake now under consideration is in excess of one-half square mile, supervision of the lake, together with its inlets and outlet, is within the jurisdiction of the Water and Power Resources Board. Therefore, before a change that would in any manner diminish the course, current or cross section of the stream or body of water may legally be made, a permit must be procured. The person lowering the stream without such a permit would be guilty of a misdemeanor, and on conviction may be sentenced under Section 7 to pay a fine of not more than one thousand dollars ($1,000), or undergo imprisonment not exceeding one year.

An Act also authorizes the courts of common pleas, on the application of the commission, to restrain violations of the Act.

Therefore, you are advised that your Board may institute prosecutions against the persons who lowered the lake without having received a permit. The Board may also proceed to obtain an injunction against

the continued violation of the Act. Of course, you may make such investigations as may be necessary in connection with such litigation, if the information at hand is inadequate.

Very truly yours,

DEPARTMENT OF JUSTICE,
JAS. W. SHULL,
Deputy Attorney General.

OPINION NO. 16

Banks—Liquidation of Banks—Compensation of Attorney Employed by the Secretary of Banking.

The basis of compensation to be paid an attorney employed by the Secretary of Banking, to perform legal services in connection with the liquidation of banks taken into possession, should be substantially the same as is paid a Deputy Attorney General.

Department of Justice,
Harrisburg, Pa., July 25, 1931.

Honorable William D. Gordon, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have requested an opinion on the question whether there is any uniform basis for the compensation or attorneys employed by the Secretary of Banking, with the approval of the Attorney General, to perform legal services in connection with the liquidation of banks taken into possession.

In your request you state that when an institution is taken into possession you appoint a special deputy secretary of banking to take charge of the liquidation, that you pay him on a salary basis, and that the maximum salary paid to these special deputies is at the rate of Seven Thousand, Five Hundred Dollars ($7,500) per annum. I gather from your letter that you feel that there should be some uniform rule for the compensation of attorneys with an established maximum.

Section 24 of the Act of June 15, 1923, P. L. 809, provides that when your Department has taken possession of a bank you may appoint a special deputy or deputies to assist you in the work of continuing or liquidating the business of the bank, and also that you may employ "such expert assistants and legal counsel" as you may deem necessary.

However, whether this provision has any force is doubtful. Section 906 of The Administrative Code of 1929 provides expressly that the Attorney General, with the approval of the Governor, shall have the

power: "From time to time to appoint and fix the compensation of special deputy attorneys general, and special attorneys, to represent the Commonwealth, or any department, board, or commission thereof, in special work or in particular cases;" and Section 512 of the same Act provides that: "It shall be unlawful for any department, board, commission, or officer, of the Commonwealth, to engage any attorney to represent such department, board, commission, or officer, in any matter or thing relating to the public business of such department, board, commission, or officer, without the approval in writing of the Attorney General." It would seem that all legal services required by or on behalf of any State officer, in connection with the performance of his public duties, must now be provided under these sections of The Administrative Code.

The matter of fixing attorneys' fees is one upon which it is most difficult to establish a general rule. Attorneys in private matters are paid on the basis of their relative experience and ability, and with due regard to the importance of the particular matter in which their services have been rendered. There is no rule which applies generally in such cases.

However, when attorneys are employed in public matters we are not without some guideposts. The Legislature has fixed the compensation payable to judges of all of our courts, to the Attorney General, and to the district attorneys of the several counties.

Twenty Thousand Dollars ($20,000) per annum is paid to the Chief Justice of the Supreme Court, the highest judicial officer of the State, and Nineteen Thousand, Five Hundred Dollars ($19,500) is paid to the other Justices of that Court. Their duties require their full time.

The salary of the Attorney General is Twelve Thousand Dollars ($12,000) per annum, but his time is not necessarily devoted exclusively to the business of the Commonwealth.

Common Pleas Judges and Orphans' Court Judges in our most populous counties receive a salary of Fourteen Thousand Dollars ($14,000) per annum, and are precluded from engaging in any other income-producing legal work.

The maximum compensation of deputy attorneys general, although not fixed by statute, is Six Thousand Dollars ($6,000) per annum.

Obviously, a lawyer appointed to render legal services to the Secretary of Banking in connection with the operation or liquidation of a bank in possession is doing public, as distinguished from private, work. He is not relieving the Attorney General from the primary responsibility for advising your Department, nor is your Department relieved from the duty of seeking the Attorney General's advice. Every such lawyer is, therefore, in effect, appointed to assist in the work of this Department. His compensation should be limited accordingly.

It is a fact that the compensation of these attorneys is paid out of the estates of the banks held in possession by your Department, but it is also a fact which cannot be ignored that when a bank is taken into possession its continuance or liquidation is under the supervision of your Department acting as an agency of the Commonwealth. Depositors and stockholders have a right to expect that the Commonwealth will jealously protect them against any unnecessary expense or excessive charge of any character whatsoever.

While it is not possible to establish any uniform standard or fix any iron-clad limitation, nevertheless, in our judgment, Twenty Thousand Dollars ($20,000) should be regarded as the maximum compensation for legal services rendered to the Commonwealth in connection with any closed bank, unless the services extended over a period exceeding a year, or unless counsel was required to conduct litigation for the recovery of large sums of money and brought such litigation to a successful conclusion.

The ordinary foreclosure of mortgages and the institution of ordinary lawsuits for reducing to judgment claims against debtors clearly do not justify exceptionally large fees.

We have indicated what the maximum compensation should be, unless the circumstances are extraordinary. It is only proper to say that in our judgment there are very few instances in which a fee of this size would be proper. In the large majority of cases the services rendered are certainly no more important than those rendered by the regular deputies of this Department, and the basis of compensation should be substantially the same.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,
Attorney General.

OPINION NO. 17

Elections—Nomination Petitions—Judges—"Profession, Business or Occupation" of Candidate—Duty of Secy. of Commonwealth—Acts of 1851, P. L. 648; 1911, P. L. 198, Sec. 2; 1931, Act No. 106; Art. V, Sec. 5 of the Constitution.

The Secretary of the Commonwealth may decline to file nomination petitions of candidates for the office of judge, whose stated "profession, business or occupation" is other than that of attorney or counselor at law, as provided for in the Acts of 1851, P. L. 648; 1911, P. L. 198, Sec. 2; 1931, No. 106; Art. V, Sec. 5 of the Constitution.

Department of Justice,
Harrisburg, Pa., July 30, 1931.

Honorable Richard J. Beamish, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether it is your duty to accept and file nomination petitions designating as candidates for the office of judge of the Supreme Court of Pennsylvania, judge of the Court of Common Pleas of Allegheny County, or judge of the County Court of Allegheny County, persons whose occupations are stated to be either carpenter, or welder, or salesman, or housewife, or machinist, or journalist, or plumber.

We understand that nomination petitions have been proffered in which it is stated that the "profession, business or occupation" of the candidate is one of those specified.

Under the Act of April 15, 1851, P. L. 648, judges of the Supreme Court must be "learned in the law."

Under Article V, Section 5, of the Constitution, and the Act of May 21, 1931 (Act No. 106), judges of the Court of Common Pleas of Allegheny County must be learned in the law.

Under Section 2 of the Act of May 5, 1911, P. L. 198, as amended, judges of the County Court of Allegheny County must, likewise, be learned in the law.

The expression "learned in the law" has a well known and well understood meaning. To be learned in the law a person must be an attorney or counselor at law.

In *Freiler v. Schuylkill County*, 46 Pa. Sup. Ct. 58, in an opinion by Judge Orlady, our Superior Court interpreted this expression. Judge Orlady said, at page 62:

> "It has been held that the term 'learned in the law' means that the person is 'either admitted or entitled to be admitted without examination to practice as an attorney at law in the state.' The term 'learned in the law' clearly indicates an intention to prescribe some sort of an educational qualification, and should be given some practical effect; and therefore no one is eligible as a judge who is not, when elected, either admitted or entitled to be admitted, without examination, to practice as an attorney at law. To be learned in the law means that the person must have been ascertained by a competent tribunal prior to his election or appointment: *Jamieson v. Wiggin*, 12 S. D. 16, 80 N. W. Repr. 137, 46 L. R. A. 317, 76 Am. St. Rep. 585; *Howard v. Burns*, 14 S. D. 383, 85 N. W. Repr. 920."

Our Primary Act requires that every candidate must make an affidavit, "stating his residence with street and number, if any, and his post office address, his election district, the name of the office for which he consents to be a candidate, *that he is eligible for such office,* that he will not knowingly violate any election law * * *:" Section 6 (b) of the Act of July 12, 1913, P. L. 719, as amended.

On the face of the petitions out of which your inquiry arises, the affidavits of the candidates that they are eligible to the offices respectively of judge of the Supreme Court, judge of the Court of Common Pleas of Allegheny County and judge of the County Court of Allegheny County, are false affidavits. A carpenter is not eligible for election to any of the offices mentioned. Neither is a salesman, a welder, a machinist, a journalist, a plumber, or a housewife. To be eligible the candidate must be a lawyer.

Under these circumstances, the nomination petitions on their face are defective in that the proposed candidates are ineligible to the offices for which they aspire. Were the nomination petitions to be accepted and the candidates nominated and elected, it would clearly be the duty of the Attorney General forthwith to institute quo warranto proceedings to have the persons elected ousted from office because of their ineligibility.

It is our opinion that the nomination petitions in question should be refused. It is true that the acceptance of nomination petitions is a matter in which the Secretary of the Commonwealth acts as a ministerial and not as a discretionary officer, but in the exercise of his ministerial duties he does have the right to decline to receive a petition which is defective on its face: *Hamilton v. Johnson,* 293 Pa. 136. Thus, in the case cited, the Supreme Court sustained the right of the Secretary of the Commonwealth to refuse to receive a nomination petition which had an inadequate number of signatures giving the names and addresses of the signers. If a petition filed on behalf of an eligible candidate may be rejected because of defects in its execution which appear on the face of the petition, we entertain no doubt of your right to reject a petition when it appears upon the face of the petition that the candidate is ineligible, under the Constitution and laws of this Commonwealth, to the office which he seeks. See *Beaver's Petition,* 29 Dist. 245, and *Robert's Petition,* 2 D. and C. 236.

A question almost identical to that which you raise was decided by the Supreme Court of Minnesota in *State v. Schmahl* et al., 125 Minn. 533, in which a layman filed a nomination petition for judge of one of the district courts of Minnesota. The statute authorized only eligible persons to file as candidates, and the Constitution required judges of the district courts to be "learned in the law."

The Supreme Court of Minnesota, in holding that the name of the layman could not be placed on the ballot as a candidate, said:

> "Beyond question the framers of the Constitution used the last five words quoted in the sense of attorneys at law, and this view has since been uniformly accepted. The few authorities on the subject are to the same effect. See *Jamieson v. Wiggin,* 12 S. D. 16; *Freiler v. Schuylkill County,* 46 Pa. Superior Ct. 58. The matter does not merit further discussion."

Accordingly, you are advised that you may decline to file the nomination petitions in question.

Very truly yours,

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

OPINION NO. 18

School Treasurers—School Depositories—Bonds—Substitution of Collateral Securities for Surety Bonds—School Code Sections 326 and 509.

School treasurers and school depositories may not post collateral securities in place of furnishing the bonds with sureties required by sections 326 and 509 of the School Code of 1911, P. L. 309.

Department of Justice,
Harrisburg, Pa., July 30, 1931.

Honorable James N. Rule, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether treasurers of school districts and depositories of school funds may be permitted to post collateral security to insure faithful performance of their duties and protection of the public moneys, instead of furnishing bonds with individual or corporate sureties.

Section 326 of the School Code of May 18, 1911, P. L. 309, 24 P. S. 303, requires that:

> "Every person elected treasurer of any school district * * * shall before entering upon the duties of his office furnish to the school district a proper bond, in such amount and with such surety or sureties as the board of

> school directors therein may approve, conditioned for the faithful performance of his duties as school treasurer. * * *''

Section 509 of the Code, 24 P. S. 461, requires that before receiving any of the school funds, any depository selected by the directors: ''* * * shall furnish a proper bond, in such amount and with such surety or sureties as may be required, to be approved by the board of school directors, and conditioned upon the faithful keeping, paying out, and accounting for of all the school funds and property of said school district that may come into its hands * * *.''

It is clear from the statutory provisions that treasurers and depositories must furnish bonds. The question, therefore, is whether they can qualify by giving their own bonds accompanied by a pledge of collateral security. May the statutory requirement of ''surety or sureties'' be construed to mean simply ''security?'' It is our opinion that it may not.

> ''In a broad sense a 'surety' is one who becomes responsible for the debt, default, or miscarriage of another. But in a narrower sense a 'surety' is a person who binds himself for the payment of a sum of money, or for the performance of something else, for another who is already bound for the same, and in some jurisdictions there are statutory definitions to this effect. A 'surety' has also been defined as a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so:'' 50 C. J. 13.

See also Words and Phrases, ''Surety;'' *Touhill v. Dayton Construction Company*, 12 Pa. Dist. 560; Act of July 24, 1913, P. L. 971.

All authorities concur in attributing to the term ''surety'' an implication of a personal and general obligation. We have not found any instance in which the word was used as synonymous with ''security.'' One who furnishes collateral security for the debt or obligation of another, without assuming a personal liability for it, is never spoken of as being a surety.

The distinction between a contract of suretyship and the pledging of collateral security is illustrated by *Herr v. Reinoehl*, 209 Pa. 483, 487. In that case our Supreme Court had before it for construction the Act of June 8, 1893, P. L. 344, which forbade any married woman to become ''* * * accommodation indorser, maker, guarantor or surety for another.'' The Court held that a married woman's assignment of a life insurance policy as security for her husband's debt was valid, saying:

> "* * * But what the statute prohibits is the incurring of a personal liability for the forbidden purpose, a liability which carries the risk of a general judgment. * * * The pledge of specific property whether real or personal was within her previously existing powers, and these, as heretofore said, were not narrowed by what was intended as an enabling statute to enlarge them."

Herr v. Reinoehl was recently cited on the same point in *Commercial Acceptance Corporation v. Ruppel,* 295 Pa. 88.

Sections 326 and 509 of the School Code expressly require bonds with surety or sureties. We are of the opinion that the language of these sections does not permit substitution of pledges of collateral security in the place of such surety bonds. The Legislature has expressly authorized such substitutions in the case of deposits of State Funds (Act of February 17, 1906, P. L. 45, Section 7; The Fiscal Code of April 9, 1929, P. L. 343, Section 505), and in Court proceedings: Act of April 22, 1909, P. L. 115. In each of those cases deposits of cash or securities are permitted as alternatives to the furnishing of surety bonds.

The fact that legislative authority was deemed necessary to permit the substitution in those cases and that no such permission has been given in the ones now before us, confirms our conclusion that no such alternative was contemplated in respect to school treasurers and school depositories.

We, therefore, advise you that school treasurers and depositories cannot qualify without furnishing to the school districts satisfactory surety bonds.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 19

School Districts—Libraries—Establishment and Maintenance by School Districts—School Libraries—Non-school Libraries—School Code Sections 401 and Art. XXV.

School districts may establish and maintain public school libraries which are, in effect, free, public, non-sectarian libraries. School funds may not be used for the sole maintenance of any libraries except public school libraries. School funds may be used to assist in the maintenance, or establishment and maintenance of non-school public libraries where no separate public school library exists.

Department of Justice,
Harrisburg, Pa., July 30, 1931.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether a board of school directors may use funds of the school district for the maintenance of a public library or to assist in maintaining such a library. You ask further whether the fact that the board maintains school libraries under statutory authority would, in any way, affect the answer to your first question.

The School Code of May 18, 1911, P. L. 309, provides for the establishment and maintenance of public school libraries from the funds of school districts. The basic authorization is found in Section 401 of the Code, 24 P. S. 331. Article XXV of the Code, 24 P. S. 2161, et seq., contains detailed directions in respect to such libraries.

Section 2507 of the Code authorizes school boards to appropriate from school taxes such sums as they may deem proper, not exceeding one mill on each dollar of the assessed valuation of taxable property, for the support and maintenance of public school libraries within their districts. It also contains provisions for paying the cost of buildings for school libraries.

Section 2513 provides for keeping public school libraries open throughout the year "For the use and convenience of the residents of the district." It also authorizes the directors to permit residents of other school districts to use the libraries.

Section 2510 provides that:

> "Instead of establishing or maintaining a separate public school library, any board of school directors may, by a two-thirds vote, join with or aid any individual or association in the maintenance, or the establishment and maintenance, of a free, public non-sectarian library, under such written agreement as it may determine, which agreement shall be entered in full in its minutes. Such agreement shall specify the manner, terms, and conditions agreed upon for the aiding, establishment, maintenance, or management of such joint library."

Section 2519, which was added to the Code by the Act of May 7, 1929, P. L. 1630, authorizes districts of the second class to levy a special tax not exceeding one mill, annually, to be used in assisting in the maintenance of any free, public, non-sectarian library in the municipality, in accordance with any agreement for such aid authorized by law.

From the statutory provisions referred to, it would seem to be clear that school directors may maintain, with public funds, public school libraries that are, as a practical matter, free, public, non-sectarian libraries. The Code definitely provides for their use by the residents, not only of the one school district, but of other districts. Use of the libraries is not confined to use by school pupils. We, therefore, advise you that in this sense school boards may maintain free, public, non-sectarian libraries. This may be done, however, only in accordance with the provisions of the School Code. The boards have no authority to maintain wholly any library which is not a public school library as defined and regulated by the Code.

Sections 2510 and 2519 of the Code would seem to be clear in respect to the authority of school boards to assist in the maintenance, or establishment and maintenance, of libraries which are not separate school libraries. Section 2510 expressly authorizes the boards to give such assistance "Instead of establishing or maintaining a public school library." Under Section 2519, districts of the second class may levy a special tax for the purpose. No authority to levy such a special tax appears to be given to districts of other classes, but we are of the opinion that Section 2510 carries with it authority to use public funds for the purposes set forth in the section, to the same extent as such funds might be used for separate public school libraries under Section 2507.

What we have just said answers your last question. Section 2510 authorizes assistance to outside libraries only where separate public school libraries are not established and maintained.

We, therefore, advise you that school funds may be used for the establishment and maintenance of public school libraries which are, in effect, free, public, non-sectarian libraries. School funds may not be used for the sole maintenance of any library except such public school libraries as are provided by the School Code. School funds may be used to assist in the maintenance or the establishment and maintenance of non-school public libraries, but this may be done only where no separate public school library is established.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 20

Supplies—Reciprocal Purchase of—Equipment Owned by State Contractor.

Section 523 of The Administrative Code of 1929 as amended by the Act of 1931, No. 144, does not prohibit a contractor, performing a state contract, from

using equipment owned by him, which was purchased in a state, which prohibits the use of supplies in or on its public works not manufactured in such state.

Department of Justice,
Harrisburg, Pa., August 10, 1931.

Honorable S. S. Lewis, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have asked our advice in reference to Section 523 of The Administrative Code of 1929, as amended by Act No. 144, approved June 1, 1931. This section amends The Administrative Code of 1929 by adding a new section which relates to reciprocal limitations upon the purchase of supplies and materials.

You particularly ask:

1. What steps you should take in awarding contracts where the contractor has road building equipment formerly purchased by him in a state which prohibits use of equipment not manufactured in such state.

2. Should you specify that no equipment manufactured in such state shall be purchased for use on your projects.

The above section reads as follows:

> "Reciprocal Limitations upon the Purchase of Supplies and Materials.—It shall be unlawful for any administrative department, board, or commission to specify for or permit to be used in or on any public building or other work erected, constructed, or repaired at the expense of the Commonwealth, or to purchase, any supplies, equipment, or materials manufactured in any state which prohibits the specification for or use in or on its public buildings or other works or the purchase of supplies, equipment, or materials not manufactured in such state."

Your inquiry resolves itself into the question whether the above section applies to equipment owned by a contractor, as part of his own road building equipment with which he does his work, but which does not become a component part of the building or other public work.

The section applies to the erection, construction, or repair of public works at the expense of the Commonwealth. It makes it unlawful *to use "in or on* any public building or other work * * * or to purchase * * * any supplies, equipment, or materials" which are manufactured in states that prohibit use of supplies, equipment, or materials on its public works not manufactured in such state.

The evident intention of this provision was to limit the Commonwealth in the use or purchase of materials, equipment, and supplies

that enter into and become a component part of any public work. It does not relate to materials, supplies, and equipment which are owned by a contractor and used exclusively by him in carrying out his contract.

You are therefore advised that the above section does not apply to machinery and road building equipment which is the property of a contractor, and used by him in the performance of State contracts.

Very truly yours,

DEPARTMENT OF JUSTICE,
JOHN A. MOSS,
Deputy Attorney General.

OPINION NO. 21

Street Railways—Abandonment—Obligation to Restore Highway—Turnpikes.

Upon the abandonment of the facilities of a street railway company, it is the obligation of the company or the purchasers of its facilities, upon removal of the tracks from a state highway, to replace the surface of the highway in the same condition as the rest of the road at the time of the removal of the tracks.

A turnpike operated by a private company is a public highway.

Department of Justice,
Harrisburg, Pa., August 17, 1931.

Honorable Samuel S. Lewis, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have inquired as to the liability of the Lancaster, Ephrata and Lebanon Street Railway Company to replace the surface on State Highway Route No. 137, made necessary by the removal of the tracks of the company.

That part of State Highway Route 137 with which we are concerned was formerly a turnpike operated and maintained by the Clay and Hinkletown Turnpike Company.

On July 26, 1911, the turnpike company entered into an agreement granting to the Ephrata and Lebanon Street Railway Company, predecessor of the Lancaster, Ephrata and Lebanon Street Railway Company, the right to construct and maintain a single track railway from Ephrata to Clay, along the turnpike, under certain terms and conditions which will be referred to hereafter.

We are advised by the Department of Internal Affairs that the Lancaster, Ephrata and Lebanon Street Railway Company was recently sold under foreclosure proceedings, and the purchaser is now removing the tracks of the company. The turnpike was purchased September 12, 1919, by the Commonwealth, the County of Lancaster contributing a portion of the purchase price.

We are of the opinion that it is the duty of the railway company, or its successor by purchase, upon abandonment of its franchise and the removal of its rails from the improved portion of the highway, to replace and restore that portion formerly occupied by its tracks to a condition equal to the balance of the road at the time the removal was effected.

It is fundamental that the highways of the Commonwealth are held in trust for the use of all the citizens thereof in common. They must be kept open and free from nuisance at all times for the benefit of any who would use them. Delegation of the duty of maintenance to any subdivision of the Commonwealth does not change its status as a public highway. The right of the public in highways cannot be bargained away. Special rights of use granted to public service corporations are at all times held in subordination to the superior rights of the public and all necessary and reasonable police ordinances. On this subject, Elliot, in his work on Roads and Streets, 3rd Ed., Section 939, says:

> "The general rule is well settled that no contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police power, for it is incapable of alienation."

It has, therefore, been repeatedly held that the duty of street railways to repair the surface of the road between the tracks exists as a common law duty, irrespective of contract or ordinance permitting them to occupy the highway. *Reading v. United Traction Company,* 202 Pa. 571.

The duty of repair, which formerly rested on the municipality, is transferred to the traction company, which is given a special use of the highway, and the responsibility for maintaining that portion used by it rests upon the railway company, except when expressly withheld by the grant and its imposition continued on the municipality. *Reading v. United Traction Company,* 215 Pa. 250, at page 255.

Where it exists, the duty to repave extends to paving in an improved manner when the necessity for repaving arises, and this is so even though the contract under which the railway company occupies the highway specifically mentions the type of paving to be laid. As was said in *Reading v. United Traction Company,* 202 Pa. 571, at 576:

> "* * * The requirement to pave with cobblestones was intended to exact from the company something more, not something less, than a reasonable correspondence with the rest of the street. There was no thought of relieving the company from any obligations devolving upon it under the law, but to impose upon it a duty greater than, in view of the then condition of the streets, the law would have imposed upon it. * * *"

Furthermore, any contract purporting to bargain away the public rights and relieve the railway company of duties specifically imposed upon it by law, would be beyond the power of a municipal subdivision of the State to enter into, and could not be enforced. *Street Railways,* 25 D. R. 439.

The question whether the common law duty resting upon a railway company to repave the street between its tracks includes the duty to restore the road after the abandonment of the railway and removal of its tracks, has not arisen in this State. It has, however, come up before the Supreme Court of Ohio in the case of *City of Mt. Vernon v. Berman & Reed,* reported in 125 N. E. 116. In that case, the railway company occupied the streets of the City of Mt. Vernon under an ordinanee which required it to pave between its rails. On a sale of the company's property, the purchaser thereof refused to repave the surface of the street after removing the rails. The Court held that the purchaser succeeded to the obligations of the company and that the obligation to repave the street, to keep it opened and free from nuisance, and to repave it in a manner equivalent to the balance of the road, continued after the sale. The Court said, at page 119:

> "* * * It would be a strange rule which would permit the grantee to violate its contract, to abandon and wholly fail to perform the service to the public for which the franchise was granted, and then to go upon the street and tear up and render it unfit for travel, without restoration; to tear up expensive paving which it was obligated by its contract to pay for, and which it wholly failed to do. * * *"

It is, therefore, the general rule that a street railway company is obliged to restore the surface of the highway upon removal of its rails. Does the general rule apply where the franchise is granted not by a municipality but by a turnpike company which, at the time of the grant, operated and maintained the road?

It has repeatedly been held that a turnpike operated by a private company is none the less a public highway forming a part of the system of highways of the Commonwealth. In *Northern Central Railway Company v. Commonwealth,* 90 Pa. 300, the Court sustained an indictment against a railway company for maintaining a badly

constructed crossing over a turnpike on the grounds that it was a public nuisance, interfering with the free passage of the public on the turnpike. At page 302, the Court said, quoting Chief Justice Shaw in *Commonwealth v. Wilkinson,* 33. Mass. 175:

> " 'We think, that a turnpike road is a public highway, established by public authority for public use, and is to be regarded as a public easement, and not as private property. The only difference between this and a common highway is, that instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at the expense of individuals in the first instance, and the cost of construction and maintenance is reimbursed by a toll, levied by public authority for the purpose. Every traveller has the same right to use it, paying the toll established by law, as he would have to use any other public highway.' "

Again, in *Pittsburgh, etc., Railway Company v. Commonwealth,* 104 Pa. 583, a turnpike was held to be a public highway within the meaning of the statutes requiring a railway to construct a new road where it occupied any existing public highway.

Also, in *Derry Township Road,* 30 Pa. Super. 539, at 541, the Court held that a turnpike was a public highway within the meaning of the statutes requiring termini of any public highway to be in a public highway or place of necessary public resort. The Court said in that case, at page 541:

> "* * * The corporation was the agent of the state for the purpose of constructing the road, the road is a part of the system of public highways of the commonwealth, and the court below had jurisdiction to add to that system a new road connecting the turnpike with another public highway."

It is apparent from these decisions that a turnpike has the same attributes, as far as the public is concerned, as any other highway. The only difference is that a private agent is vested with the duty of maintenance, for which it is given a corresponding right to collect tolls to reimburse it. As turnpikes are public highways, the rights of the public therein cannot be affected to any greater extent than their rights in other highways.

It is our opinion, therefore, that the general rule applies to this road, and the street railway must be held to the same duty to restore the portion formerly occupied by its tracks to a condition equal to the balance of the road.

The contract dated July 26, 1911, between the Clay and Hinkletown Turnpike Company and the Ephrata and Lebanon Street Railway Company, provided, inter alia:

> "* * * Where the middle of the turnpike is occupied the railway company at its own expense shall reconstruct the turnpike road so that it shall be at least ten and a half feet in width at each side of the rails and the space between the rails shall be macadamized at the expense of the railway company and kept in good order and repair at the expense of the said railway company so as to furnish a safe and even driveway over said tracks so horses, wagons, carriages and vehicles can cross and recross from one side of the tracks to the other and said railway tracks shall be so laid as to strictly conform to the grade of the turnpike road and at each crossing along said turnpike the same provisions as to grade maintains and cost shall apply and be binding. * * * The railways company shall construct and maintain their roadbed poles and wires so as not to interfere with, obstruct or endanger travel on said turnpike and shall provide, construct and maintain safe and suitable crossings at all lanes and crossings roads. * * *"

The above parts of the contract of 1911 are no more than a restatement of the common law duty of the company, and the Department of Highways, having succeeded to all the rights of the turnpike company by its purchase in 1919, succeeds to those arising under the contract. See *Cheltenham Township v. P. R. T. Co.*, 292 Pa. 284. These contract obligations relating to the paving of roads are enforcible by the Courts: *Sayre Borough v. Waverly, Etc., Traction Company*, 270 Pa. 412. Upon the failure of the railway company to do the work, the State can do it and collect from the company. See *Swarthmore Borough v. P. R. T. Co.*, 280 Pa. 79.

You are therefore advised that it is the obligation of the Lancaster, Ephrata and Lebanon Street Railway Company, or its successor, upon removal of the tracks, to replace the surface of the highway in the same condition as the rest of the road at the time of the removal of the tracks.

If the purchaser refuses to comply with a notice from you to restore the surface of the highway, you can, by a suit in equity, compel him to do so. If, in your judgment, the surface should be restored at once, your Department would have authority to do the work at the expense of the Commonwealth and collect the cost thereof by suit against the purchaser.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN A. MOSS,

Deputy Attorney General.

OPINION NO. 22

Taxation—School Tax Collectors—Return of Delinquent Taxes to County Commissioners—Acts of May 9, 1929, P. L. 1684 and May 29, 1931, P. L. 280.

Collectors of school taxes may return unpaid taxes to the county commissioners under the Acts of 1929, P. L. 1684 and 1931, P. L. 280, irrespective of whether there is on the taxed land, personal property from which the tax could be collected.

Under Section 21 of the Act of 1931, P. L. 280, no returns of delinquent taxes may be made to the county commissioners if the taxing authorities direct the collector not to make such returns.

Department of Justice,
Harrisburg, Pa., August 24, 1931.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your letter of July 28, in which you ask whether, under the Act of May 9, 1929, P. L. 1684, collectors of school taxes may make returns to the county commissioners of unpaid taxes on seated lands, regardless of whether there is personal property on the land from which the taxes could be collected. You call attention to Section 559 of The School Code, which requires every tax collector to account to the treasurer of the school district on or before June 1 of each year for all taxes appearing on his duplicate, except items from which he has been exonerated and those levied on real estate upon which there is no personal property out of which the taxes might have been collected.

The Act of May 21, 1913, P. L. 285, which provided for the return to the county commissioners of unpaid taxes on seated lands, expressly limited such returns to cases where no personal property from which the taxes could be collected could be found on the land. This portion of the Act of 1913 remained unchanged until 1925, when by the amendment of May 14, 1925, P. L. 735, the limitation was stricken from the Act.

The next legislation on the question is found in the Act of May 4, 1927, P. L. 712, which is an amendment to Section 21 of the Act of April 15, 1834, P. L. 509. The original section prescribed the remedies that might be had against persons and personal property for collection of delinquent taxes. The amendment of 1927 added the following provision:

> "* * * No failure to demand or to collect any taxes by distress and sale of goods and chattels, or by imprisonment of the delinquent, shall invalidate any return

made or lien filed for nonpayment of taxes or any tax sale had for the collection of such taxes on such return or lien."

The Act of May 4, 1927, P L. 716, which applied only to counties of the eighth class, provided for the return of taxes on seated lands, without limitation as to the availability of personal property from which the taxes could be collected.

It is apparent, therefore, that before the Act of 1929 was adopted, provision had been made for the return of taxes to the commissioners without regard to the presence or lack of personal property on the land.

The Act of 1929 expressly repealed the Act of 1913 and also the Act of May 4, 1927, P. L. 716, and attempted to furnish a complete system for return of unpaid taxes to the commissioners. Like the Act of 1913 after adoption of the amendment of May 14, 1925, P. L. 735, and like the Act of May 4, 1927, P. L. 716 it contains nothing that would restrict such returns to taxes on lands where no personal property was available. We do not see how any such restriction could be read into it.

The Act of 1929 has been, in turn, superseded and repealed by the Act of May 29, 1931, No. 132. This latter Act, in many respects, follows the Act of 1929. It provides for similar returns to the county commissioners, and, like the Act of 1929, in no way refers to the presence of personal property on the land.

Section 21 of the Act of 1931 contains a new provision, however. It directs that no tax collector shall make a return of taxes under the Act if the taxing authorities shall direct him not to do so. This makes it possible for a school board or other taxing body to prevent such return if it shall so desire.

We have dealt with your question without reference to Section 559 of The School Code for the reason that the Acts we have mentioned were all adopted after that section of the Code. If they impose upon collectors of school taxes duties or give them privileges inconsistent with the provisions of Section 559, the Code provisions must yield, and the later enactments will control.

Therefore we conclude and advise you that collectors of school taxes may return to the county commissioners unpaid taxes on seated lands even though there may be personal property on the land from which the taxes might have been collected. No returns as to seated lands may be made under the Act of 1931, however, if the school

directors, acting under Section 21 of the Act, notify the collector not to make such returns.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 23

Child Labor—Minors—Employment in Coal Mines—Workmen's Compensation—Acts of June 9, 1911, P. L. 756 and April 14, 1931, P. L. 36.

The Act of 1931, P. L. 36, amending the Act of 1919, P. L. 730, does not prohibit the employment of minors under the age of eighteen years in bituminous coal mines. It simply increases the burden of employers who violate the labor laws concerning such minors. Subject to the limitations contained in the Act of 1911, P. L. 756, minors over the age of sixteen though under the age of eighteen years may work in bituminous mines.

Department of Justice,
Harrisburg, Pa., September 1, 1931.

Honorable A. M. Northrup, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether minors under the age of eighteen years, but over sixteen, may be employed in bituminous coal mines. You also ask whether the Act of April 14, 1931, No. 29, in any way restricts the employment of minors under the age of eighteen years.

Section 5 of the Act of May 13, 1915, P. L. 286, 43 P. S. 44, the Child Labor Law, contains the following provisions:

> "No minor under eighteen years of age shall be employed or permitted to work in the operation or management of hoisting machines, in oiling or cleaning machinery, in motion; in the operation or use of any polishing or buffing-wheel; at switch-tending, at gate-tending, at track-repairing; as a brakeman, fireman, engineer, or motorman or conductor, upon a railroad or railway; as a pilot, fireman, or engineer upon any boat or vessel; in or about establishments where gunpowder, nitro-glycerine, dynamite, or other high or dangerous explosive, is manufactured or compounded; as a chauffeur of an automobile or an aeroplane.

> "In addition to the foregoing, it shall be unlawful for any minor under eighteen years of age to be employed or permitted to work in any other occupation dangerous to the life or limb, or injurious to the health or morals, of the said minor, as such occupations shall, from time to time, after public hearing thereon, be determined and declared by the Industrial Board of the Department of Labor and Industry: Provided, That if it should be hereafter held by the courts of this Commonwealth that the power herein sought to be granted to the said board is for any reason invalid, such holding shall not be taken in any case to affect or impair the remaining provisions of this section."

Section 1 of Article XVIII of the Act of June 9, 1911, P. L. 756, 52 P. S. 34, provides as follows:

> "No boy under the age of fourteen years, and no woman or girl of any age, shall be employed, permitted or suffered to work in or about any mine, and no boy under the age of eighteen years shall be permitted to mine or load coal in any room, entry, or other working place, unless in company with an experienced person over eighteen years of age."

The foregoing provisions constitute all of the statutory law on the subject.

We understand that neither the Industrial Board nor your Department has ever declared that all mining operations are dangerous to life or limb or injurious to health or morals.

Accordingly, there is no general prohibition of the employment of boys between the ages of sixteen and eighteen in bituminous mines. Of course, the Act of 1911, above quoted, must be obeyed; boys under eighteen may mine or load coal only in company with experienced persons over that age. This, however, is the only statutory limitation on the right of boys between sixteen and eighteen years of age to be employed in bituminous mines.

The Act of 1931, No. 29, is an amendment to the Workmen's Compensation Act. It provides that where an injured employe is a minor under eighteen years of age who was employed or permitted to work in violation of any law relating to such minors, compensation shall be payable in double the amount that would otherwise be allowed.

This Act does not affect the law in respect to the occupations in which minors under the age of eighteen may be employed. It merely increases the burden of employers who violate the labor laws.

Therefore, we advise you that minors over the age of sixteen, but under eighteen, may legally be employed in bituminous coal mines,

subject to the provisions of the Act of June 9, 1911, P. L. 756; and that the Act of 1931 in no way affects the legality of any such employment.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 24

Supplies—Reciprocal Purchase of, by Dept. of Highways—Extent of Prohibition of, as to Articles Manufactured in Other States.

Under Section 523 of The Administrative Code of 1929 as amended by Act No. 144 approved June 1, 1931, no supplies manufactured in Minnesota can be purchased for use by the State of Pennsylvania on its public works.

Department of Justice,
Harrisburg, Pa., September 4, 1931.

Honorable S. S. Lewis, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: We have your inquiry whether, under Section 523 of The Administrative Code of 1929, as amended by Act No. 144, approved June 1, 1931, you should reject materials, supplies and equipment manufactured in Minnesota, by reason of certain laws of that State. Section 523 of The Administrative Code, as amended, provides as follows:

> "Reciprocal Limitations upon the Purchase of Supplies and Materials.—It shall be unlawful for any administrative department, board, or commission to specify for or permit to be used in or on any public building or other work erected, constructed, or repaired at the expense of the Commonwealth, or to purchase, *any supplies, equipment, or materials manufactured* in any state which prohibits the specification for or use in or on its public buildings or other works or the purchase of supplies, equipment, or materials not manufactured in such state."

There are three provisions in the Minnesota laws, to which you refer, and which are quoted at length from *Mason's Minnesota Statutes* (1927) Vol. 1:

> "Section 4430. RULES—Said board shall make specific rules as to the manner in which supplies shall be purchased and contracts made for the several institutions, so as to insure competition and publicity. Any person

desiring to sell supplies to an institution, who shall file with the chief executive officer thereof, and with the secretary of the board, a memorandum showing his address and business, shall be afforded an opportunity to compete for the furnishing of supplies, under such rules and limitations as the board may prescribe. In purchasing supplies, preference shall be given to Minnesota dealers when it can be done without loss to the state. Samples furnished shall be properly marked and preserved for six months after purchase of such supplies."

"Section 4434. Material produced in state to be given preference in public buildings—That in any and all buildings hereafter erected by the State of Minnesota, or to the erection of which the State of Minnesota has granted aid, preference shall always be given in the erection thereof to materials produced or manufactured in the State of Minnesota by citizens or residents thereof wherever practicable; provided, that in the building and erecting of foundations, steps, approaches, and the outer walls of any and all such buildings, materials produced and manufactured in the State of Minnesota by citizens and residents thereof only shall be used. Provided, that the provisions of this act shall not apply to metal lath or Portland cement necessarily used in any such foundations, steps, approaches or outer walls. ('15 c. 211 Sec. 1)."

"Section 4435-1.—Home products used in buildings.—That in all such buildings that involve the use of cut or dressed stone in their construction the work of cutting, dressing or fabricating such stone shall be done within the territorial limits of the State of Minnesota, and provisions to this effect shall be incorporated in all contracts hereafter made for the erection of such buildings. Provided that this act shall not be held to affect contracts existing at the time this act goes into effect. ('15, c. 211, Sec. 2-A: added '25, c. 189 Sec. 1)."

Section 4434, above quoted, is the only one which absolutely prohibits the use of materials not manufactured in Minnesota. It constitutes a limited prohibition, applicable, with certain exceptions, only to materials used in building and erecting foundations, steps, approaches and the outer walls of State buildings.

Is the use or purchase by the Commonwealth of Pennsylvania of any materials, manufactured in Minnesota, prohibited because of the limited prohibition imposed by Minnesota in favor of materials manufactured in that state?

Section 523 of The Administrative Code prohibits the use or purchase of *any* supplies, equipment or materials manufactured in a state which prohibits the use or purchase of materials for its public works not manufactured in such state. The prohibition imposed on the

Commonwealth of Pennsylvania is general and applies to all supplies, equipment or materials. It becomes effective as to the products of another state whenever that state prohibits the use or purchase of non-domestic supplies for its public works, irrespective of the degree or extent of the prohibition in that state. If the intent had been to prohibit the use or purchase of manufactured articles only to the same extent to which another state prohibits the use of non-domestic products, the Legislature could readily have expressed that intention by inserting the word "such" in the next to the last line of the section before the words "supplies, equipment or materials."

The Commonwealth of Pennsylvania, by this enactment, does not prohibit the use or purchase of foreign manufactured goods generally. It limits itself in the use or purchase of foreign goods manufactured only in those states which attempt to discriminate against Pennsylvania products in the building of their public works or purchase of their supplies.

It is our opinion that Minnesota does prohibit the use of foreign manufactured supplies, equipment or materials in or on its public buildings. Therefore, under Section 523 of The Administrative Code, it is unlawful for any administrative department, board or commission to purchase or to specify or permit to be used, in or on any public building or other work for which the Commonwealth of Pennsylvania pays, any supplies, equipment or materials manufactured in Minnesota.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN A. MOSS,

Deputy Attorney General.

OPINION NO. 25

National Guard—Participation in Yorktown Sesqui-centennial Celebration—Expenses—Availability of Appropriation—Space in Yorktown Book—Act of 1931, No. 31A.

Space in the Yorktown Book to be published in connection with the Yorktown Sesqui-centennial Celebration, can be taken provided it is used to exploit the Pennsylvania National Guard,—but it will not be permissible to take space for a general description of the achievements of Pennsylvania without reference to the participation of the National Guard in the celebration. Act of 1931, No. 31A.

Department of Justice,
Harrisburg, Pa., September 9, 1931.

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

Sir: You have asked us to advise you whether payments in connection with the Yorktown Sesqui-centennial Celebration may be made under Act No. 31-A, approved June 22, 1931.

The act makes an appropriation of ten thousand dollars ($10,000) to the Department of Military Affairs "for the payment of the necessary traveling, subsistence, transportation, housing, contingent, or other expenses incident to the participation in the Sesqui-centennial Celebration at Yorktown, Virginia * * * of officers and enlisted men of the Pennsylvania National Guard selected by the Adjutant General with the approval of the Governor."

The Yorktown Sesqui-centennial Association has asked Pennsylvania to make a contribution of two thousand dollars ($2,000) toward the expense of the celebration and has also requested us to subscribe for a space in the "Yorktown Book," in which each of the forty-eight states is asked, through its Governor, to tell of its achievements. The subscription rate is: two pages, $500; one page, $300; one-half page, $175; and a quarter page, $100.

You wish to know whether under the act cited we may lawfully make the contribution requested and subscribe to space in the Yorktown Book.

Obviously, the appropriation made by Act No. 31-A can be expended for a single purpose, namely, the participation of a group of selected officers and enlisted men of the Pennsylvania National Guard in the celebration to be held at Yorktown in October of this year. Expenses incident to the participation of these men in the celebration can be paid out of the appropriation, but such expenses must bear a direct relationship to this particular type of participation.

It would not be proper to expend a lump sum out of this appropriation by contributing it to the Yorktown Sesqui-centennial Association to be used toward the payment of the general expenses of the celebration.

Space in the Yorktown Book can be taken, provided it is used to exploit the Pennsylvania National Guard, representatives of which will participate in the celebration. It would, of course, be permissible to speak of Pennsylvania in connection with the description of our National Guard whose representatives will participate directly in the celebration. It will not be permissible to take space in the Yorktown Book for a general description of the achievements of Pennsylvania

without reference to the participation of the National Guard in the celebration.

Very truly yours,

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

OPINION NO. 26

Department of Banking—Duties of Secretary in Possession of Trust Companies —Administration of Trust Department Prior to Liquidation—Banking Act of 1923, Sec. 40.

Under the provisions of Section 40, of the Act of 1923, P. L. 809, it is the right and duty of the Secretary of Banking in possession of closed institutions under his supervision actively to administer the trust department thereof pending his decision to liquidate the affairs of the institution with the power to secure the appointment of a substitute fiduciary during such period and the duty to apply for such substitution following the order of liquidation.

Department of Justice,
Harrisburg, Pa., September 9, 1931.

Honorable William D. Gordon, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have requested an opinion from this Department with respect to your duties as Secretary of Banking in possession of institutions maintaining trust departments.

The Banking Act of June 15, 1923, P. L. 809 provides, in Section 40, entitled "Trust Funds," as follows:

> "(a) Taking Possession by Secretary.—Whenever the secretary takes possession of the business and property of a corporation or person in accordance with the provisions of this act, he shall also take possession of all funds, property, and investments held by such corporation or person in any fiduciary capacity, but shall keep the same separate and apart from the assets thereof.
>
> "(b) Substituted Fiduciaries.—Upon determining to liquidate the affairs of such corporation or person, the secretary shall forthwith give written notice to all parties interested in any such funds, property, or investments held in a fiduciary capacity, so far as such notice is practicable, requiring them within thirty days to apply to the proper court or official for the appointment of substituted fiduciaries to take the place of such corporation

or person. On the failure or neglect of the parties so notified to make such application within the time designated, or in case the parties in interest can not be notified, the secretary shall himself apply for such appointment of substituted fiduciaries.

"(c) Settlement Without Accounting.—In any instance where there shall be no dispute as to the amount or identity of such funds, property, or investments, and all parties in interest are sui juris and so request in writing, the secretary may, without filing of an account, transfer, pay over, and deliver to such substituted fiduciary all funds, property, and investments of the particular trust, taking from parties and such substituted fiduciary a receipt and release in full, which shall discharge the secretary and such corporation or person from any further liability in the premises.

"(d) Jurisdiction of Disputes as to Identity of Trust Fund.—In any instance where there shall be a dispute as to the identity of alleged trust funds, property, or investments, either because the same have become or are alleged to have become mingled with other funds, property, or investments, or otherwise, the court having jurisdiction of the liquidation proceedings shall have exclusive jurisdiction to determine such dispute.

"(e) Accounting.—In all other instances, the secretary shall, with the least possible delay, prepare and file in the courts having jurisdiction thereof the accounts of such corporation or person in such fiduciary capacities, and shall transfer, pay over, and deliver the balances, determined upon such accounts to be due, in accordance with the orders and decrees of such courts.

"(f) Deficiencies and Surcharges.—In any instance where it shall be ascertained by such court that there is a deficiency in any such trust funds, property, or investments for which such corporation or person is liable, or that such corporation or person is liable to surcharge in respect thereof, the amount thereof shall constitute an unpreferred claim against the general funds in the hands of the secretary, and the order or decree of such court shall be conclusive, subject to appeal as to the amount of such claim. Should the existence or amount of any deficiency or surcharge or the liability of the corporation or person thereof be undetermined at the time of any distribution of such general funds, it shall be the duty of the court ordering such distribution to set apart and withhold from such distribution a sufficient amount to pay the proportionate dividend upon such undetermined claim until the same shall have been finally adjudicated."

When you take possession of a trust company, you assume control not only of its commercial department, but also of its trust department, the assets and records of which you keep separate. In the case of the commercial department, it is your duty to collect accounts owing, pay off obligations and generally to put the house in order, as far as it is possible for you and your deputies to do so.

You then come to the point where it is necessary to determine whether or not you shall liquidate the institution or permit it to resume business, or otherwise to restore possession to its stockholders. Once you have determined to liquidate, you must follow a particular form of procedure prescribed by the act. All of this may require a period of months, during which time the beneficiaries of trust estates to which you have succeeded as trustee will be expecting to receive income and in some cases, upon the termination of the trust, principal. There will also be cases where securities constituting the principal of the estate may mature and be paid off, which will result in your having in your possession cash funds which should be invested. There may also be cases where real estate forms a part of the trust, which will necessarily require attention both as to receipts and expenditures. Likewise there will be cases, no doubt, where a change in the character of the securities should, for good reason, be made. All of this presupposes an active handling of the estate.

While the law requires that a substituted trustee be appointed after you have determined to liquidate a bank in possession, it does not direct you actively to conduct trust estates pending your decision on the question whether the bank will be liquidated or reopened. Nor does it prohibit you from doing so.

We are firmly of the opinion that the Legislature intended that you should actively conduct the business of estates as long as they are in your hands as successor to the trustee. The closing of the banking department of an institution does not in any way affect earmarked trust funds. They do not belong to general creditors and the stockholders do not have any interest in them. There would be no possible reason for interrupting the payment of income to beneficiaries or for postponing the distribution of principal in proper cases. However, as successor to the trustee, you have the responsibilities and are subject to the liabilities of a trustee and should seek and follow the guidance of this department whenever there is any legal question, however trivial it may appear, in connection with the administration of a trust estate.

Of course, if in any case it is the desire of the beneficiaries to apply to the courts having jurisdiction for the substitution of a trustee, they have the right to do so, and if you desire to follow this course and file such petition, whether or not you have determined to liquidate

the institution, you may do so. In any case, there should be no sudden cessation of all activity in the trust department as would work a hardship on the beneficiaries entitled to income and ultimately to the principal.

Under the provisions of subsection (f) of Section 40 of the Act of 1923, heretofore cited, where a deficiency in the trust funds of the institution in your possession is liable to result from inactivity on your part, the beneficiaries would be entitled to present an unpreferred claim against the general funds of the institution in your hands, which would naturally result in a diminution of the dividend to which depositors and the general creditors would be entitled.

Therefore, you are advised that while in possession of a trust company, it is your right and duty to administer its trust department as successor to the trustee, with the power in any case to resort to the court having jurisdiction to secure the appointment of a successor prior to your decision to liquidate, and with the duty on your part to apply for such substitution once you have decided to liquidate if the cestuis que trustent fail to do so within thirty days after notice from you, or if you are unable to serve them with notice to do so.

Very truly yours,

DEPARTMENT OF JUSTICE,
HAROLD D. SAYLOR,
Deputy Attorney General.

OPINION NO. 27

Banking Department—Right of State banks and Trust companies to pledge assets—Deposit of public funds.

1. A state bank incorporated under the Act of May 13, 1876, P. L. 161, as amended, is not specifically authorized by statute to pledge its funds to secure the deposit of public funds, but the courts have permitted such pledge, which may be legally made, at least when the bank is solvent.

2. A trust company incorporated under the Act of April 29, 1874, P. L. 73, as amended, is permitted by statute to pledge its securities to safeguard the deposit of public funds.

Department of Justice,
Harrisburg, Pa., September 10, 1931.

Honorable William D. Gordon, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have requested an opinion on the right of banks and trust companies under your supervision to pledge assets as collateral to secure the deposit of public funds.

As far as trust companies are concerned, the Act of May 29, 1895, P. L. 127, amending the Act of May 9, 1889, P. L. 159, provides that trust companies have the power "to receive deposits of moneys and other personal property and issue their obligations therefor." This has been interpreted by the Supreme Court of the Commonwealth in *Cameron v. Christy,* 286 Pa. 405, (1926), to mean that a trust company has authority to pledge its assets to secure county funds deposited in the name of a delinquent tax collector. The court, in the course of its opinion, held at page 409 as follows:

> "* * * The power to issue an 'obligation' for a deposit fairly implies a power to pledge securities therefor when necessary to safeguard the return of the deposit when called upon by the depositor. The conditions on which the deposit was made worked no hardship on other depositors. Presumably their deposits were made more secure by the additional business secured by the company through the large deposits made by defendant. * * *"

Although the facts in that case had to do entirely with a trust company incorporated under the provisions of the Act of April 29, 1874, P. L. 73, as amended, the court went so far as to say that a bank created by the Commonwealth had the same power.

The Act of May 13, 1876, P. L. 161, as amended, which is popularly known as the General Banking Act, contains no provision authorizing banks to pledge assets to secure deposits. There is, however, nothing in the act or in subsequent legislation which prohibits such procedure.

In the case of *Ahl v. Rhoads,* 84 Pa. 319, (1877), it was held that the Farmers' and Mechanics' Bank of Shippensburg, which was incorporated on April 11, 1862 by a special act of the Legislature, had the power to pledge a mortgage to secure the deposit of a private individual. Subsequently this mortgage was foreclosed and the bank became owner of the property securing it. It, in turn, gave its own mortgage against the property as substituted collateral to secure the private deposit. The Supreme Court, in upholding the right of the bank to make such pledge, said, at page 324:

> "* * * The same land was bound, the same remedies were reserved, and the same indebtedness remained. The power belongs to a corporation as to an individual, unless restrained by its charter or by other statutes, to assign its property or effects to pay preferred creditors, without the authority or consent of its stockholders: *Dana v. The Bank of the United States,* 5 W. & S. 233. The power of this bank to secure its debt to the plaintiff in the mode adopted here, has not been destroyed or impaired by the constitutional provision and the legislation under it, which the defendants have invoked. * * *"

In *Dana v. The Bank of the United States,* 5 W. & S. 233, (1843), it was held that The Bank of the United States, through its board of trustees, could exercise the power belonging to a corporation as to an individual, to assign its property and effects in trust to pay certain preferred creditors without the authority or consent of the stockholders, unless it be restrained by its charter or other legal provision.

There seems to be no subsequent decision of our courts on the question whether a Pennsylvania bank may pledge its assets as collateral for deposits. Certainly there is nothing in the cases overruling the decision of the court in *Ahl v. Rhoads,* supra. It would seem to be the law that they may do so. As was said by Mr. Justice Frazer in *Cameron v. Christy,* supra, at page 410:

> "* * * It surely cannot be contrary to public policy to follow a practically universal custom established by long usage and good business and which has likewise the sanction of the federal government in the deposit of its funds in national banks. In fact, we find it difficult to see in what respect an arrangement intended to safeguard public money on deposit in banks could be deemed contrary to public policy. The greater the precautions taken the better the public is secured. * * *"

To summarize:

(1) It is clearly the law of this Commonwealth that a trust company may pledge its assets to secure the deposit of public funds;

(2) There is no statute prohibiting a bank from doing likewise, and in our opinion it may lawfully make such a pledge if at the time it is solvent. If it is insolvent other depositors and creditors of the bank might attack the pledge as a preference in favor of a single depositor. We express no opinion on the question whether such an attack would be successful.

Therefore, you are advised that solvent banks and trust companies under your supervision may pledge assets to secure the deposit of public funds held by them.

Very truly yours,

DEPARTMENT OF JUSTICE,
HAROLD D. SAYLOR,
Deputy Attorney General.

OPINION NO. 28

School Treasurers—School Depositories—Bonds—Nature of Security Required —School Code, Sections 326 and 509.

The bonds required by school treasurers and school depositories by Sections 326 and 509 of the School Code of May 18, 1911, P. L. 309, may be bonds with individual or corporate sureties.

Department of Justice,
Harrisburg, Pa., October 6, 1931.

Honorable William M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether the bonds which school treasurers and school depositories are required to furnish may be the bonds of individual sureties, or whether corporate sureties are necessary.

Section 326 of the School Code of May 18, 1911, P. L. 309, 24 P. S. 303, requires each school treasurer to "furnish to the school district a proper bond, in such amount and with such surety or sureties as the board of school directors therein may approve, conditioned for the faithful performance of his duties as school treasurer."

Section 509 of the Code, 24 P. S. 461, requires each school depository to "furnish a proper bond, in such amount and with such surety or sureties as may be required, to be approved by the board of school directors."

In our opinion of July 30, 1931, to your Department, we advised that these sections do not permit treasurers or depositories to post collateral security in place of giving bonds with surety or sureties thereon.

As we pointed out in that opinion, a recognized definition of a "surety" is a person who becomes responsible for the debt, default or miscarriage of another. The basic concept of the term is a personal relation, a personal liability. It has been only in comparatively recent years that corporations have been authorized to become sureties. The law of sureties and suretyship developed when individual sureties were the only ones known to the law. The term could not now be limited to mean corporate sureties only, unless such a limitation is obviously intended in the particular case under consideration. In spite of the growth of the business of surety companies, vast numbers of transactions are still conducted in reliance on individual sureties. Therefore, unless the Legislature has distinctly indicated an intention to the contrary, there could be no justification for a construction of the statutory provisions above quoted that would limit the term "surety or sureties," as there used, to mean only corporate sureties.

There is no such limitation in the School Code, nor have we been able to find any other expression of the Legislature that would so restrict the usual meaning of the words in question.

Our attention has been called to the Act of June 26, 1895, P. L. 343, and to the Act of May 23, 1907, P. L. 225, as amended by the Act of April 26, 1923, P. L. 105. Neither of these Acts affects the present question. The Act of 1895 authorized corporations to become sole sureties on bonds which would otherwise require one or more individual sureties. The Act of 1907, as amended, authorized school districts and other municipal subdivisions to pay the premiums on any corporate surety bonds which might be required of their officers or employes. Neither of these Acts in any way restricted the meaning of the word "surety" to corporations, nor required school treasurers or depositories to furnish corporate surety.

Therefore, we advise you that school boards may legally accept from school treasurers and depositories bonds with individual sureties. The School Code leaves the question to the discretion of each board. The board must determine in each case whether it will accept a bond with individual sureties or will require corporate surety.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 29

School Districts—Indebtedness—Temporary Loans for Current Expenses—School Code Section 508.

School districts may borrow money in anticipation of current revenues to meet current expenses, without regard to existing indebtedness or their general borrowing capacity. Under Sec. 508 of the School Code as amended, school districts may borrow for current expenses in anticipation of revenues for two years, subject to the limitations stated in that section. School districts may not borrow money for current expenses for a longer period than two years.

Department of Justice,
Harrisburg, Pa., October 27, 1931.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you concerning a question submitted to you by the school board of Latrobe Borough. The board states that collection of school taxes in the borough during this and the coming year is likely to be very difficult, and asks what power

it has to borrow money on notes in anticipation of the collection of the taxes. Specifically, the board inquires whether it may issue notes payable in one, two and three years, the aggregate amount of the notes not to exceed two per centum of the assessed valuation of the taxable property of the borough.

We assume that the purpose of the proposed loans will be to meet current expenses of the school district, and not to make permanent improvements. Therefore, our discussion will be confined to a consideration of the extent of the authority of the district to borrow for current needs.

The Supreme Court has said:

> "Money borrowed for current expenses must be a sum within the current revenues. Current revenues include taxes for the ensuing year and all liquid assets, such as delinquent taxes, licenses, fines and other revenues which, in the judgment of the authorities, are collectible. * * *" *Georges Township v. Union Trust Company,* 293 Pa. 364, 369.

Loans for a year or less, to meet current expenses, which, together with other operating expenses, can be paid out of current revenues "due or created within the year," do not constitute increases of indebtedness under the Constitution: *Georges Township v. Union Trust Company,* supra, page 369; *Jackson v. Conneautville Borough,* 280 Pa. 601, 607; *Shamokin Banking, Etc., Company v. Coal Township Poor District,* 13 Pa. D. & C. 57, 61. Such borrowings may be made without respect to the amount of existing indebtedness or the constitutional borrowing capacity of the districts.

Therefore, the districts may issue notes payable within a year, in anticipation of current revenues.

Under the Georges Township Case, supra (pp. 369, 371), it would seem that without statutory authority, money could not be borrowed for a period longer than a year, to meet current expenses.

Secion 508 of the School Code of May 18, 1911, P. L. 309, as last amended by Section 12 of the Act of May 29, 1931, No. 130, provides as follows:

> "Any school district having no indebtedness, or whose indebtedness, incurred or created without the assent of the electors thereof, is less than two (2) per centum of the total valuation of the taxable property for school purposes therein, may, at any time, by or through its board of school directors, incur, in addition to any bonds herein authorized, a temporary debt, or borrow money, which, in school districts of the first and second class, shall not exceed four-tenths of one (1) per centum, and in school districts of the third and fourth class shall not exceed

one (1) per centum, of the total amount of taxable property in such school district, and issue an obligation or obligations therefor, under the seal of the district, if any, properly attested by the president and secretary thereof, payable within two years from the date thereof, and bearing interest not exceeding the legal rate but no such obligation shall be sold for less than par: Provided, That the incurring of any such temporary debt, or borrowing money upon such obligation, shall receive the affirmative vote of not less than two-thirds of the members of the board of school directors therein: Provided further, That the total amount of all indebtedness incurred or created without the assent of the electors in any school district issuing such obligations shall not, at any time, including all such obligations, exceed two per centum of the total valuation of the taxable property therein: Provided further, That any school district incurring any temporary debt, and issuing such obligations, in the manner herein provided, shall provide from its current revenue for the payment of the same, except such temporary debt as may be outstanding on the thirty-first day of December, one thousand nine hundred and thirty, and which, by the provisions of section five hundred and six, may be refunded by an issue of bonds."

This section of the Code does not in any way increase the borrowing capacity of the school districts, but it appears to authorize certain borrowings for current expenses to be extended over a period of two years.

Indebtedness incurred under this section of the Code for more than a year, of course, is chargeable against the constitutional borrowing capacity of the district; and before the loan may be obtained, the proceedings must be submitted to and approved by the Department of Internal Affairs, under the Act of March 31, 1927, P. L. 91, and its supplement of April 11, 1929, P. L. 516.

Therefore, we advise you that school districts may issue temporary obligations payable within one year out of current revenues, to meet current expenses, without regard to existing indebtedness or the general borrowing capacity of the districts. Within the limitations fixed by Section 508 of the School Code, the districts may borrow for current expenses in anticipation of revenues for two years. There is no authority for the districts to borrow money for current expenses for a longer period than two years.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 30

Unemployed—Constitutionality of Legislative Enactment for Relief of—Appropriations—Art. III, Sec. 18 of the Constitution.

The Legislature cannot make appropriations for the payment of money the furnishing of food, clothing and shelter to unemployed persons and their families either directly or through a State agency or to political subdivisions of the State.

The Legislature cannot, without violating the Constitution, make appropriations for unemployment relief to any charitable corporation or association. Art. III, Sec. 18 of the Constitution.

Department of Justice,
Harrisburg, Pa., October 27, 1931.

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

Sir: You have asked to be advised what measures the Legislature of Pennsylvania may take under our Constitution to relieve the distress resulting from unemployment during the forthcoming winter. Specifically, you wish to know:

First: Whether the Legislature can make appropriations for the payment of money or the furnishing of food, clothing and shelter to unemployed persons and their families;

Second: Whether the Legislature can make an appropriation to a State agency for these purposes;

Third: Whether the Legislature can appropriate money to political subdivisions of the State for these purposes; and,

Fourth: Whether the Legislature can make appropriations to incorporated or unincorporated welfare agencies, the money to be used for these purposes.

The constitutional provision which immediately comes to mind in considering the Legislature's ability to appropriate money for unemployment relief is Article III, Section 18, which reads as follows:

> "No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association."

In *Busser et al. Snyder,* 282 Pa. 440 (1925) the Supreme Court held that this section had been violated in the passage of the "Old Age Pension Act" of May 10, 1923, P. L. 189.

The Act created an Old Age Assistance Commission and county old age assistance boards which were to administer its provisions. It pro-

vided that assistance might be granted only to persons seventy years of age or upwards who had been residents of the United States and of this Commonwealth for certain periods prior to their application for aid, who had no children or other persons responsible for their support and able to support them, who had property of the value of less than three thousand dollars ($3,000), and who had an income of less than one dollar ($1.00) per day. The amount of assistance was to be such that when added to the income of the applicant from all other sources it would not exceed a total of one dollar ($1.00) a day.

In attempting to sustain the Act, the Attorney General sought to have the Court take the view that the words "person" and "community" as used in Article III, Section 18, of the Constitution have a restricted meaning. He argued that in view of the fact that old age assistance was to be granted by an administrative agency and that money for assistance had been and was to be appropriated to this agency, the constitutional provision was not applicable. In disposing of this argument, Mr. Justice Kephart said, at page 451:

> "* * * This contention is not sound; 'person' and 'community' are not limited to the idea of a single person or place where persons are located; they are used in an inclusive sense, relating to an individual or a group or class of persons, wherever situated, in any part or all of the Commonwealth. It applies to persons, kind, class and place, without qualification. The language of the Constitution is an absolute and general prohibition. Nor does the fact that the appropriation is made to an agency (the intermediate and practical step by which public money is distributed to citizens) aid appellant's case. The gift is not to the commission, but to the particular persons selected by the legislature to receive it. The commission cannot use the money; it merely passes it on to the selected class. It is none the less a gift directly to the individual, even though it pauses for a moment on its way thither in the hands of the agency. Nor can the act be sustained because the appropriation is to an agency as an arm of the government, working out a governmental policy. What the Constitution prohibits is the establishment of any such policy which causes an appropriation of state moneys for benevolent purposes to a particular class of its citizens, whether under the guise of an agency, as an arm of the government through which a system is created, or directly to the individual. * * *"

The Attorney General also argued that if the Old Age Pension Act were held unconstitutional, by the same reasoning grants of public money for the care and maintenance of indigent, infirm and mentally deficient persons without ability or means to sustain themselves must be stricken down as unconstitutional. Answering this proposition, Mr. Justice Kephart said, at page 453:

> "* * * To provide institutions, or to compensate such institutions for the care and maintenance of this class of persons, has for a long time been recognized as a governmental duty, and where institutions are compensated (except as hereinafter noted) for the care of indigent, infirm and mentally defective, including certain physically defective persons, such appropriations may well be sustained on this theory. The expenditure of money for such purposes is and long has been recognized as a function of government, and the manner of its administration is restricted only by section 18 of article III. * * *"

It was also argued that if this act were held void, the various State retirement acts must also fall. This the Court said was not sound because the retirement acts do not appropriate money for charitable or benevolent purposes. They provide compensation for the hazard of long continued public employment.

Finally, the Attorney General sought to sustain the Act on the ground that it was a "poor law" and that there is no constitutional inhibition against State aid for poor relief. This contention was discussed at length. At page 457, Judge Kephart said:

> "As said by Mr. Justice Brewer in *Griffith v. Osawkee Twp.*, 14 Kans. 418, 422, 27 Pac. St. Rep. 322, 324, 'Cold and harsh as the statement may seem, it is nevertheless true that the obligation of the state to help is limited to those who are unable to help themselves.' We agree with what the court below says on this question: 'That system provided for poor districts, poor directors and overseers, and for the relief of paupers as a matter of local concern. Those who framed the Constitution understood it, and no word is contained in the Constitution with reference to it. The system was left untouched. If there had been any purpose to change that system, some word indicating that purpose would have been found in the Constitution * * * * * The conclusion is therefore irresistible that a direct appropriation from the state treasury to any person or class of persons cannot be sustained on the theory that it is a discharge of the inherent obligation of the State to take care of its paupers.'"

This decision necessarily leads us to the conclusion that an appropriation enabling cash, food, clothing or shelter to be supplied to those who are unemployed because of economic depression would be treated as a charitable appropriation to "persons" and, therefore, unconstitutional. Clearly, if a person is an object of charity when unable to support himself by reason of advanced age and lack of sufficient income, then a person is likewise an object of charity when unable to support himself because of temporary unemployment due to economic depression; and if it is not a governmental duty but a charity for the

State to provide for the care of indigent sick and injured, it must necessarily follow that it is not a governmental duty but a charity to care for persons temporarily indigent because of economic depression.

Another Supreme Court decision which requires consideration is *Collins v. Martin, et al.*, 290 Pa. 388 (1927).

The Legislature had appropriated a million dollars to the Department of Welfare for the care and treatment of indigent sick and injured persons in hospitals not owned by the Commonwealth. The Department contracted with certain hospitals to furnish medical and surgical treatment to such persons, at a per diem rate. One of these hospitals was St. Agnes Hospital in Philadelphia, which the Court found to be a sectarian institution. The question was whether the State Treasurer could lawfully pay to St. Agnes Hospital the amount which the Department of Welfare had contracted to pay it for the treatment of indigent persons cared for in the hospital.

The Attorney General argued that the payment could be made because under the contract the Department of Welfare was purchasing service for indigent persons and was not giving money to the hospital except as compensation for services rendered; that (as indicated by the Supreme Court in the Old Age Pension Case) the treatment of indigent sick and injured persons is not a charity but a governmental duty; and that it is not unconstitutional for a sectarian institution to receive money not appropriated to it, to compensate it for services rendered or materials furnished.

All of these contentions were rejected by the Court, which held that payment could not be made to the hospital under its contract with the Department of Welfare.

Mr. Justice Kephart, speaking for the Court, at page 395, disposed of the State's contention that the care of indigent sick and injured persons is not a charity but the performance of a governmental duty. He said:

> "* * * While such activities may, because of their number and importance to the recipients, assume the form of a governmental function or duty, * * * they do not lose their chief character, viz, the State's work of charity. * * *"

The Court distinguished between governmental care of the poor, as carried on during the entire history of the State, and the care of persons who are temporarily in need of financial assistance. It had been argued that the language used by Mr. Justice Kephart in the Busser case supported the proposition that any appropriation to care for indigent persons is made in the performance of a governmental duty. This contention was answered, at page 397, as follows:

> "* * * It is argued that the effect of this decision (the Old Age Pension decision) should be applied to the case of the needy poor contemplated by the Act of 1925, and the various direct appropriations to hospitals. But the difference between the two classes is manifest; it lies in the words 'without ability or means to sustain themselves.' On the one hand there are persons totally indigent, as opposed to persons being generally able to take care of themselves, yet when sickness or injury overtakes them they are unable to provide proper treatment, and as to that they are indigent."

The Court took the position that an appropriation to a State department, to be used for paying a sectarian institution for services rendered, is equivalent to an appropriation made directly to the sectarian institution. That being so, an appropriation to a State department for feeding or clothing persons or communities must be regarded as equivalent to an appropriation directly to the persons or communities to be benefited.

Under this decision, an appropriation for unemployment relief made to a department, commission or other agency created by law would be just as objectionable as appropriations made directly to the beneficiaries whom the Legislature desires to aid.

A political subdivision of the Commonwealth, whether it be a county, a city, a borough, a township, or a poor district, must necessarily be regarded as a "community" within the meaning of Article III, Section 18 of the Constitution as interpreted by the Supreme Court in the Busser case. Therefore, the Legislature could not make an appropriation for any charitable purpose to any such political subdivision.

Accordingly, we are compelled to answer your first three questions in the negative. The Legislature cannot make appropriations for the payment of money or the furnishing of food, clothing and shelter to unemployed persons and their families either directly or through a State agency or to political subdivisions of the State.

The question remains, could the Legislature appropriate money for unemployment relief to a nonsectarian institution, corporation or association?

It is true that the Supreme Court in the Busser case indicated that by forbidding charitable appropriations to be made to denominational or sectarian institutions, corporations or associations, the people in the Constitution had recognized the right of the Legislature to make such appropriations to nondenominational or sectarian institutions, corporations and associations.

However, in considering the Legislature's right to make such appropriations, we cannot ignore the inhibition against appropriations for charitable purposes "to any person or community;" and, if an appro-

priation were made to a non-sectarian corporation for purposes incident to unemployment relief, the effect would be indirectly to aid a person or group of persons by supplying them with money or its equivalent in food, clothing or shelter. This would be no different from a similar appropriation made to a department or commission of the State government. The real purpose of the appropriation would be to extend financial aid to those who, for lack of employment, must be given assistance.

Let us suppose, for example, that a corporation were formed to administer an old age pension system. Would the Supreme Court sustain an appropriation to such a corporation "for maintenance"? Obviously, it could not, under the reasoning applied in the St. Agnes Hospital case. Consistently with that decision, the court would look through the form of the appropriation and find that it was in fact an appropriation for old age pensions "to persons," and, therefore, invalid.

But, it may be asked, how then can maintenance appropriations to hospital corporations be sustained? The answer is clear. These appropriations are made for institutional service; and such appropriations are recognized both in Sections 17 and 18 of Article III of the Constitution.

We cannot escape the conclusion that under the cases cited, the Legislature could not, without violating the Constitution, make appropriations for unemployment relief to any charitable corporation or association.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

Attorney General.

OPINION NO. 31

Legislature—Extraordinary Session—Governor's Proclamation—Constitutionality—Constitutionality of Senate Bills Nos. 1 to 19 inc.—Art. III, Sec. 25 and Art. IV, Sec. 12 of the Constitution.

The Governor's proclamation convening the General Assembly in special session and the supplemental proclamation adding to the list of subjects to be considered at the special session, are constitutional.

Constitutionality of Senate Bills Nos. 1 to 19 inclusive.

Department of Justice,

Harrisburg, Pa., November 16, 1931.

Honorable Edward C. Shannon, President of the Senate, Harrisburg, Pennsylvania.

Sir: I have before me a certified copy of Senator Salus's motion passed on Monday, November 9, requesting me to supply to the Senate, through you, my opinion as to the constitutionality of the Governor's call for the present Extraordinary Session, and of the bills introduced last week, and, from time to time, of bills presented hereafter during the Session. Subject to a reservation which I shall state at the conclusion of this communication, it gives me great pleasure to comply with the Senate's request.

The provisions of the Constitution dealing with Extraordinary Sessions of the General Assembly appear in Article IV, Section 12, and Article III, Section 25. They are:

> Article IV, Section 12: "He [the Governor] may, on extraordinary occasions, convene the General Assembly, * * * He shall have power to convene the Senate in extraordinary session by proclamation for the transaction of executive business."
>
> Article III, Section 25: "When the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session."

These constitutional provisions have been construed by our appellate courts in a number of cases; and it will be helpful, I am sure, to review these cases before dealing with the constitutionality either of the Governor's call or of the bills which have been introduced.

Pittsburg's Petition, 217 Pa. 227, was decided in 1907, following the Special Session of the Legislature held in 1906.

Governor Pennypacker called the Special Session by Proclamation dated November 11, 1905, to convene on January 15, 1906. In his proclamation, the Governor specified seven subjects which he asked the Legislature to consider. The first subject was:

> "To enable contiguous cities in the same counties to be united in one municipality in order that the people may avoid the unnecessary burdens of maintaining separate city governments."

On January 9, 1906, the Governor issued a second proclamation adding four subjects to the list contained in the original proclamation. The fourth was as follows:

> "To enable cities that are now or may hereafter be contiguous or in close proximity, including any intervening land, to be united in one municipality, in order that the people may avoid the unnecessary burdens of maintaining separate municipal governments. This fourth subject is a modification of the first subject in the original call, and is added in order that legislation may be enacted under either of them, as may be deemed wise."

It will be noted that in this subject certain words of the first subject of the original call were omitted, and other words were added. The omitted words were "in the same counties." Among those added were, "or in close proximity, including any intervening land."

The Legislature passed the Act of February 7, 1906, P. L. 7, entitled, "An act to enable cities that are now, or may hereafter be, contiguous or in close proximity, to be united, with any intervening land other than boroughs, in one municipality; * * *"

Under this act the cities of Pittsburgh and Allegheny were consolidated by the Court of Quarter Sessions of Allegheny County. From the consolidation decree an appeal was taken to the Superior Court, and subsequently from that Court to the Supreme Court. Both appellate courts sustained the decree.

The first contention of the appellants was that the Act of 1906 was unconstitutional because it was not legislation upon a subject designated in the proclamation of the Governor calling the Special Session. The Supreme Court held that while the act did not come within subject "First" of the original proclamation, it did come within subject "Fourth" of the supplemental proclamation, and that the Governor's supplemental proclamation had validly enlarged the scope of legislative action at the Special Session.

In speaking for the Court, Mr. Justice Brown said, at page 230:

> "In the original proclamation the legislation to be considered by the general assembly on the subject of the consolidation of cities was confined to contiguous cities in the same county, and it may well be contended that, *as the mandate of the constitution is imperative that the legislature,* at the special session, *shall pass no law upon any subject not designated in the call,* the act is technically without it. The act is not for the consolidation of two contiguous cities, situated in the same county, but for that of any two, contiguous or in close proximity, wherever situated. They may be in different counties. We need not, however, pass upon the sufficiency of the *first proclamation* to sustain the act as being one of the subjects of legislation designated in it.
>
> "Whether the general assembly ought to be called together in extraordinary session is always a matter for the executive alone. How it shall be called, and what notice of the call is to be given, are also for him alone. The constitution is silent as to these matters, and wisely so, for emergencies may arise requiring the instant convening of the legislature, and, in the power given to the governor to call it, no time for the notice is too short, if it can reach the members of the general assembly; no form of proclamation is to be followed, and if, after one has been issued, it occurs to the executive that other sub-

> jects than those designated in it should be passed upon by the legislature, he can unquestionably issue another, fixing the same time for the meeting of the general assembly as was fixed in the first, and designate other subjects for its consideration. * * * The proclamation of January 9 is in effect a second proclamation. * * * it would be judicial hypercriticism to declare his second notice or proclamation insufficient to authorize the legislature to pass the act under consideration."

In *Likins's Petition* (No. 1), 223 Pa. 456, Governor Pennypacker's call for the Special Session of 1906 was again before the courts. On this occasion the Act of March 6, 1906, P. L. 78, was challenged as legislation not coming within the Governor's proclamation. The lower court held the act unconstitutional, but on appeal the Superior Court, (37 Superior Court 625), reversing the lower court, sustained the act; and the Supreme Court affirmed the Superior Court decision.

The opinion of the Superior Court was written by Judge Orlady, who said, at page 632:

> "* * * In order to interpret the proclamation of the governor, we are bound to give the words used the same fair and reasonable meaning and intendment which we apply when considering a statute, and the general scope and sufficiency of the proclamation is to be determined by the same well-known rules. The purpose of the proclamation is to inform the members of the legislature of the designated subject which they are convened to consider, and when the general assembly enacts a law which is fully and clearly responsive to such a call, both in its title and in the body of the act, it is playing on words to say that the call, as such, was misleading or insufficient.

In *Likins's Petition* (No. 2), 223 Pa. 468, the Supreme Court also affirmed an opinion of the Superior Court in which it interpreted Governor Pennypacker's proclamation convening the Special Session of 1906. In this case Judge Orlady said, at 37 Pa. Superior Court, page 638:

> "Item Third in the second proclamation of the governor is as follows: 'To designate the uses to which moneys may be applied by candidates, political managers and committees in political campaigns, both for nominations and elections, and to require the managing committees and managers of all political parties to file with some designated official at the close of each campaign a detailed statement in writing, accompanied by affidavit, of the amounts collected and the purposes for which they are expended.'
>
> "In the analysis of this item of the proclamation we are to view it as the members of the general assembly

were warranted in viewing it, that is, in the light of the whole document, together with the earlier proclamation of November 11, 1905, under which the general assembly was specially convened with a view to legislation on this and other specified subjects.

"It is urged that the third item in this proclamation contains two subjects; or at least a principal and a subsubject for the purposes of this case, conceding this to be the fact, yet, the reason for the constitutional mandate prohibiting legislation on any subjects at a special session save those designated in the proclamation of the governor is fairly apparent. The purpose was that the legislators, thus unusually summoned, and the public at large should be advised, as to the general character of the legislation that could or might be constitutionally enacted at such special session. Although a governor who has decided to convene a special session of the legislature is empowered to proclaim, to indicate, to designate the subjects for legislative consideration at such session, he cannot by his proclamation, any more than he can by his message to the same body when in regular session, prescribe or limit the manner in which or the extent to which the legislature may dispose of those subjects, which he designates in his proclamation as matters for legislative consideration. He may by proclamation in the one case, as by message in the other, suggest the lines along which in his judgment, the lawmaking body could most wisely or effectively operate. Such recommendations are in nowise restrictive of the legislative power. When, therefore, the governor, by his proclamation, couched in such language as he may select, has fairly indicated to the legislators and the people, a general subject for legislative consideration, the legislature, in special session, may lawfully deal with that subject as fully and completely as at a regular session. * * *

"It is necessary that the subject be sufficiently designated in the proclamation to bring about intelligent and responsive action by the assemblymen. It is not required by the constitution that the subject be as clearly expressed in the proclamation as in the title to an act, nor is it required that the details by which the desired results may be accomplished be stated in the call, as this is necessarily a brief suggestion of a subject in such words so as reasonably to direct to it the attention of the legislative mind. This accomplished, the purpose of the constitution is fulfilled and the mission of the call is ended."

It would appear from a careful consideration of these cases that the Governor has absolute discretion regarding the question whether the General Assembly shall be convened in Extraordinary Session and as to the notice to be given; that the legislature cannot modify or expand the subjects stated in the Governor's call; but that when

the Governor has stated a general subject followed by certain details, the details are to be regarded in the light of recommendations and not as limiting the scope of the general subject previously stated. Clearly it is for the Governor alone to determine what the subjects of legislation shall be, whether they shall be many or few, and whether they shall be broad or narrow; but in construing the subjects stated by the Governor the General Assembly may, and the courts will, construe liberally the language used by the Governor.

Sweeney v. King, 289 Pa. 92, was decided in 1927, following the Special Session of 1926. This case decided flatly that constitutional amendments may be proposed at Special Sessions even though their subject-matter is not included in the Governor's proclamation. This for the reason, in the language of Mr. Justice Simpson, that "constitutional amendments are not 'legislation,'" within the meaning of Article III, Section 25, of the Constitution.

Having in mind the principles stated by the courts in the cases cited, I shall discuss the constitutionality of the call and of the bills thus far introduced in the Senate.

The Call. I have no doubt whatever regarding the validity of the Governor's proclamation convening the General Assembly in Special Session or of the supplemental proclamation adding to the list of subjects to be considered at the Special Session. I am of the opinion that they are constitutional.

Senate Bill No. 1, Proposing to Amend the Appropriation Made in 1931 for the Construction of the Pymatuning Dam. This bill comes within Subject No. 9 of the original proclamation, and is clearly constitutional.

Senate Bill No. 2, Proposing an Amendment to Article XIV, Section 1 of the Constitution. As already pointed out, amendments may be proposed whether or not they are mentioned in the call for the Special Session. Therefore this bill is valid.

Senate Bill No. 3, Authorizing Counties and Other Political Subdivisions of the State to Levy Taxes and Expend Money for Unemployment Relief. This bill comes within Subject No. 5 of the original proclamation, and may, therefore, be enacted at the Special Session. It involves other interesting constitutional questions which were carefully weighed when the bill was prepared in my office. The principal question is whether the General Assembly can authorize political subdivisions of the Commonwealth to appropriate money to institutions or associations which assist or relieve the poor or provide medical care and treatment for sick or injured persons. The bill declares specifically that it is a proper governmental function of any municipal subdivision of this Commonwealth to expend money for the relief of distress caused by unemployment during prolonged periods of eco-

nomic depression, and then expressly authorizes money to be expended for relief in particular ways. In my judgment the General Assembly has the power to say what the governmental functions of political subdivisions of the Commonwealth are; and, having declared that unemployment relief is such a function, it may expressly authorize the appropriations specified in this measure. I am of the opinion that the bill is constitutional.

Senate Bill No. 4, Making an Emergency Appropriation to the Governor to be Expended by Him with the Approval of the Auditor General and State Treasurer for Projects in which Labor can be Employed. This bill comes within Subject No. 4 of the supplemental proclamation, and may, therefore, be passed at this Session. The only other constitutional question which occurs to me is whether an appropriation such as this could be attacked as a delegation of legislative power to executive officers. In view of the facts that this is an emergency appropriation, that it can be allocated to departments, boards, or commissions to do only such work as they have already been authorized by law to undertake and perform, or by the Department of Property and Supplies only for *necessary* building and other projects, I am of the opinion that the bill does not delegate legislative power to executive officers. It is to be remembered that the Governor, the Auditor General, and the State Treasurer constitute the Board of Commissioners of Public Grounds and Buildings and, as such, have for many years exercised wide discretionary powers. In my opinion the bill is constitutional.

Senate Bill No. 5, Making Additional Appropriations to the Department of Military Affairs for Veterans' Relief and to the Department of Welfare for Maintenance of State-owned Hospitals. This bill covers Subjects Nos. 2 and 3 of the supplemental proclamation. In my opinion it is constitutional in every respect.

Senate Bill No. 6, Making an Emergency Appropriation to the Department of Welfare for the Care and Treatment of Indigent Sick and Injured Persons in Non-sectarian Hospitals not Owned by the State. This bill comes within Subject No. 1 of the supplemental proclamation. It can, therefore, be passed at this Special Session. The bill differs from the act which was held unconstitutional in *Collins v. Martin et al.*, 290 Pa. 388, in that it provides expressly that the appropriation must be used for the care and treatment of persons only in non-sectarian hospitals. This difference eliminates the constitutional objection sustained in that case. In my opinion the bill, as written, is constitutional.

Senate Bill No. 7, Making an Appropriation to the Department of Property and Supplies for the Erection of an Additional Office Building in Capitol Park and for Grading and Terracing the Ground Sur-

rounding It. This bill comes within Subject No. 4 of the supplemental proclamation, can be passed at this Session, and is, in my opinion, constitutional.

Senate Bill No. 8, Entitled, "An act for the Acquisition of property by the Commonwealth east of the Soldiers' and Sailors' Memorial Bridge in the City of Harrisburg, and making an appropriation." I am of the opinion that this bill, as drawn, cannot be passed at this Session. The bill could not be construed more broadly than its title, and its title does not come within any subject stated in the Governor's original or supplemental proclamations.

Senate Bill No. 9, Providing for an Extension of Capitol Park, for the Acquisition of Real Estate in Connection Therewith, and for the Demolition of the Buildings and Structures Thereon. This bill comes within Subject No. 4 of the Governor's supplemental proclamation, can be passed at this Session, and is, in my judgment constitutional.

Senate Bill No. 10, Concerning Unemployment Relief and Creating a State Commission on Unemployment Relief. This bill comes squarely within Subject No. 1 of the original proclamation, and can be passed by the Special Session. In my opinion the bill is constitutional.

It is true that Article III, Section 18 of the Constitution prohibits appropriations to persons or communities, and that under date of October 27, 1931 I rendered to the Governor, Formal Opinion No. 30, in which I expressed the view that this section of the Constitution prevents appropriations for direct unemployment relief. It is to be noted, however, that the Constitution applies only to "appropriations." It does not prohibit the creation of agencies to supervise relief extended in other ways; nor does it prohibit the Legislature from authorizing a State agency to accept contributions for relief and to disburse the moneys contributed for the purposes specified by the contributors. It is also, in my judgment, within the power of the Legislature to authorize the issuance of receipts for moneys contributed in which the statement is made that if at a future date the people adopt a pending constitutional amendment, the money shall be repaid as per the provisions of such pending amendment.

It is also my belief that the legislature may make an expense appropriation to a State agency created, among other purposes, for supervising the administration of unemployment relief by local authorities and for disbursing, in accordance with the instructions of the donors, money contributed for relief purposes. Biennially the Legislature makes appropriations to the Department of Welfare to supervise the administration of poor relief by local authorities throughout the Commonwealth. Similarly, the Legislature has authorized the acceptance by all departments, boards, and commissions of contributions to be used in connection with the work of such departments, boards, and

commissions. The overhead expense attending the expenditure of such contributions is paid out of money appropriated by the Legislature. There is no constitutional provision forbidding any of the appropriations mentioned in this paragraph.

Senate Bill No. 11, Authorizing the Department of Highways to Construct, Reconstruct, or Resurface Roads, Highways, or Streets Anywhere in Pennsylvania Wholly or Partially at State Expense. This bill clearly comes within Subject No. 7 of the original proclamation, can be passed at the Special Session, and is constitutional.

Senate Bill No. 12, Authorizing the Issue and Sale of Bonds by the Commonwealth if and when the Constitutional Amendment Proposed in Senate Bill No. 16 is Adopted by the People. This bill comes within Subject No. 4 of the Governor's first proclamation, and can be passed at this Session. The bill provides expressly that it shall become effective only after the approval by the electors of the constitutional amendment proposed by Senate Bill No. 16. This proposed legislation follows a precedent already established in connection with other proposed loan amendments. I am of the opinion that the bill is constitutional.

Senate Bill No. 13, Authorizing Counties, Cities, Boroughs, Townships, School Districts, and Poor Districts to Negotiate Temporary Emergency Loans for Certain Purposes during 1932 and, if Necessary, to Refund Such Loans Annually by Temporary Emergency Loans during the Four Succeeding Years. This bill comes within Subject No. 2 of the Governor's original proclamation. The loans authorized by the bill are to be evidenced by notes maturing within the year of their date, payable out of the revenues of that year, and if not so paid, then payable out of the revenues of the succeeding year before any other appropriations are made from them. Under the decisions of the courts, these loans would not constitute a debt within the meaning of the constitutional provisions restricting the indebtedness of political subdivisions of the Commonwealth. In my opinion the bill is constitutional.

Senate Bill No. 14, Authorizing the Governor to Appoint Commissioners to Endeavor to Negotiate an Interstate Compact for the Rehabilitation of the Bituminous Coal Industry. This bill comes within Subject No. 11 of the Governor's proclamation, can be passed at this Session, and is, in my opinion, constitutional.

Senate Bill No. 15, Proposing an Amendment to Article IX, Section 4 of the Constitution. Clearly, this bill may be introduced at this Session, and can validly be passed.

Senate Bill No. 16, Proposing an Amendment to the Constitution to be Known as the "Unemployment Relief Amendment." Like Senate

Bill No. 15, this bill can clearly be passed at this Session without constitutional objection.

Senate Bill No. 17, Amending the General Appropriation Act of 1931 in Certain Particulars. In my opinion, this bill comes within Subject No. 8 of the Governor's original proclamation, as modified by Subject No. 4 of his supplemental proclamation, and is constitutional. Appropriations made under these subjects must enable State agencies "by undertaking additional projects to give work to the unemployed," or "enable schools in certain districts to remain open," or "enable newly imposed taxes to be collected."

All of the increased appropriations, except two, authorize the payment of salaries, wages, or other compensation by the several departments to employes of all classes. It is obvious that increased appropriations for salaries and wages will enable additional projects to be undertaken through which work may be given to the unemployed.

Of the two appropriations which do not expressly authorize additional payroll expenditures, one merges and increases two items of the appropriation to the Department of Military Affairs and adds to the purposes for which the merged appropriation may be used, the general improvement of the State Military Reservation. The purpose of this appropriation is to enable the addition to the Reservation, at Indiantown Gap, to be prepared for use at once. This will involve large expenditures for labor.

The other exception is an increase in the appropriation to the Department of Property and Supplies for supplies and printing. This increase is necessary in order to pay, in part, the cost of this Special Session.

The bill also provides for the anticipation in certain cases of amounts due by the State to school districts. This provision will "enable public schools in certain districts to remain open."

The additional appropriation to the Department of Revenue comes within that part of Subject No. 4 of the supplemental call which authorizes appropriations to be increased "to enable newly imposed taxes to be collected."

Senate Bill No. 18, Authorizing Tax Sales to be Adjourned in Certain Cases. This bill is covered by Subject No. 6 of the Governor's original proclamation, can be passed at the Special Session, and is, in my opinion, constitutional.

Senate Bill No. 19, Entitled, "An act to reduce the salary and compensation of certain State employes for a two-year period." In my opinion this bill cannot validly be passed at this Session, for the reason that it could not possibly be construed as coming within any of the subjects stated by the Governor in his original or supplemental proclamations.

As I stated at the outset, I have cheerfully complied with the request made in the motion of the Senate passed on November 9, 1931, and I shall continue to comply with that request throughout the continuance of the Special Session. However, I feel it my duty to say that I comply with this request subject to the reservation that my action in so doing shall not be deemed a precedent. At a regular Session of the General Assembly a request similar to that to which I am now responding, would impose upon the Attorney General a task which it would be next to impossible to perform, unless the regular work of his office were to be temporarily abandoned. However, this Special Session is called to deal with an emergency, and it gives me the greatest pleasure to further in every respect fulfilment of the evident desire of both Houses of the General Assembly to meet the emergency in the shortest space of time, and without any unnecessary delays.

Very truly yours,

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

OPINION NO. 31-A

Legislature—Senate—Constitutionality of Senate Bills Nos. 20 to 25 inc., Introduced in the Extraordinary Session of 1931.

The Attorney General advises the President of the Senate regarding the constitutionality of Senate Bills Nos. 20 to 25, Extraordinary Session of 1931.

Department of Justice,
Harrisburg, Pa., November 23, 1931.

Honorable Edward C. Shannon, President of the Senate, Harrisburg, Pennsylvania.

Sir: This opinion supplements formal opinion No. 31 rendered to you on November 16, 1931. I shall now furnish to the Senate, through you, my opinion regarding the constitutionality of the bills introduced in the Senate during the week beginning November 16th.

Senate Bill No. 20, Amending the Appropriation to the Department of Property and Supplies for the Acquisition of Land and Buildings so as to Authorize the Construction of a Dam at Torrance State Hospital. This bill comes within Subject No. 4 specified by the Governor in his supplemental proclamation of November 9, 1931. In my opinion, the bill, if enacted, will be constitutional.

Senate Bill No. 21, Proposing the Establishment of "The Pennsylvania Industrial Army." This bill does not come within any of the subjects stated by the Governor in his proclamations calling the present Session, and, in my opinion, would be unconstitutional, if passed.

Senate Bill No. 22, Eliminating Certain Exemptions from Taxation in Counties of the First Class. Like Senate Bill No. 21, this bill does not come within any of the subjects stated by the Governor in his proclamations, and, in my opinion, would be unconstitutional, if passed.

Senate Bill No. 23, Proposing an Amendment to the Constitution. For the reasons stated in my opinion of November sixteenth, any constitutional amendment can be initiated at this Session whether or not it comes within a subject specified by the Governor in his proclamation. Therefore, this bill is valid.

Senate Bill No. 24, Appropriating Thirty Million Dollars ($30,000,000) from the General Fund to the Motor License Fund and Allocating the Moneys Appropriated to the Various Cities, Boroughs and Townships of the Commonwealth. This bill does not come within any subject stated by the Governor in his proclamation. Subject No. 13, as stated in the original proclamation, cannot possibly be construed to include transfers from the General Fund to the Motor License Fund otherwise than, as stated, "in anticipation of revenue received from the emergency tax on gasoline." I am of the opinion that the bill, if passed, would be unconstitutional.

Senate Bill No. 25, Proposing an Amendment to Section 225 of the General Poor Relief Act of May 14, 1935, P. L. 762. In my opinion, this bill does not come within any of the subjects specified by the Governor in his original or supplemental proclamations calling the Special Session and would, if enacted, be unconstitutional.

Subject No. 2 of the original proclamation is:

> "Authorizing counties, cities, boroughs, townships, and poor districts during the year one thousand nine hundred thirty-two to negotiate emergency loans for unemployment relief and school districts during the same year to negotiate similar loans to meet deficiencies in current operating expenses, and authorizing such loans to be refunded under certain circumstances annually for a certain period."

The proposed bill would permit poor districts during any year to issue temporary notes running for a period not exceeding one year, the proceeds to be used for the purpose "of meeting unusual or unforseen demands for maintenance or support of the poor of the district and expenditures in the operation of the district arising therefrom."

Under the present law, these loans may be made on notes running for a period of not longer than six (6) months.

The bill is not confined in its operation to the year 1932 nor does it provide that loans negotiated under its terms shall be used for unemployment relief. Therefore, its subject differs radically from that stated by the Governor in his proclamation.

Very truly yours,

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

OPINION NO. 31-B

Legislature—Senate—Constitutionality of Senate Bills Nos. 28 and 30, Extraordinary Session of 1931.

The Attorney General advises the President of the Senate regarding the constitutionality of Senate Bills Nos. 28 and 30, Extraordinary Session of 1931.

Department of Justice,
Harrisburg, Pa., November 30, 1931.

Honorable Edward C. Shannon, President of the Senate, Harrisburg, Pennsylvania.

Sir: In accordance with the motion of the Senate adopted November 9, 1931, I shall give my opinion as to the constitutionality of Senate Bills Nos. 28 and 30.

Senate Bill No. 28, proposes an amendment to the Constitution. As you have previously been advised, any amendment can be initiated at a Special Session of the Legislature, whether or not it comes within the subjects specified by the Governor in his call.

Senate Bill No. 30, Supplementing the Act of May 26, 1931 (Appropriation Acts, page 106), by Making an Emergency Appropriation of Two Hundred Million Dollars ($200,000,000) to the Department of Welfare to Be Paid to Specified State-aided Hospitals. In my opinion, this bill comes within Subject No. 1 of the Governor's supplemental proclamation and would be constitutional, if passed.

Very truly yours,

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

OPINION NO. 31-C

Legislature—Senate—Constitutionality of Senate Bills Nos. 32, 33 and 34, Extraordinary Session of 1931.

The Attorney General advises the President of the Senate regarding the constitutionality of Senate Bills Nos. 32 to 34 inclusive, Extraordinary Session of 1931.

Department of Justice,
Harrisburg, Pa., December 7, 1931.

Honorable Edward C. Shannon, President of the Senate, Harrisburg, Pennsylvania.

Sir: In accordance with the Senate's Motion of November ninth, I take pleasure in giving the Senate, through you, my opinion regarding the constitutionality of the bills introduced in the Senate last week.

Senate Bill No. 32 amending the Act of June 26, 1931, P. L. 1403, by Extending for Three Years the Period within which Cities of the First Class May Make Emergency Loans for Unemployment Relief. Subject No. 2 of the Governor's original proclamation convening the Special Session is "Authorizing counties, cities, boroughs, townships and poor districts during the year one thousand nine hundred thirty-two to negotiate emergency loans for unemployment relief * * * and authorizing such loans to be refunded under certain circumstances annually for a certain period." In my opinion a bill which would authorize emergency loans for unemployment relief to be made during the years 1932, 1933 and 1934 does not come within this subject and cannot validly be passed at this Session.

Senate Bill No. 33. The same except in minor details as Senate Bill No. 32. For the reasons stated in discussing Senate Bill No. 32, this bill cannot, in my opinion, be validly enacted at this Session.

Senate Bill No. 34 proposes an amendment to the constitution and can validly be passed at this Session.

Very truly yours,

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

OPINION NO. 31-D

Legislature—Senate—Constitutionality of Senate Bills Nos. 35 to 38 Inclusive, Extraordinary Session of 1931.

The Attorney General advises the President of the Senate regarding the constitutionality of Senate Bills Nos. 35 to 38 inclusive, Extraordinary Session of 1931.

Department of Justice,
Harrisburg, Pa., December 14, 1931.

Honorable Edward C. Shannon, President of the Senate, Harrisburg, Pennsylvania.

Sir: In accordance with the motion of the Senate adopted November 9, 1931, I take pleasure in giving the Senate through you my opinion regarding the constitutionality of the bills introduced in the Senate last week.

Senate Bill No. 35, Making an Appropriation to the Department of Property and Supplies for the Erection of a New State Tuberculosis Sanatorium. This bill comes within Subject No. 4 of the Governor's supplemental proclamation and would, in my opinion, be constitutional if passed.

Senate Bill No. 36, Authorizing the Transfer to and Acceptance by the Commonwealth of the Chester County Hospital for Mental Defectives and Making an Appropriation. In my opinion this bill does not come within any subject stated by the Governor in his original or supplemental proclamations and cannot validly be enacted at this Session.

Senate Bill No. 37, Making an Appropriation to the Department of Property and Supplies for the Erection of a State Tuberculosis Sanatorium. Like Senate Bill No. 35, this bill comes within Subject No. 4 of the Governor's supplemental proclamation and would, in my opinion, be constitutional if passed.

Senate Bill No. 38, Regulating the Sale of Water, Gas and Electricity for Domestic Purposes. This bill does not come within any subject stated by the Governor in either of his proclamations and could not, in my opinion, be sustained if enacted at this Session.

Very truly yours,

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

OPINION NO. 32

Legislature—House of Representatives—Constitutionality of House Bills Nos. 1 to 30 Inclusive, Extraordinary Session of 1931—Art. VI, Sec. 12; Art. III, Sec. 25 of the Constitution.

The Attorney General advises the Speaker of the House of Representatives regarding the constitutionality of House Bills Nos. 1 to 30 inclusive, Extraordinary Session of 1931.

Department of Justice,
Harrisburg, Pa., November 16, 1931.

Honorable C. J. Goodnough, Speaker of the House of Representatives, Harrisburg, Pennsylvania.

Sir: I have the request of the House of Representatives, communicated to me through a certified copy of its resolution of November 10, asking me to supply to it my opinion as to the constitutionality of each bill presented at the present Extraordinary Session within one week after its introduction. Subject to a reservation which I shall state at the conclusion of this communication, it will give me great pleasure to comply with the request.

The provisions of the Constitution applying to Extraordinary Sessions of the General Assembly appear in Article IV, Section 12, and Article III, Section 25. They are:

> Article IV, Section 12: "He [the Governor] may, on extraordinary occasions, convene the General Assembly. * * * He shall have power to convene the Senate in extraordinary session by proclamation for the transaction of executive business."
>
> Article III, Section 25; "When the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session."

These constitutional provisions have been construed by our appellate courts in a number of cases; and it will be helpful, I am sure, to review these cases before dealing with the constitutionality of the bills thus far introduced.

Pittsburg's Petition, 217 Pa. 227, was decided in 1907, following the Special Session of the Legislature held in 1906.

Governor Pennypacker called the Special Session by Proclamation dated November 11, 1905, to convene on January 15, 1906. In his proclamation, the Governor specified seven subjects which he asked the Legislature to consider. The first subject was:

> "To enable contiguous cities in the same counties to be united in one municipality in order that the people may avoid the unnecessary burdens of maintaining separate city governments."

On January 9, 1906, the Governor issued a second proclamation adding four subjects to the list contained in the original proclamation. The fourth was as follows:

> "To enable cities that are now or may hereafter be contiguous or in close proximity, including any intervening land, to be united in one municipality, in order that the people may avoid the unnecessary burdens of maintaining separate municipal governments. This fourth subject is a modification of the first subject in the original call, and is added in order that legislation may be enacted under either of them, as may be deemed wise."

It will be noted that in this subject certain words of the first subject of the original call were omitted, and other words were added. The omitted words were "in the same counties." Among those added were, "or in close proximity, including any intervening land."

The Legislature passed the Act of February 7, 1906, P. L. 7, entitled "An act to enable cities that now are, or may hereafter be, contiguous or in close proximity, to be united, with any intervening land other than boroughs, in one municipality; * * *."

Under this act the cities of Pittsburgh and Allegheny were consolidated by the Court of Quarter Sessions of Allegheny County. From the consolidation decree an appeal was taken to the Superior Court, and subsequently from that Court to the Supreme Court. Both appellate courts sustained the decree.

The first contention of the appellants was that the Act of 1906 was unconstitutional because it was not legislation upon a subject designated in the proclamation of the Governor calling the Special Session. The Supreme Court held that while the act did not come within subject "First" of the original proclamation, it did come within subject "Fourth" of the supplemental proclamation, and that the Governor's supplemental proclamation had validly enlarged the scope of legislative action at the Special Session.

In speaking for the Court, Mr. Justice Brown said, at page 230:

> "In the original proclamation the legislation to be considered by the general assembly on the subject of the consolidation of cities was confined to contiguous cities in the same county, and it may well be contended that, *as the mandate of the constitution is imperative that the legislature,* at the special session, *shall pass no law upon any subject not designated in the call,* the act is technically without it. The act is not for the consolidation of two contiguous cities, situated in the same county, but for that of any two, contiguous or in close proximity, wherever situated. They may be in different counties. We need not, however, pass upon the sufficiency of the

first proclamation to sustain the act as being one of the subjects of legislation designated in it.

"Whether the general assembly ought to be called together in extraordinary session is always a matter for the executive alone. How it shall be called, and what notice of the call is to be given, are also for him alone. The constitution is silent as to these matters, and wisely so, for emergencies may arise * * * requiring the instant convening of the legislature, and, in the power given to the governor to call it, no time for the notice is too short, if it can reach the members of the general assembly; * * * no form of proclamation is to be followed, and if, after one has been issued, it occurs to the executive that other subjects than those designated in it should be passed upon by the legislature, he can unquestionably issue another, fixing the same time for the meeting of the general assembly as was fixed in the first, and designate other subjects for its consideration. * * * The proclamation of January 9 is in effect a second proclamation. * * * It would be judicial hypercriticism to declare his second notice or proclamation insufficient to authorize the legislature to pass the act under consideration."

In *Likins's Petition* (No. 1), 223 Pa. 456, Governor Pennypacker's call for the Special Session of 1906 was again before the courts. On this occasion the Act of March 6, 1906, P. L. 78, was challenged as legislation not coming within the Governor's proclamation. The lower court held the act unconstitutional, but on appeal the Superior Court, (37 Superior Court 625), reversing the lower court, sustained the act; and the Supreme Court affirmed the Superior Court decision.

The opinion of the Superior Court was written by Judge Orlady, who said, at page 632:

"* * * In order to interpret the proclamation of the governor, we are bound to give the words used the same fair and reasonable meaning and intendment which we apply when considering a statute, and the general scope and sufficiency of the proclamation is to be determined by the same well-known rules. The purpose of the proclamation is to inform the members of the legislature of the designated subject which they are convened to consider, and when the general assembly enacts a law which is fully and clearly responsive to such a call, both in its title and in the body of the act, it is playing on words to say that the call, as such, was misleading or insufficient. * * *"

In *Likins's Petition* (No. 2), 223 Pa. 468, the Supreme Court also affirmed an opinion of the Superior Court in which it interpreted Governor Pennypacker's proclamation convening the Special Session of

1906. In this case Judge Orlady said, at 37 Pa. Superior Court, page 638:

> "Item Third in the second proclamation of the governor is as follows: 'To designate the uses to which moneys may be applied by candidates, political managers and committees in political campaigns, both for nominations and elections, and to require the managing committees and managers of all political parties to file with some designated official at the close of each campaign a detailed statement in writing, accompanied by affidavit, of the amounts collected and the purposes for which they are expended.'
>
> "In the analysis of this item of the proclamation we are to view it as the members of the general assembly were warranted in viewing it, that is, in the light of the whole document, together with the earlier proclamation of November 11, 1905, under which the general assembly was specially convened with a view to legislation on this and other specified subjects.
>
> "It is urged that the third item in this proclamation contains two subjects; or at least a principal and a subsubject; for the purposes of this case, conceding this to be the fact, yet, the reason for the constitutional mandate prohibiting legislation on any subjects at a special session save those designated in the proclamation of the governor is fairly apparent. The purpose was that the legislators, thus unusually summoned, and the public at large should be advised, as to the general character of the legislation that could or might be constitutionally enacted at such special session. Although a governor who has decided to convene a special session of the legislature is empowered to proclaim, to indicate, to designate the subjects for legislative consideration at such session, he cannot by his proclamation, any more than he can by his message to the same body when in regular session, prescribe or limit the manner in which or the extent to which the legislature may dispose of those subjects, which he designates in his proclamation as matters for legislative consideration. He may by proclamation in the one case, as by message in the other, suggest the lines along which in his judgment, the lawmaking body could most wisely or effectively operate. Such recommendations are in nowise restrictive of the legislative power. When, therefore, the governor, by his proclamation, couched in such language as he may select, has fairly indicated to the legislators and the people, a general subject for legislative consideration, the legislature, in special session, may lawfully deal with that subject as fully and completely as at a regular session * * *
>
> "It is necessary that the subject be sufficiently designated in the proclamation to bring about intelligent and responsive action by the assemblymen. It is not re-

> quired by the constitution that the subject be as clearly expressed in the proclamation as in the title to an act, nor is it required that the details by which the desired results may be accomplished be stated in the call, as this is necessarily a brief suggestion of a subject in such words so as reasonably to direct to it the attention of the legislative mind. This accomplished, the purpose of the constitution is fulfilled and the mission of the call is ended."

It would appear from a careful consideration of these cases that the Governor has absolute discretion regarding the question whether the General Assembly shall be convened in Extraordinary Session and as to the notice to be given; that the Legislature cannot modify or expand the subjects stated in the Governor's call; but that when the Governor has stated a general subject followed by certain details, the details are to be regarded in the light of recommendations and not as limiting the scope of the general subject previously stated. Clearly, it is for the Governor alone to determine what the subjects of legislation shall be, whether they shall be many or few, and whether they shall be broad or narrow; but in construing the subjects stated by the Governor the General Assembly may, and the courts will, construe liberally the language used by the Governor.

Sweeney v. King, 289 Pa. 92, was decided in 1927, following the Special Session of 1926. This case decided flatly that constitutional amendments may be proposed at Special Sessions even though their subject matter is not included in the Governor's proclamation. This for the reason, in the language of Mr. Justice Simpson, that "constitutional amendments are not 'legislation,' " within the meaning of Article III, Section 25, of the Constitution.

With these principles in mind, I shall discuss the specific bills which have been introduced.

House Bill No. 1, Amending the General Appropriation Act of 1931 in Certain Particulars. In my opinion this bill comes within Subject No. 8 of the Governor's original proclamation, as modified by Subject No. 4 of his supplemental proclamation, and is constitutional. Appropriations made under these subjects must enable State agencies "by undertaking additional projects to give work to the unemployed," or "enable schools in certain districts to remain open," or "enable newly imposed taxes to be collected."

All of the increased appropriations, except two, authorize the payment of salaries, wages, or other compensation by the several departments to employes of all classes. It is obvious that increased appropriations for salaries and wages will enable additional projects to be undertaken through which work may be given to the unemployed.

Of the two appropriations which do not expressly authorize additional payroll expenditures, one merges and increases two items of the appropriation to the Department of Military Affairs and adds to the purposes for which the merged appropriation may be used, the general improvement of the State Military Reservation. The purpose of this appropriation is to enable the addition to the Reservation, at Indiantown Gap, to be prepared for use at once. This will involve large expenditures for labor.

The other exception is an increase in the appropriation to the Department of Property and Supplies for supplies and printing. This increase is necessary in order to pay in part the cost of this Special Session.

The bill also provides for the anticipation in certain cases of amounts due by the State to school districts. This provision will "enable public schools in certain districts to remain open."

The additional appropriation to the Department of Revenue comes within that part of Subject No. 4 of the supplemental call which authorizes appropriations to be increased "to enable newly imposed taxes to be collected."

House Bill No. 2, proposing an Amendment to the Constitution to be Known as the "Unemployment Relief Amendment." As already pointed out, amendments may be proposed whether or not they are mentioned in the Call for the Special Session. Therefore, this bill is valid.

House Bill No. 3, Authorizing Tax Sales to be Adjourned in Certain Cases. This bill is covered by Subject No. 6 of the Governor's original Proclamation, can be passed at the Special Session, and is, in my opinion, constitutional.

House Bill No. 4, Concerning Unemployment Relief and Creating a State Commission on Unemployment Relief. This bill comes squarely within Subject No. 1 of the original proclamation, and can be passed by the Special Session. In my opinion, the bill is constitutional.

It is true that Article III, Section 18, of the Constitution prohibits appropriations to persons or communities, and that under date of October 27, 1931, I rendered to the Governor Formal Opinion No. 30, in which I expressed the view that this section of the Constitution prevents appropriations for direct unemployment relief. It is to be noted, however, that the Constitution applies only to "appropriations." It does not prohibit the creation of agencies to supervise relief extended in other ways; nor does it prohibit the Legislature from authorizing a State agency to accept contributions for proper purposes and to disburse the moneys contributed for the purposes specified by the contributors. It is also, in my judgment, within the power of the Legislature to authorize the issuance of receipts for moneys contributed

in which the statement is made that if at a future date the people adopt a pending constitutional amendment, the money shall be repaid as per the provisions of such pending amendment.

It is also my belief that the Legislature may make an expense appropriation to a State agency created, among other purposes for supervising the administration of unemployment relief by local authorities and for disbursing, in accordance with the instructions of the donor, money contributed for relief purposes. Biennially the Legislature makes appropriations to the Department of Welfare to supervise the administration of poor relief by local authorities throughout the Commonwealth. Similarly, the Legislature has authorized the acceptance by all departments, boards, and commissions of contributions to be used in connection with the work of such departments, boards, and commissions. The overhead expense attending the expenditure of such contributions is paid out of money appropriated by the Legislature. There is no constitutional provision forbidding any of the appropriations mentioned in this paragraph.

House Bill No. 5, Authorizing Counties, Cities, Boroughs, Townships, School Districts, and Poor Districts to Negotiate Temporary Emergency Loans for Certain Purposes during 1932 and, if Necessary, to Refund such Loans Annually by Temporary Emergency Loans during the Four Succeeding Years. This bill comes within Subject No. 2 of the Governor's original proclamation. The loans authorized by the bill are to be evidenced by notes maturing within the year of their date, payable out of the revenues of that year and if not so paid, then payable out of the revenues of the succeeding year before any other appropriations are made from them. Under the decisions of the courts, these loans would not constitute a debt within the meaning of the constitutional provisions restricting the indebtedness of political subdivisions of the Commonwealth. In my opinion the bill is constitutional.

House Bill No. 6, Imposing an Emergency Tax on Gasoline at the Rate of One Cent per Gallon for the Period Beginning January 1, 1932, and Ending June 30, 1933, and Appropriating the Proceeds of the Tax for Certain Specific Purposes. Subject No. 12 of the Governor's original proclamation is, "An emergency tax on gasoline at the rate of two cents per gallon for two years, the proceeds to be payable into the Motor License Fund."

Whether or not an emergency tax at the rate of one cent per gallon for eighteen months would come within this subject is a doubtful question. Under the Supreme Court's decision in *Pittsburg's Petition,* it may be argued that House Bill No. 6 would not come within the subject stated by the Governor, but under the language used by Judge Orlady in *Likins's Petition* (No. 2), it would seem that the subject stated by the Governor is "an emergency tax on gasoline," and that

the rate and the period specified are to be treated merely as recommendations by the Governor which the Legislature is free to adopt, reject or modify.

Two propositions seem reasonably clear:

The first is that the subject stated by the Governor does not warrant any special appropriation of the proceeds of the emergency tax for purposes other than those to which the Motor License Fund is appropriated by the Act of May 1, 1929, P. L. 1046, as amended.

The second is that if the Legislature enacts any measure imposing an emergency tax on gasoline at a rate other than two cents per gallon or for a period other than two years, the validity of the act is very likely to be challenged in the courts. Litigation will cause delay in the collection of the tax, with the result that the purpose of having the act operate as an emergency measure will be defeated.

In my opinion, the bill, as drawn, would not be constitutional; but I am inclined to the view that, with the appropriation feature omitted, the bill, if enacted, would be held constitutional.

House Bill No. 7, Authorizing the State Treasurer to Make Transfers from the General Fund to the Motor License Fund in Anticipation of Revenues to be Derived from the Emergency Tax on Gasoline and the Subsequent Transfer from the Motor License Fund to the General Fund. This bill comes squarely within Subject No. 13 of the Governor's original proclamation, may be passed at the Special Session, and is, in my opinion, constitutional.

House Bill No. 8, Authorizing Counties and Other Political Subdivisions of the State to Levy Taxes and Expend Money for Unemployment Relief. This bill comes within Subject No. 5 of the original proclamation, and may, therefore, be enacted at the Special Session. It involves other interesting constitutional questions which were carefully weighed when the bill was prepared in my office. The principal question is whether the General Assembly can authorize political subdivisions of the Commonwealth to appropriate money to institutions or associations which assist or relieve the poor or provide medical care and treatment for sick or injured persons. The bill declares specifically that it is a proper governmental function of any municipal subdivision of this Commonwealth to expend money for the relief of distress caused by unemployment during prolonged periods of economic depression, and then expressly authorizes money to be expended for relief in particular ways. In my judgment the General Assembly has the power to say what the governmental functions of political subdivisions of the Commonwealth are, and, having declared that unemployment relief is such a function, it may expressly authorize the appropriations specified in this measure. I am of the opinion that the bill is constitutional.

House Bill No. 9, Proposing an Amendment to Article IX, Section 4 of the Constitution. Clearly, this bill may be introduced at this Session and can validly be passed.

House Bill No. 10, Making an Emergency Appropriation to the Department of Welfare for the Care and Treatment of Indigent Sick and Injured Persons in Non-sectarian Hospitals not Owned by the State. This bill comes within Subject No. 1 of the supplemental proclamation. It can, therefore, be passed at this Special Session. The bill differs from the act which was held unconstitutional in *Collins v. Martin,* et al., 290 Pa. 388, in that it provides expressly that the appropriations must be used for the care and treatment of persons only in non-sectarian hospitals. This difference eliminates the constitutional objection sustained in that case. In my opinion the bill, as written, is constitutional.

House Bill No. 11, Providing for an Extension of Capitol Park, for the Acquisition of Real Estate in Connection Therewith, and for the Demolition of the Buildings and Structures Thereon. This bill comes within Subject No. 4 of the Governor's supplemental proclamation, can be passed at this Session, and is, in my judgment, constitutional.

House Bill No. 12, Making an Appropriation to the Department of Property and Supplies for the Erection of an Additional Office Building in Capitol Park and for Grading and Terracing the Ground Surrounding It. This bill comes within Subject No. 4 of the supplemental proclamation, can be passed at this Session, and is, in my opinion, constitutional.

House Bill No. 13, Making Additional Appropriations to the Department of Military Affairs for Veterans' Relief and to the Department of Welfare for Maintenance of State-owned Hospitals. This bill covers Subjects Nos. 2 and 3 of the supplemental proclamation. In my opinion it is constitutional in every respect.

House Bill No. 14, Entitled, "An act for the acquisition of property by the Commonwealth east of the Soldiers' and Sailors' Memorial Bridge in the City of Harrisburg, and making an appropriation." I am of the opinion that this bill, as drawn, cannot be passed at this Session. The bill could not be construed more broadly than its title, and its title does not come within any subject stated in the Governor's original or supplemental proclamations.

House Bill No. 15, Authorizing the Department of Highways to Construct, Reconstruct, or Resurface Roads, Highways, or Streets Anywhere in Pennsylvania Wholly or Partially at State Expense. This bill clearly comes within Subject No. 7 of the original proclamation, can be passed at the Special Session, and is constitutional.

House Bill No. 16, Imposing a State Tax upon Billboards and the Business of Outdoor Advertising. This bill comes within Subject

No. 15 of the Governor's original proclamation, can be passed at this Session, and, in my opinion, is constitutional.

House Bill No. 17, Entitled "An act authorizing the State Treasurer to transfer ten million dollars from the General Fund to the Motor License Fund for the purpose of constructing certain highways and making appropriations necessary to effect such transfers." This bill does not come within any subject stated by the Governor in his original or supplemental proclamations. It would, in my opinion, be unconstitutional if passed.

House Bill No. 18, Making an Appropriation to the Department of Property and Supplies for Construction Work at the Cumberland Valley State Institution for Mental Defectives. This bill comes within Subject No. 4 of the Governor's supplemental proclamation, can be passed at this Session, and is, in my opinion, constitutional.

House Bill No. 19, Authorizing the Issue and Sale of Bonds by the Commonwealth if and when the Constitutional Amendment Proposed in House Bill No. 2 is Adopted by the People. This bill comes within Subject No. 4 of the Governor's first proclamation, and can be passed at this Session. The bill provides expressly that it shall become effective only after the approval by the electors of the constitutional amendment proposed by House Bill No. 2. This proposed legislation follows a precedent already established in connection with other proposed loan amendments. I am of the opinion that the bill is constitutional.

House Bill No. 20, Authorizing the Governor to Appoint Commissioners to Endeavor to Negotiate an Interstate Compact for the Rehabilitation of the Bituminous Coal Industry. This bill comes within Subject No. 11 of the Governor's proclamation, can be passed at this Session, and is, in my opinion, constitutional.

House Bill No. 21, Proposing to Amend the Appropriation Made in 1931 for the Construction of the Pymatuning Dam. This bill comes within Subject No. 9 of the original proclamation, and is clearly constitutional.

House Bill No. 22, Making an Appropriation for the Expenses of the Special Session. This bill comes within Subject No. 10 of the Governor's original proclamation, can be passed at this Session, and, in my opinion, is constitutional.

House Bill No. 23, Imposing an Emergency Tax on Gasoline at the Rate of Two Cents per Gallon for a Period of Two Years. This bill comes within Subject No. 12 of the Governor's original proclamation, and, in my opinion, is constitutional.

House Bill No. 24, Making an Emergency Appropriation to the Governor to be expended by him with the Approval of the Auditor General and the State Treasurer, for Projects in which Labor can be employed.

This bill comes within Subject No. 4 of the supplemental proclamation, and may, therefore, be passed at this Session. The only other constitutional question which occurs to me is whether an appropriation such as this could be attacked as a delegation of legislative power to executive officers. In view of the facts that this is an emergency appropriation, that it can be allocated to departments, boards, or commissions to do only such work as they have already been authorized by law to undertake and perform, or by the Department of Property and Supplies only for *necessary* building and other projects, I am of the opinion that the bill does not delegate legislative power to executive officers. It is to be remembered that the Governor, the Auditor General, and the State Treasurer constitute the Board of Commissioners of Public Grounds and Buildings, and, as such, have for many years exercised wide discretionary powers. In my opinion, the bill is constitutional.

House Bill No. 25, Making an Appropriation out of the Motor License Fund to the Department of Property and Supplies for the Maintenance and Improvement of Airports, Landing Fields and Intermediate Landing Fields. This bill comes within Subject No. 4 of the Governor's supplemental proclamation, can be passed at this Session, and, in my opinion, is constitutional.

House Bill No. 26, Imposing a State Tax upon Sales of Cigarettes. In my opinion this bill comes within Subject No. 14 of the Governor's original proclamation, and is in every respect constitutional.

House Bill No. 27, Imposing an Amendment to the Constitution. For reasons already stated, this resolution can be passed at this Session even though its subject matter does not come within the subjects stated by the Governor in his proclamations.

House Bill No. 28, Entitled "An act relating to unemployed persons, establishing an unemployment fund and providing for contributions thereto by employers and by the Commonwealth, providing for the management of such fund and for the payment therefrom to certain unemployed persons of sums of money during periods of unemployment, imposing additional duties and powers upon the Department of Labor and Industry, imposing duties upon employers, providing penalties and making an appropriation." While this bill relates to unemployment relief, it does not come within any of the specific subjects stated by the Governor either in his original proclamation or in his supplemental proclamation. It cannot, therefore, validly be passed at this Session, and in my opinion would be unconstitutional if enacted.

House Bill No. 29, Proposing an Amendment to The Administrative Code by Creating an Unemployment Indemnity Board. Like House Bill No. 28, this bill does not come within any of the subjects stated

by the Governor in his proclamations, and would, in my opinion, be unconstitutional if passed.

House Bill No. 30, Proposing an Amendment to Article III of the Constitution. This joint resolution can be validly passed at this Session.

As I stated at the outset, I have cheerfully complied with the request made in the Resolution of the House passed on November 10, 1931, and I shall continue to comply with that request throughout the continuance of the Special Session. However, I feel it my duty to say that I comply with this request subject to the reservation that my action in so doing shall not be deemed a precedent. At a regular session of the General Assembly, a request similar to that to which I am now responding, would impose upon the Attorney General a task which it would be next to impossible to perform, unless the regular work of his office were to be temporarily abandoned. However, this Special Session is called to deal with an emergency, and it gives me the greatest pleasure to further in every respect fulfillment of the evident desire of both Houses of the General Assembly to meet the emergency in the shortest space of time and without any unnecessary delay.

Very truly yours,

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

OPINION NO. 32-A

Legislature—House of Representatives—Constitutionality of House Bills Nos. 31 to 37 inclusive, Extraordinary Session of 1931.

The Attorney General advises the Speaker of the House of Representatives regarding the constitutionality of House Bills Nos. 31 to 37 inclusive. Extraordinary Session of 1931.

Department of Justice,
Harrisburg, Pa., November 23, 1931.

Honorable C. J. Goodnough, Speaker of the House of Representatives,
Harrisburg, Pennsylvania.

Sir: In further response to the request made by the House of Representatives in its resolution of November tenth, I take pleasure in furnishing you at this time my opinion regarding the constitutionality of the bills introduced in the House during the week beginning November 16, 1931.

House Bill No. 31, Proposing an Amendment to Section 225 of the General Poor Relief Act of May 14, 1925, P. L. 762. In my opinion, this bill does not come within any of the subjects specified by the Governor in his original or supplemental proclamations calling the Special Session and would, if enacted, be unconstitutional.

Subject No. 2 of the original proclamation is:

> "Authorizing counties, cities, boroughs, townships, and poor districts during the year one thousand nine hundred thirty-two to negotiate emergency loans for unployment relief and school districts during the same year to negotiate similar loans to meet deficiencies in current operating expenses, and authorizing such loans to be refunded under certain circumstances annually for a certain period."

The proposed bill would permit poor districts during any year to issue temporary notes running for a period not exceeding one year, the proceeds to be used for the purpose "of meeting unusual or unforeseen demands for maintenance or support of the poor of the district and expenditures in the operation of the district arising therefrom." Under the present law, these loans may be made on notes running for a period of not longer than six (6) months.

The bill is not confined in its operation to the year 1932 nor does it provide that loans negotiated under its terms shall be used for unemployment relief. Therefore, its subject differs radically from that stated by the Governor in his proclamation.

House Bill No. 32, Appropriating Thirty Million Dollars ($30,000,000) from the General Fund to the Motor License Fund and Allocating the Moneys Appropriated to the Various Cities, Boroughs and Townships of the Commonwealth. This bill does not come within any subject stated by the Governor in his proclamation. Subject No. 13, as stated in the original proclamation, cannot possibly be construed to include transfers from the General Fund to the Motor License Fund otherwise than, as stated, "in anticipation of revenue received from the emergency tax on gasoline." I am of the opinion that the bill, if passed, would be unconstitutional.

House Bill No. 33, Proposing an Amendment to the Liquid Fuels Tax Act Which Would Return to the Counties Two Cents per Gallon of the Three Cent Tax now Imposed on Gasoline instead of One-half Cent per Gallon as at Present. This bill does not come within any subject stated by the Governor in his original or supplemental proclamation and for this reason would, in my opinion, be unconstitutional, if passed.

House Bills Nos. 34, 35 and 36, Proposing Amendments to the Constitution of the Commonwealth. As you have previously been ad-

vised, any amendment to the Constitution can be proposed at this Session whether or not it comes within a subject stated by the Governor in his proclamation.

House Bill No. 37, Imposing a Tax on Incomes. This bill does not come within any subject stated by the Governor in either of his proclamations and would, therefore, be unconstitutional, if enacted. As the bill would clearly be unconstitutional for the reason stated, it is unnecessary to consider and advise you upon the question whether a graduated income tax could be enacted under our present Constitution.

Very truly yours,

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

OPINION NO. 32-B

Legislature—House of Representatives—Constitutionality of House Bills Nos. 38 to 41 inclusive—Extraordinary Session of 1931.

The Attorney General advises the Speaker of the House of Representatives regarding the constitutionality of House Bills Nos. 38 to 41 inclusive. Extraordinary Session of 1931.

Department of Justice,
Harrisburg, Pa., November 24, 1931.

Honorable C. J. Goodnough, Speaker of the House of Representatives, Harrisburg, Pennsylvania.

Sir: In accordance with the resolution of the House of Representatives adopted November 10, 1931, I shall give you my opinion as to the constitutionality of House Bill Nos. 38 and 41 inclusive, all introduced on November 17, 1931, but printed copies of which did not come to me until yesterday. That accounts for my failure to have included a discussion of these bills in my communication forwarded to you yesterday covering other bills introduced in the House last week.

House Bill No. 38, Prohibiting Any Officers of the State Government from Denying Any Person Employment in the State Service on Account of His or Her Age. This bill does not come within any of the subjects specified by the Governor in his original and supplemental proclamations convening the Special Session, and would, therefore, be unconstitutional if passed.

House Bill No. 39, Imposing a State Tax upon Sales of Cosmetics. Like House Bill No. 38, this bill does not come within any of the sub-

jects stated by the Governor in his proclamations. Therefore it cannot validly be enacted at this Special Session.

House Bill No. 40, Providing that the Department of Highways Shall Take over Certain Roads within Boroughs for Construction and Maintenance. Subject No. 7 of the Governor's original proclamation convening the Special Session is, "Authorizing the Department of Highways with the approval of the Governor and of the political subdivisions involved to enter upon and construct, reconstruct, or resurface wholly or partially at State expense any public roads, streets, and highways which are now constructed and maintained at the expense of the several political subdivisions of the Commonwealth, and making an appropriation for this purpose."

Under this subject the General Assembly can at this Session enact legislation authorizing the Department of Highways to "enter upon and construct, reconstruct, or resurface" any streets or highways in Pennsylvania. It could not authorize the Department to take over streets or highways for maintenance purposes.

The bill under consideration provides not merely for the construction, reconstruction, or resurfacing of certain borough streets but that they shall be taken over as State highways for all purposes. In my opinion this is a departure from the subject stated by the Governor. Accordingly, I am of the opinion that the bill, if passed, would be unconstitutional.

House Bill No. 41, Creating a "State Board of Trustees on Unemployment Relief and the Restoration of Industrial and Commercial Stability in Pennsylvania," and Prescribing its Powers and Duties. In my opinion this bill comes within Subject No. 1 of the Governor's original proclamation convening the Special Session.

However, even though the bill comes within a subject stated by the Governor in his call for the Special Session, it would, in my opinion, be unconstitutional legislation if enacted. I shall state my reasons.

Section 3 of the bill provides that the Chief Justice of the Supreme Court of Pennsylvania shall appoint one of the members of the Board of Trustees. This would be a violation of Article V, Section 21 of the Constitution, which provides that "No duties shall be imposed by law upon the Supreme Court or any of the judges thereof except such as are judicial, nor shall any of the judges thereof exercise any power of appointment except as herein provided." Nowhere in the Constitution is provision made for appointment, by the Chief Justice, of a member of a board of trustees such as that which this bill proposes to create.

A more fundamental objection to the bill is that the board of trustees which it creates would be authorized to receive contributions "from any and all persons willing to loan on the credit of this Com-

monwealth * * * sums of money," to give receipts "for such moneys accepted as a loan to this Commonwealth," and to issue for moneys received, obligations of the Commonwealth in the form of bonds known as "Industry Bonds." This provision is one of the basic provisions of the bill and clearly violates Article IX, Section 4 of the Constitution, which prohibits the creation by or on behalf of the State of any debt except to supply casual deficiencies of revenue, repeal invasion, suppress insurrection, defend the State in war, or pay existing debt, or for improving or rebuilding the highways of the Commonwealth.

Furthermore, Section 24 of the bill provides that the board of trustees shall have the power to use the money borrowed upon the credit of the Commonwealth for the purpose, among others, of loaning to any employer, association, firm, copartnership, or corporation "such sum or sums in whole or in part as in their judgment * * * may be considered sufficient to enable such industry to resume its business," taking from the borrower certain types of security. This provision would be a violation of Article IX, Section 6 of the Constitution, which provides that the credit of the Commonwealth shall not be pledged or loaned to any individual, company, corporation, or association.

Very truly yours,

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

OPINION NO. 32-C

Legislature—House of Representatives—Constitutionality of House Bills Nos. 42 to 57 inclusive; 59 to 61 inclusive; 64 to 68 inclusive, Extraordinary Session of 1931.

The Attorney General advises the Speaker of the House of Representatives regarding the constitutionality of House Bills Nos. 42 to 57 inclusive; 59 to 61 inclusive; 64 to 68 inclusive. Extraordinary Session of 1931.

Department of Justice,
Harrisburg, Pa., November 30, 1931.

Honorable C. J. Goodnough, Speaker of the House of Representatives, Harrisburg, Pennsylvania.

Sir: In accordance with the resolution of the House of Representatives adopted November 10, 1931, I shall give you my opinion as to the constitutionality of House Bills Nos. 42 to 68 inclusive.

House Bill No. 42, Authorizing any County, City, Borough, Township or Poor District for the purpose of Furnishing Employment to the Unemployed, to Undertake Certain Public Improvements, Poor Districts to Furnish Labor under Certain Conditions and All of Said Political Subdivisions to Provide Funds for the Purposes Specified. In my opinion, this bill comes within Subject No. 5 of the Governor's original proclamation convening the Special Session of the Legislature and would be constitutional if enacted.

House Bill No. 43, Allowing Sunday Theatrical Performances and Athletic Contests and *House Bill No. 44, Prohibiting the Employment in State Service of Any Husband Whose Wife is Employed in the State Service.* These bills could not possibly be considered as coming within any of the subjects stated by the Governor in his original and supplemental proclamations convening the Special Session of the Legislature. They could not, therefore, validly be enacted.

House Bills Nos. 45 and 46 propose constitutional amendments. As you have already been advised, any constitutional amendments may be proposed at a Special Session, whether or not they come within the subjects stated by the Governor in his call.

House Bill No. 47, Appropriating One Million Eight Hundred Fifty Thousand Dollars ($1,850,000) out of the Motor License Fund to be Paid to Counties of the First Class for the Construction, Reconstruction, Maintenance and Repair of Roads and Highways within Such Counties. Clearly, this bill does not come within any subject specified by the Governor in his original or supplemental proclamations and would be unconstitutional if passed.

House Bill No. 48, Making an Appropriation from the "Unemployment Relief Fund" to Be Used for the Removal of Pollution from the Navigable Rivers of the Commonwealth. This bill is predicated upon a misconception of the nature of the "Unemployment Relief Fund," which will be created by House Bill No. 4, if enacted. Under that bill the Unemployment Relief Fund would not be a fund in the State Treasury subject to appropriation. It would consist exclusively of contributions to be used for the purposes specified by the contributors. It would be held by the State Treasurer as custodian only. In any event, the appropriation contemplated by the bill would not come within any of the subjects specified by the Governor in either of his proclamations, and would, therefore, be void, if enacted.

House Bill No. 49, Proposing an Appropriation of Twenty-Two Million Dollars ($22,000,000) to the City of Philadelphia from the "Unemployment Relief Fund." For the same reasons stated in discussing House Bill No. 48, this bill would be unconstitutional, if passed.

House Bill No. 50, Appropriating to the City of Philadelphia Five Hundred Thousand Dollars ($500,000) out of the Motor License Fund

for the Maintenance and Repair of Certain Streets in Said City. Like House Bill Nos. 48 and 49, this bill does not come within any of the subjects stated by the Governor and could not validly be passed.

House Bill No. 51, Creating a State Highway Survey Commission and Appropriating Two Hundred Thousand Dollars ($200,000) for Its Work. Subject No. 4 of the Governor's supplemental proclamation issued November 9, 1931, contemplates new or increased appropriations "to the Governor or any department, board or commission of the State government * * * to enable additional projects to be undertaken which will give work to the unemployed * * *." In my opinion, this subject is not sufficiently broad to cover the creation of new departments, boards or commissions. It refers only to the appropriation of money to existing agencies of the State government. Therefore, in my opinion the bill, if passed, would be unconstitutional.

House Bill No. 52, Imposing a State Tax upon the Manufacture of Malt and Brewed Liquors. This bill is clearly not within any of the subjects stated by the Governor in his proclamation and cannot validly be enacted.

House Bill No. 53, Authorizing the Commonwealth to Borrow Fifty Million Dollars ($50,000,000) for Unemployment Relief. This bill, if enacted, would be a palpable violation of Article IX, Section 4, of the Constitution. It would be void.

House Bill No. 54, Prohibiting the Employment in State Service of Any Married Person Whose Spouse is Employed in a Gainful Occupation. This bill does not come within any of the subjects stated by the Governor and would be unconstitutional, if passed.

House Bill No. 55 proposes a constitutional amendment.

House Bill No. 56, Proposing to Amend the Liquid Fuels Tax Act by Authorizing Refunds in Certain Cases. This bill does not come within any of the subjects stated by the Governor and could not validly be enacted.

House Bill No. 57, Authorizing a State Bond Issue for Unemployment Relief and Appropriating the Proceeds Thereof to the Counties of the Commonwealth. The bond issue proposed by this bill would violate Article IX, Section 4, of the Constitution, and the appropriation would violate Article III, Section 18. Accordingly, the bill would be void if passed.

House Bill No. 59, Proposing to Amend the "Sunday Laws." This bill is clearly foreign to any of the subjects specified in the Governor's proclamations and could not validly be passed at this Session.

House Bill No. 60, Appropriating Five Million Dollars ($5,000,000) for the Acquisition of Additional Forest Lands and for Forest Protection, Development, etc. This bill comes within Subject No. 4 of

the Governor's supplemental proclamation, and would be constitutional, if enacted.

House Bill No. 61, Authorizing the Use of a Million Dollars ($1,000,000) of the Motor License Fund for Township Reward. This bill would be of doubtful constitutionality. It could be sustained only upon the theory that it is an additional appropriation to the Department of Highways "to enable additional projects to be undertaken which will give work to the unemployed," thus bringing it within Subject No. 4 of the Governor's supplemental proclamation. However, as all of the moneys in the Motor License Fund have already been appropriated and as I understand can be expended during the present biennium, it is difficult to see how this appropriation could be construed as authorizing "additional projects to be undertaken." If it could be shown to have this effect, it would come within the call for the Special Session; otherwise it would not.

House Bill No. 64, Appropriating One Hundred Million Dollars out of the State Treasury to the Counties of the Commonwealth in Proportion to Their Population. This bill would, in my opinion, necessarily be held to be in violation of Article III, Section 18, of the Constitution, and could not be sustained, if enacted.

House Bill No. 65. This bill is identical with House Bill No. 61.

House Bill No. 66, Providing for Preference to Citizens of Pennsylvania in Employment in Public Works of the State. This bill does not come within any of the subjects specified by the Governor in his proclamation and could not validly be enacted.

House Bill No. 67, Making an Appropriation to the Department of Property and Supplies for the Erection of Armories. This bill comes within Subject No. 4 of the Governor's supplemental proclamation and would, in my opinion, be constitutional, if passed.

House Bill No. 68, Authorizing a County Tax on Billboards and Outdoor Advertising. In my opinion, this bill comes within Subject No. 15 of the Governor's original proclamation and would be valid, if enacted.

Very truly yours,

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

OPINION NO. 32-D

Legislature—House of Representatives—Constitutionality of House Bills Nos. 69 to 76 inclusive, Extraordinary Session of 1931.

The Attorney General advises the Speaker of the House of Representatives regarding the constitutionality of House Bills Nos. 69 to 76 inclusive. Extraordinary Session of 1931.

Department of Justice,
Harrisburg, Pa., December 7, 1931.

Honorable C. J. Goodnough, Speaker of the House of Representatives,
Harrisburg, Pennsylvania.

Sir: In accordance with the resolution of the House adopted November 10, I shall give you my opinion regarding the constitutionality of the bills introduced in the House last week.

House Bill No. 69, Providing for the Quarterly Collection of Taxes by City Treasurers in Cities of the Third Class. In my opinion this bill does not come within any of the subjects stated by the Governor in his proclamation convening this Session, and would be unconstitutional if enacted.

House Bill No. 70, Making An Appropriation to the Department of Welfare "for State Aid to Political Subdivisions Charged by Law with the Care of the Poor." It is impossible to discuss the constitutionality of this measure without first stating in detail, what it provides.

Section 1 of the bill provides, "That in the exercise of the police power for the protection of the public health safety morals and welfare threatened by existing conditions of unemployment the sum of ten million dollars is hereby specifically appropriated to the Department of Welfare for payment to political subdivisions charged by law with the care of the poor which appropriation shall be allocated as hereinafter provided * * *."

Section 2 provides that the money appropriated to the Department of Welfare shall be allocated the several counties of the Commonwealth "* * * on a ratio that the estimated number of unemployed persons in a county bears to the estimated number of unemployed persons in the entire Commonwealth * * *."

Section 3 provides that where a political subdivision charged with the care of the poor, is coextensive with a county the amount allocated to the county shall be paid to such political subdivision; that where political subdivisions charged with the care of the poor and counties are not coextensive, the county's share of the appropriation shall be paid into the county treasury and be allocated among the political subdivisions of the county by the county commissioners, with the approval of the court, "* * * on the basis of unemployed persons resident within the several subdivisions as ascertained from the best sources of information obtainable * * *;" and that in counties coextensive with cities the county's share of the State appropriation shall be paid into the city treasury, and allocated by the Department

of Welfare of the city among the various political subdivisions charged with the care of the poor, also "* * * on the basis of unemployed persons within the respective subdivisions as ascertained from the best sources of information obtainable * * *."

Section 4 provides that each political subdivision charged by law with the care of the poor "* * * shall have authority under the provisions of this act any law to the contrary notwithstanding to expend the moneys received from the appropriation made by this act for the purpose of providing food clothing fuel and shelter for residents within their districts who are in need of the same. In no case shall any of said appropriation be used for paying cash commonly known as a 'dole' to persons entitled to relief."

Section 5 provides that the amounts allocated to political subdivisions of the State, under this bill, and expended by them shall be audited by their own auditors "* * * in the same manner and with like effect as other moneys expended by such subdivisions."

It will be observed that the bill does not specify how the State's money shall be expended by any poor district; it merely renders it permissive for poor districts to purchase food, clothing, fuel, and shelter for residents "who are in need of the same." Nor does the bill give to the State any right whatever to supervise, or even inquire into, the manner in which the State funds which it appropriates are to be used.

In a word, the appropriation made by this bill would be in relief of the taxpayers of the poor districts, and not necessarily in relief of the unemployed.

It is apparent on the face of the bill that it was conceived and prepared upon the theory that it could be sustained as constitutional because the appropriation purports to be made "* * * in the exercise of the police power for the protection of the public health safety morals and welfare threatened by existing conditions of unemployment * * *"

Whether this is so, is the first question which must be considered.

Article III, Section 18 of the Constitution provides that "No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community, * * *."

An appropriation made to the Department of Welfare for the single purpose of being by it allocated among and paid to the counties of the State is, in law, an appropriation to such counties or cities. No other conclusion is possible under the Supreme Court's decision in the St. Agnes Hospital Case (*Collins v. Martin*, 290 Pa. 388).

If there were in the bill a requirement that the money should be used for unemployment relief, the appropriation would clearly be for

a "charitable purpose." As stated by the present Chief Justice in *Taylor v. Hoag,* 273 Pa. 194, at page 196, "* * * The word 'charitable,' in a legal sense, includes every gift for a general public use, to be applied, consistent with existing laws, for the benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical or social standpoint. * * *" In the St. Agnes Hospital Case, already cited, the Court held definitely that an appropriation for the care and treatment of indigent persons in hospitals was an appropriation for a charitable or benevolent purpose.

There can be no doubt that a county, a city, or a poor district is a "community." The dictionary definition of this word is, "The people who reside in one locality and are subject to the same laws, or have the same interests, etc.; a body politic, whether village, town, city, or state * * *;" and our Supreme Court in *Busser v. Snyder,* 282 Pa. 440, held that "person" and "community," as used in Article III, Section 18, are "* * * not limited to the idea of a single person or place where persons are located; * * *." These words in this section, according to the Court "* * * are used in an exclusive sense, relating to an individual or a group or class of persons, wherever situated, in any part or all of the Commonwealth. * * *" It was said that the constitutional prohibition "* * * applies to persons, kind, class and place, without qualification. The language of the Constitution is an absolute and general prohibition. * * *"

The Supreme Court in the case last cited also held that the system in effect when our Constitution was adopted " '* * * provided for poor districts, poor directors and overseers, and for the relief of paupers as a matter of local concern. Those who framed the Constitution understood it, * * * The system was left untouched. * * * The conclusion is therefore irresistible that a direct appropriation from the State Treasury to any person or class of persons cannot be sustained on the theory that it is a discharge of the inherent obligation of the State to take care of its paupers.' "

Therefore, we begin with the clear proposition that if the present bill contemplated (which it does not) an appropriation out of the State Treasury to counties, cities, and poor districts which must be used *for unemployment relief,* it would be an appropriation to communities for charitable purposes and would thus come within the prohibition of Article III, Section 18.

As former Chief Justice von Moschzisker said in *Collins v. Kephart,* 271 Pa. 428, "When simple words are used in writing the fundamental law, they must be read according to their plan, generally understood, or popular, meaning: * * *."

The appropriation contemplated by this bill, if it became a law, would transfer money from the State Treasury to the treasuries of

counties, cities, and poor districts without any mandatory specification of the purpose for which the money must be used and without any State supervision or audit of the use to which the money was actually applied. Such an appropriation would be a gift to the political subdivisions receiving it, and as such would be for "benevolent purposes." See the language of the Supreme Court in *Commonwealth v. Alden Coal Company,* 251 Pa. 134, at page 146, where the Court held unconstitutional an attempt by the Legislature to return to the anthracite producing counties to be used in their discretion, one-half of the tax on anthracite coal.

As it stands, the bill would be a clear violation of the plain and readily understood language of Article III, Section 18.

Can a bill which would otherwise be unconstitutional, be made constitutional by the simple device of declaring that it is passed "in the exercise of the police power?"

"Police power is the power inherent in a government to enact laws, *within constitutional limits,* to promote the order, safety, health, morals, and general welfare of society * * *." 12 Corpus Juris, page 904. This power is always "* * * subject to the limitations imposed by the Federal and State Constitution upon every power of government, * * *." Cooley's Constitution Limitations, (8th ed.), page 1229.

In *Commonwealth v. Vrooman,* 164 Pa. 306, at page 316, our Supreme Court said "* * * It (the police power) is therefore a power inherent in all forms of government. Its exercise may be limited by the frame or constitution of a particular government, but its natural limitations, *in the absence of a written constitution,* are found in the situation and necessities of the state * * *."

Our Constitution contains a number of limitations upon the power of the Legislature. We have already discussed Article III, Section 18, forbidding appropriations for charitable and benevolent appropriations to any person or community. Another limitation is contained in Article IX, Section 4, and is as follows: "* * * No debt shall be created * * * except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or to pay existing debt; * * *." If by a mere recital that a bill is passed in the exercise of the police power, the Legislature can nullify Article III, Section 18, it must necessarily be able also by the same means to nullify Article IX, Section 4. The same reasoning which would sustain the present bill would, therefore, sustain a bill borrowing unlimited sums of money "* * * in the exercise of police power for the protection of the public health safety morals and welfare threatened by existing conditions of unemployment * * *."

Such a proposition is too absurd to merit serious consideration.

The Legislature does have the right in the exercise of the police power to enact any measure calculated to promote the health, safety, morals or general welfare of the public, which is not expressly forbidden by the Constitution; but it cannot, by the mere recital that it is exercising the police power, wipe out a constitutional provision and thus in effect amend the Constitution.

It may be that there are dicta of judges of this and other states, contrary to the opinion here expressed; but I have not been able to find any decision in which any court ignored an express prohibition contained in a written constitution on the theory that the constitutional provision was void if the Legislature elected to declare that it was exercising the police power. Our Constitution can be amended only in the method prescribed by Section 18. Amendments require action by two Legislatures and a vote of the people. They cannot be made by the "say-so" of a court or judge, any more than by an act of the Legislature.

I cannot escape the conclusion that House Bill No. 70 is unconstitutional.

I may add in conclusion that this bill furnishes ample proof of the wisdom of those who framed Article III, Section 18, of our Constitution. The bill is a "wolf in sheep's clothing." It uses the cloak of the present unemployment situation to cover what would be in essence a "dole" from the State to counties, cities and poor districts,—a payment from the State Treasury to local treasuries to be used in the discretion of local authorities. It would, if enacted and sustained, establish a precedent which would haunt Legislatures for many years to come.

If the bill were a sincere effort to afford direct relief to the unemployed, through a State appropriation to be used, supervised and audited for relief purposes, it would be a very unpleasant duty to hold it unconstitutional, just as it was to write my opinion of October 27 to the Governor, with which you are familiar. But as Attorney General it is my duty to advise State officers according to the Constitution and laws as I find them. It is not my duty to guess whether our courts, by strained constructions, would endeavor to circumvent constitutional provisions. Nor can I, under my oath of office, advise that because certain appropriations in the past have been made in disregard of a constitutional limitation without being attacked in the courts, the Legislature can now disregard the plain and unambiguous language of the Constitution.

For many years the Legislature made appropriations to sectarian institutions, but when, after millions of dollars had been thus expended, the courts were called upon to interfere, they did not hesitate, in *Collins v. Kephart,* 271 Pa. 428, to apply the constitutional

prohibition against the practice, however distasteful it may have been to deprive worthy institutions of State aid which they had been receiving for many years.

Finally, it would be impossible under any reasoning to bring the bill within any of the subjects stated by the Governor in his proclamations. It cannot, therefore, be validly enacted at this Session.

House Bill No. 71, Providing for the Imposition of an Income Tax. I have already advised you that in my opinion an income tax does not come within any of the subjects stated by the Governor in his proclamations and would be unconstitutional if enacted at this Session.

House Bill No. 72, Imposing a Tax on Admission to Concerts and Other Public Performances. This bill does not come within any of the subjects specified by the Governor in his proclamation and cannot, in my opinion, be validly enacted at this Session.

House Bill No. 73, Proposes a Constitutional Amendment, and can validly be enacted.

House Bills Nos. 74 and 75, Making Appropriations to the Department of Welfare in Aid of Certain Hospitals Not Owned by the Commonwealth. These bills come within Subject No. 1 of the Governor's supplemental proclamation and would, in my opinion, be constitutional if enacted.

House Bill No. 76, Proposing a Tax upon Malt. For the reasons stated in discussing House Bills Nos. 71 and 72, this bill could not, in my opinion, be sustained if enacted at this Session.

Very truly yours,

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

OPINION NO. 32-E

Legislature—House of Representatives—Constitutionality of House Bills Nos. 77 to 86 inclusive, Extraordinary Session of 1931.

The Attorney General advises the Speaker of the House of Representatives regarding the constitutionality of House Bills Nos. 77 to 86 inclusive. Extraordinary Session of 1931.

Department of Justice,
Harrisburg, Pa., December 14, 1931.

Honorable C. J. Goodnough, Speaker of the House of Representatives,
Harrisburg, Pennsylvania.

Sir: In accordance with the resolution of the House of Representatives adopted November 10, 1931, I shall give you my opinion re-

garding the constitutionality of the bills introduced in the House last week. They are House Bills Nos. 77 to 86 inclusive.

I have repeatedly stated to you my views with respect to the construction which must be placed upon the proclamations of the Governor calling the Special Session. It will serve no useful purpose again to repeat those views.

In my opinion, none of the bills introduced in the House last week come within any subject stated by the Governor in his proclamations, and all of them would be unconstitutional if enacted at this Session.

Very truly yours,

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

OPINION NO. 33

Corporations—Fictitious Names—Acts of June 28, 1917, P. L. 645 and June 29, 1923, P. L. 979.

Whether or not a trade name must be registered under the Fictitious Names Act of June 28, 1917, P. L. 645, as amended by the Act of June 29, 1923, P. L. 979, is to be determined by ascertaining whether the name is "assumed," "feigned," fictitious," "not real" or "not genuine." Unless a trade name may be so classified it is not within the Fictitious Names Act, even though it fails to identify precisely the individuals conducting the business.

A trade name containing the word "company" will ordinarily be fictitious within the meaning of the Fictitious Names Act.

Department of Justice,
Harrisburg, Pa., November 25, 1931.

Honorable Richard J. Beamish, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: You have asked us to construe the Act of June 28, 1917, P. L. 645, as last amended by the Act of June 29, 1923, P. L. 979, which is commonly known as the Fictitious Names Act. You wish us to furnish you with a guide which will enable you to determine whether particular business names should be registered under the act.

Every case, of course, must stand on its own facts, but there is a sufficient similarity among many of them that will permit us to state some guiding principles and to illustrate them with examples of common types of business names that are commonly used.

The act forbids any individual or individuals "to carry on or conduct any business in this Commonwealth under any assumed or fic-

titious name, style or designation'' unless such name, style or designation shall have been registered with the Secretary of the Commonwealth and with the prothonotary of the county, in the manner therein prescribed.

In *Engle v. Capital Fire Insurance Company,* 76 Pa., Super. 390, 397, the Superior Court stated the purpose of the act as follows:

> ''The purpose of the statute * * * is to protect persons giving credit in reliance on the assumed or fictitious name, and to definitely establish the identity of the individuals owning the business, for the information of those who might have dealings with the concern. * * * It is a penal regulation and should be so construed as not to extend its operation beyond the purposes for which it was obviously enacted.''

This statement has been quoted with approval by the Supreme Court in *Lamb v. Condon,* 276 Pa. 544, 547, and in *Merion Township School District v. Evans,* 295 Pa. 280, 285.

In *Mangan v. Schuylkill County,* 273 Pa. 310, 313, the Supreme Court, in construing the act, defined the words ''fictitious'' and ''assumed'' as follows:

> ''* * * We are of opinion the word 'fictitious' is here used as explanatory of 'assumed' and the two were not intended to have different meanings; that these two words have like meanings may be seen by the following excerpts from Webster's New International Dictionary: it defines 'assumed' thus,—'supposed, pretended, make believe,' and 'fictitious' thus,—'feigned, imaginary, pretended, not real, counterfeit, false, not genuine, arbitrarily invented or devised.' It is in these general senses that both words are employed in the statute before us.''

In *Hughes & Dier v. McClure,* 77 Pa. Super. 325, 327, it was held that the firm name of ''Hughes & Dier,'' designating a partnership composed of two men bearing those names, was not fictitious, and the court expressly ruled that it is not necessary that the business name used shall disclose the whole names of the owners of the business.

In *Moyer v. Kennedy,* 76 Pa. Super. 523, the Court held that the firm name of ''Moyer and Carpenter'' was fictitious where the firm consisted of three members named Moyer, Carpenter and Miller. The court said (page 527):

> ''Instead of being a partnership formed by two, there were three partners. The title or style negatives the thought that there are three partners. It is therefore fictitious. It conveys a false impression.''

In *Merion Township School District v. Evans,* 295 Pa. 280, 285, it was held that the firm name of ''McCabe Brothers'' was not fictitious

where the owners of the business were in fact brothers bearing that name.

In *Hartle v. Carlson,* 70 Pitts. L. J. 223, it was held that where a father and son conducted a business in the name of "M. A. Hartle and Son," they were not trading under a fictitious name within the meaning of the Act of Assembly.

In *Snaman v. Maginn,* 77 Pa. Super. 287, 289, it was held that the title "Snaman Realty Company" was fictitious. The plaintiff Snaman was the sole owner of the business. Likewise in *Commonwealth v. Palmer,* 3 Pa. D. & C. 650, 651, the Court of Common Pleas of Dauphin County held that the name "Hagerling Motor Car Company" was fictitious where the business was owned by a single individual. In that case Judge Hargest said:

> "An individual cannot be a company. This name implies a corporate existence rather than an individual training in that capacity. Therefore it is a pretended and arbitrarily devised name."

In *Ferraro v. Himes,* 77 Pa. 274, 276, the title "A. Ferraro and Company" was held to be fictitious where the business was owned by Albert Ferraro and Amelia Ferraro, his wife. The court there said:

> "The word company gives no notice as to who the other member or members of the firm are. There may be one or many. Certainly it does not indicate that Amelia Ferraro was the other member. It might apply to anyone. The word is impersonal."

In *Stevens v. Meade,* 13 Pa. D. & C. 9, the Court of Common Pleas of Delaware County held that the name "Albert Stevens Hardwood Flooring Company" was not fictitious where the business was owned by a single individual named Albert Stevens. This would seem to be contrary to the ruling of the Superior Court in *Snaman v. Maginn,* supra., and also contrary to the apparently better reasoning of Judge Hargest in *Commonwealth v. Palmer,* supra. It appears from the report of the case, however, that the court was treating it as though the plaintiff were doing business under the title of "Albert Stevens trading as Albert Stevens Hardwood Flooring Company." Of course if he was actually trading under this name there was nothing assumed or fictitious about it, because he disclosed not only his complete name but the fact that no other person was associated with him in the business.

In *Lamb v. Condon,* 276 Pa. 544, 547, it was held that the business name of "Lamb and Company" was fictitious, the whole business being owned by one man.

The principles to be drawn from these rulings may be summarized as follows:

The act is a penal act and is not to be construed to extend beyond the purposes for which it was obviously enacted, namely, to inform the public as to the persons with whom they are dealing. Business names which correctly state or indicate the identity of the persons engaged in the business need not be registered. Nor is it necessary that the designation shall disclose the full name of each member. The test is whether the name used is assumed, fictitious, feigned, "not real," or "not genuine."

The use of the word "company" in any title is practically sure to render the name fictitious, unless the true situation is otherwise disclosed by the title. It creates an impression either of incorporation or of the association of several persons. If used by one person alone, it is deceptive. If used by several, it gives no hint as to their identity. In this it differs from the words "brothers" and "sons." The latter words necessarily indicate a family name.

A type of name commonly in use which seems to have been considered in only two cases is illustrated by such titles as "Edwards' Book Store," "The Lewis Flower Shop," and "Bender's Business College."

In *Myers v. Campbell,* 40 Lanc, L. Rev. 617, the plaintiff was doing business under the name of "Myers Accessory House." The court, however, apparently looked only at the caption of the litigation before it and from that treated the case as though the plaintiff had been doing business under the designation of "George W. Myers trading as Myers Accessory House." It was held that the plaintiff was not using a fictitious name, but the court's opinion went off on the point that the plaintiff was using his own full name in addition to the name "Myers Accessory House."

In *Sykes v. Penn'a. R. R. Co.,* 28 Pa. Dist. 1037, the Court of Common Pleas of Cameron County held that the title "Sykes Department Store" used by the individual owner, Fanny Sykes, was assumed or fictitious. The opinion contains almost no discussion on the point, and does not consider any other cases construing the act. In view of the authorities to which we have referred, we are not able to agree with the conclusion of the court in that case.

In our opinion names of the kind illustrated in the third paragraph above are not fictitious within the meaning of the act as long as only persons owning or operating the various enterprises are the ones designated or indicated in the names themselves. Such titles are not feigned, or assumed or pretended, or false. They are genuine. They give the name of the proprietor and append a description of the nature of the business. They in no way tend to deceive or to create a

false impression, or to leave the owners, or some of them undisclosed. Therefore, we advise you that a title which contains the family name of the proprietor or all the proprietors, (but without use of the word "company"), and appends words descriptive of the business, is not fictitious. We do not consider it sufficient, however, if the proprietor's first name only is used, as for example "Mary's Beauty Shop."

The following examples will illustrate the application of the principles we have deduced from the authorities.

1. Types of names which are not fictitious and need not be registered:
   (a) "John Smith, trading as Smith Lumber Company."
   (b) "Scott and Adams," provided there are but two partners, and they bear those names.
   (c) "Alexander Brothers," provided that there are at least two owners and they are brothers, named Alexander. It cannot matter that these Alexanders may have other brothers who are not in the firm.
   (d) "Jackson and Sons" under conditions similar to those last above stated.
   (e) "Edwards' Book Store," if the sole owner is Edwards.
   (f) "The Lewis Flower Shop," if the sole owner is Lewis.

2. Types of names that are fictitious and should be registered:
   (a) "Martin and Miller" when there are other partners than the two named, or when there is but a single owner.
   (b) "Jones and Company," "The Jones Company," or "The Jones Printing Company."

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 34

Auditor General—Appropriations—Corporations—Merger or Consolidated Corporations—Adrian Hospital Association—Punxsutawney Hospital Association—Act of April 11, 1931, P. L. 29.

Where two incorporated hospital associations have informally joined their property and activities under the name of one of them, but without actual corporate merger, the resulting institution is not entitled to receive a state

appropriation made to the association whose identity and activities were lost in the transaction.

The Act of April 11, 1931, No. 26, P. L. 29, has no application to corporations which have united in any manner other than by formal merger or consolidation.

Department of Justice,
Harrisburg, Pa., December 8, 1931.

Honorable J. M. Wilson, Deputy Auditor General, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether the Adrian Hospital Association, located at Punxsutawney, is entitled to receive the appropriation made by the Legislature of 1931 to the Punxsutawney Hospital Association. From the correspondence which you have submitted to us we glean the following facts.

The Adrian Hospital Association is a corporation of the first class, chartered February 11, 1889. The Punxsutawney Hospital Association is also a first class corporation and received its charter October 1, 1908. Up until about June 1931, the two institutions were operated separately.

During the spring and summer of 1931 negotiations were carried on between the two institutions looking toward a union or consolidation of the one with the other. The actions of the respective Boards of Trustees were extremely informal, and the records before us disclose no actual agreement of consolidation and no proceedings in Court of Common Pleas to accomplish the desired end.

The only definite action taken seems to have been when the Trustees of the Punxsutawney Hospital, after a meeting of the incorporators, conveyed the real estate of that corporation to Edna Grube Goheen and Olive Jane Grube, who held a mortgage on it. These grantees thereafter entered into an agreement to convey the property to the Adrian Hospital Association upon payment of the purchase price of fifty thousand dollars ($50,000).

The personal property of the Punxsutawney Hospital Association seems to have been turned over to the Adrian Hospital and for several months only the Adrian Hospital has been operating. It seems that there was some change made in the Board of Trustees of the Adrian Hospital in order to make places for certain former members of the Board of the Punxsutawney Hospital.

The Adrian Hospital now seeks payment, not only of the appropriation made directly to it by the Legislature of 1931, but also of the appropriation made to the Punxsutawney Hospital Association. This

claim is made under the Act of April 11, 1931, No. 26. The act provides as follows:

> "Be it enacted, &c., That whenever a hospital or home to which the General Assembly has made an appropriation for maintenance shall merge or consolidate with one or more hospitals or homes, the appropriations, or any balance thereof, which has not been paid to such hospital or home shall be paid to the merged or consolidated institution, upon the same basis and subject to the same approvals as if the merger or consolidation had not occurred."

In our opinion the new institution has not qualified itself to receive the appropriation made to the Punxsutawney Hospital Association. It can receive that money only if the institution is the result of a merger or consolidation of the two corporations. The law has provided expressly for the manner in which corporations may merge or consolidate. Under the Act of April 29, 1874, P. L. 73, Section 42, as amended by the Act of April 17, 1876, P. L. 30, Section 12, corporations of the first class must proceed in the Court of Common Pleas to effect a merger or consolidation. No such proceedings have been taken in the present case. Consequently no merger or consolidation has been accomplished in the eyes of the law. The Act of 1931 cannot apply.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 35

Criminal law—Violation of statutes regulating sale of seeds—Compromise of prosecution by Department of Agriculture—Criminal Procedure Act of 1860, Section 9—Applicability.

The Department of Agriculture may not make settlement with persons who have violated the provisions of the Acts of April 26, 1921, P. L. 316, and April 11, 1929, P. L. 448, regulating the sale of seeds and seed potatoes; section 9 of the Criminal Procedure Act of March 31, 1860, P. L. 427, applies only to those cases in which a remedy by civil action has been provided.

Department of Justice,
Harrisburg, Pa., December 8, 1931.

Honorable John A. McSparran, Secretary of Agriculture, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether your Department may make settlement with parties who have violated the provisions of the

Acts of Assembly regulating the sale of agricultural seeds and mixtures thereof, by accepting a fine and withholding criminal prosecution.

The seed acts, to which your inquiry relates, are the Acts of April 26, 1931, P. L. 316, and April 11, 1929, P. L. 488. The former makes it unlawful to sell, offer for sale, or expose for sale, vegetable seeds in bulk, package or containers of ten pounds or more without having attached a label, on which shall be legibly written or printed the name of the seed and percentage of purity or freedom from inert matter. It provides that any person violating any of its provisions shall be guilty of a misdemeanor and, on conviction, sentenced to pay a fine of not more than two hundred dollars ($200.00). The Act of April 11, 1929, P. L. 488, includes agricultural seeds, vegetable seeds and seed potatoes. This act prohibits the use of the words "certified" or "registered," unless actual inspection has been made and certified by the Department of Agriculture. A violation of the provisions of this act is also made a misdemeanor and the penalty is identical with that provided in the preceding act.

The question which arises, therefore, is whether settlement may be made where violations have been committed under the provisions of either of said acts. The matter of settlement in criminal procedure is purely statutory and is authorized by the Criminal Procedure Act of March 31, 1860, P L. 427, Section 9, which provides that:

> "In all cases where a person shall, on the complaint of another, be bound by recognizance to appear, or shall, for want of security, be committed, or shall be indicted for an assault and battery or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done with intent to commit a felony, or not being an infamous crime, and for which there shall also be a remedy, by action, if the party complaining shall appear before the magistrate who may have taken recognizance or made the commitment, or before the court in which the indictment shall be, and acknowledge to have received satisfaction for such injury and damage, it shall be lawful for the magistrate, in his discretion, to discharge the recognizance which may have been taken for the appearance of the defendant, or in case of committal, to discharge the prisoner, or for the court also where such proceeding has been returned to the court, in their discretion, to order a *nolle prosequi* to be entered on the indictment, as the case may require, upon payment of costs: * * *"

It will be observed that this act relates to settlement of criminal proceedings where complaint or information has been made before a court or magistrate and the defendant entered into recognizance or was committed to jail for his appearance in a court of quarter

sessions. It does not apply to all misdemeanors but is restricted to such as are:

(1) To the injury and damage of the party complaining;
(2) Not charged to have been done with intent to commit a felony;
(3) Not infamous crimes; and,
(4) Those for which there shall be a remedy by civil action.

All of these conditions must concur, and if any be wanting, the act is not applicable. While compliance could be made with some of the clauses above noted, there would be nothing which covers clause (4) because there is no remedy provided for any civil action, hence the whole must fall.

This conclusion is fully sustained in *Pearce et ux v. Wilson et al.*, 111 Pa. 14, where it was said by Sterrett, J.:

> "* * * In general, it is to the interest of the public that the suppression of a prosecution, whether for felony or misdemeanor, should not be made matter of private bargain; and hence the suppression or settlement of such prosecutions is contrary to public policy, and therefore void, except in certain cases for the settlement of which provision is made. * * *"

There is no statute under which settlement is authorized to be made, by one who has committed a crime in violation of the laws of the State. It is the Commonwealth which has been offended and of which the courts take cognizance for the general welfare of society. For individuals to attempt settlement would be compounding the offense and suppressing the crime, which the law does not permit, except where such settlement is authorized by legislative enactment.

Therefore, you are advised that settlement may not be made with violators of the said cited acts, prior or subsequent to making information before a magistrate or court for a violation thereof.

Very truly yours,

DEPARTMENT OF JUSTICE,
JAMES W. SHULL,
Deputy Attorney General.

OPINION NO. 36

Elections—Voting machines—Approval of voters—Purchase by county commissioners—Duty of Secretary of the Commonwealth upon default—Act of April 18, 1929—Absence of funds available for purchase.

Where the voters of a county have approved the use of voting machines and a loan to pay for them, but the county commissioners have not contracted for the purchase of a sufficient number of machines, it is the duty of the Secretary of the Commonwealth to advertise for proposals and to award and execute a contract for the purchase of the number of machines necessary to supply the county, in accordance with section four of the Act of April 18, 1929, P. L. 549, as amended by the Act of June 23, 1931, P. L. 1185, although the money borrowed by the municipality for the purpose has been diverted to other uses and there are no funds available for the purchase price of the voting machines required.

Department of Justice,
Harrisburg, Pa., January 8, 1932.

Honorable Richard J. Beamish, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request to be advised regarding your duty to purchase voting machines for and on behalf of the County of Philadelphia.

The facts as we understand them are as follows:

On November 5, 1929, the electors of the City and County of Philadelphia approved the use of voting machines therein and on the same date approved a loan in the amount of two million dollars to pay for them.

To date the county commissioners of Philadelphia County have purchased voting machines to supply only twenty-one of the forty-eight wards of the city. On September 2, 1931, you notified them in writing that unless they contracted immediately for the purchase of additional machines sufficient in number to supply the entire city you would advertise for proposals, and award, make and execute a contract for the purchase of the necessary number of voting machines as provided by Section 4 of the Act of April 18, 1929, P. L. 549, as amended by the Act of June 23, 1931, (Act No. 322). The county commissioners not having contracted for voting machines as per your notice, you advertised inviting proposals.

On Wednesday of this week at a conference between the city comptroller, the county commissioners and yourself, it was pointed out that the City of Philadelphia had expended for other purposes the money borrowed for the purchase of voting machines; and the city comptroller advised that he would not advertise under the Act of June 27, 1895, as amended by the Act of April 7, 1927, P. L. 176, for proposals for voting machines, notwithstanding the request of the county commissioners that he do so, until such time as the city is in funds to enable it promptly to pay for the machines purchased.

You desire to know whether under these circumstances you are required to withhold action or whether it is your duty to proceed

to award a contract on behalf of the county of Philadelphia, as per the Voting Machine Act of 1929 and its amendments.

It is very doubtful whether, under the Act of 1895 as amended, the city comptroller can lawfully refuse to advertise for proposals for voting machines as per the directions of the county commissioners. See the decision of the Supreme Court in *Commonwealth v. Wertz,* 251 Pa. 241, and also the decision of the Court of Common Pleas of Luzerne County in *Commonwealth v. Hendershot,* 21 Luzerne 1.

But however that may be, it is perfectly clear that under the Voting Machine Act it is your absolute duty under the circumstances above outlined to proceed with the award and execution of a contract for the purchase of additional voting machines necessary to supply all of the wards of Philadelphia. That act expressly provides that:

> "* * * the cost of such voting machines, including the delivery thereof, and of making and entering into the said contract or contracts, including the preparation and printing of specifications and all other necessary expense incidental thereto, shall be the debt of the said county, and, upon the certificate of the Secretary of the Commonwealth, it shall be the duty of the controller, if any, to allow, and of the treasurer of the county to pay, the sum out of any appropriation available therefor, or out of the first unappropriated moneys that come into the treasury of the county."

The fact that the money expressly borrowed by Philadelphia for the purchase of voting machines has been diverted to other uses cannot defeat the expressed will of the electors or the plain mandatory provisions of the Voting Machine Act.

Accordingly, we advise you that it is your duty to proceed with the course of action which you have outlined in your notice to the county commissioners of Philadelphia County.

Very truly yours,

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

OPINION NO. 37

Unemployment Relief--Extraordinary Session of 1931—Constitutionality of Act No. 7E—Appropriation—Duty of Secretary of Welfare. Art. III, Sec. 18 of the Constitution.

The Secretary of Welfare is advised that she may not draw any requisitions against an appropriation for unemployment relief, made by Act No. 7E, Extra-

ordinary Session of 1931, which became a law without the Governor's signature, and was declared by the Attorney General to be in violation of Art. III, Sec. 18 of the Constitution.

Department of Justice,
Harrisburg, Pa., January 8, 1932.

Honorable Alice F. Liveright, Secretary of Welfare, Harrisburg, Pennsylvania.

Madam: We have your request to be advised what action, if any, you shall take under the provisions of Act No. 7E which became a law without the Governor's signature, on December 26, 1931.

Under date of October 27, 1931, we issued to the Governor Formal Opinion No. 30, advising that the Legislature cannot under Article III, Section 18 of the Constitution of Pennsylvania, make direct appropriations for unemployment relief. Under date of December 7, 1931, we advised the House of Representatives, in Formal Opinion No. 32D, that House Bill No. 70, which with certain minor amendments has become Act No. 7E, was unconstitutional. We took the view that it would, if passed, be in violation not only of Article III, Section 18, but also of Article III, Section 25 of the Constitution.

Under date of December 22, 1931, we advised the Governor that the bill,—then before him,—was unconstitutional, as in violation of the sections already mentioned and also of Article III, Section 3 and Article IX, Section 4.

We are attaching copies of these opinions. The first of them was issued after it had been submitted to the Auditor General and State Treasurer, both of whom approved its conclusions.

It would serve no useful purpose here to repeat at length what has been stated in our previous opinions. We believe that the act is unconstitutional and void.

Accordingly, we advise you that you cannot lawfully draw any requisitions as provided in the act.

Very truly yours,

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

Enclosures

Department of Justice,

Formal Opinion No. 30. Harrisburg, Pa., October 27, 1931.

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

Sir: You have asked to be advised what measures the Legislature of Pennsylvania may take under our Constitution to relieve the distress resulting from unemployment during the forthcoming winter. Specifically, you wish to know:

First: Whether the Legislature can make appropriations for the payment of money or the furnishing of food, clothing and shelter to unemployed persons and their families;

Second: Whether the Legislature can make an appropriation to a State agency for these purposes;

Third: Whether the Legislature can appropriate money to political subdivisions of the State for these purposes; and,

Fourth: Whether the Legislature can make appropriations to incorporated or unincorporated welfare agencies, the money to be used for these purposes.

The constitutional provision which immediately comes to mind in considering the Legislature's ability to appropriate money for unemployment relief is Article III, Section 18, which reads as follows:

> "No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectorian institution, corporation or association."

In *Busser et al. Snyder,* 282 Pa. 440 (1925) the Supreme Court held that this section had been violated in the passage of the "Old Age Pension Act" of May 10, 1923, P. L. 189.

The Act created an Old Age Assistance Commission and county old age assistance boards which were to administer its provisions. It provided that assistance might be granted only to persons seventy years of age or upwards who had been residents of the United States and of this Commonwealth for certain periods prior to their application for aid, who had no children or other persons responsible for their support and able to support them, who had property of the value of less than three thousand dollars ($3,000), and who had an income of less than one dollar ($1.00) per day. The amount of assistance was to be such that when added to the income of the applicant from all other sources it would not exceed a total of one dollar ($1.00) a day.

In attempting to sustain the Act, the Attorney General sought to have the Court take the view that the words "person" and "community" as used in Article III, Section 18 of the Constitution have a restricted meaning. He argued that in view of the fact that old age assistance was to be granted by an administrative agency and that money for assistance had been and was to be appropriated to this agency, the constitutional provision was not applicable. In disposing of this argument, Mr. Justice Kephart said, at page 451:

> "* * * This contention is not sound; 'person' and 'community' are not limited to the idea of a single person or place where persons are located; they are used in an inclusive sense, relating to an individual or a group or class of persons, wherever situated, in any part or all of the Commonwealth. It applies to persons, kind, class and place, without qualification. The language of the Constitution is an absolute and general prohibition. Nor does the fact that the appropriation is made to an agency (the intermediate and practical step by which public money is distributed to citizens) aid appellant's case. The gift is not to the commission, but to the particular persons selected by the legislature to receive it. The commission cannot use the money: it merely passes it on to the selected class. It is none the less a gift directly to the individual, even though it pauses for a moment on its way thither in the hands of the agency. Nor can the act be sustained because the appropriation is to an agency as an arm of the government, working out a governmental policy. What the Constitution prohibits is the establishment of any such policy which causes an appropriation of state moneys for benevolent purposes to a particular class of its citizens, whether under the guise of an agency, as an arm of the government through which a system is created, or directly to the individual. * * *"

The Attorney General also argued that if the Old Age Pension Act were held unconstitutional, by the same reasoning grants of public money for the care and maintenance of indigent, infirm and mentally deficient persons without ability or means to sustain themselves must be stricken down as unconstitutional. Answering this proposition, Mr. Justice Kephart said, at page 453:

> "* * * To provide institutions, or to compensate such institutions for the care and maintenance of this class of persons, has for a long time been recognized as a governmental duty, and where institutions are compensated (except as hereinafter noted) for the care of indigent, infirm and mentally defective, including certain physically defective, persons, such appropriations may well be sustained on this theory. The expenditure of money for such purposes is and long has been recognized as a func-

> tion of government, and the manner of its administration is restricted only by section 18 of article III. * * *''

It was also argued that if this act were held void, the various State retirement acts must also fall. This the Court said was not sound because the retirement acts do not appropriate money for charitable or benevolent purposes. They provide compensation for the hazard of long continued public employment.

Finally, the Attorney General sought to sustain the Act on the ground that it was a ''poor law'' and that there is no constitutional inhibition against State aid for poor relief. This contention was discussed at length. At page 457, Judge Kephart said:

> ''As said by Mr. Justice Brewer in *Griffith v. Osawkee Twp.,* 14 Kans. 418, 422, 27 Pac. St. Rep. 322, 324, 'Cold and harsh as the statement may seem, it is nevertheless true that the obligation of the state to help is limited to those who are unable to help themselves.' We agree with what the court below says on this question: 'That system provided for poor districts, poor directors and overseers, and for the relief of paupers as a matter of local concern. Those who framed the Constitution understood it, and no word is contained in the Constitution with reference to it. The system was left untouched. If there had been any purpose to change that system, some word indicating that purpose would have been found in the Constitution * * * The conclusion is therefore irresistible that a direct appropriation from the state treasury to any person or class of persons cannot be sustained on the theory that it is a discharge of the inherent obligation of the State to take care of its paupers.' ''

This decision necessarily leads us to the conclusion that an appropriation enabling cash, food, clothing or shelter to be supplied to those who are unemployed because of economic depression would be treated as a charitable appropriation to ''persons'' and, therefore, unconstitutional. Clearly, if a person is an object of charity when unable to support himself by reason of advanced age and lack of sufficient income, then a person is likewise an object of charity when unable to support himself because of temporary unemployment due to economic depression; and if it is not a governmental duty but a charity for the State to provide for the care of indigent sick and injured, it must necessarily follow that it is not a governmental duty but a charity to care for persons temporarily indigent because of economic depression.

Another Supreme Court decision which requires consideration is *Collins v. Martin et al.,* 290 Pa. 388 (1927).

The Legislature had appropriated a million dollars to the Department of Welfare for the care and treatment of indigent sick and

injured persons in hospitals not owned by the Commonwealth. The Department contracted with certain hospitals to furnish medical and surgical treatment to such persons, at a per diem rate. One of these hospitals was St. Agnes Hospital in Philadelphia, which the Court found to be a sectarian institution. The question was whether the State Treasurer could lawfully pay to St. Agnes Hospital the amount which the Department of Welfare had contracted to pay it for the treatment of indigent persons cared for in the hospital.

The Attorney General argued that the payment could be made because under the contract the Department of Welfare was purchasing service for indigent persons and was not giving money to the hospital except as compensation for services rendered; that (as indicated by the Supreme Court in the Old Age Pension Case) the treatment of indigent sick and injured persons is not a charity but a governmental duty; and that it is not unconstitutional for a sectarian institution to receive money not appropriated to it, to compensate it for services rendered or materials furnished.

All of these contentions were rejected by the Court, which held that payment could not be made to the hospital under its contract with the Department of Welfare.

Mr. Justice Kephart, speaking for the Court, at page 395, disposed of the State's contention that the care of indigent sick and injured persons is not a charity but the performance of a governmental duty. He said:

> "* * * While such activities may, because of their number and importance to the recipients, assume the form of a governmental function or duty, * * * they do not lose their chief character, viz, the State's work of charity. * * *"

The Court distinguished between governmental care of the poor, as carried on during the entire history of the State, and the care of persons who are temporarily in need of financial assistance. It had been argued that the language used by Mr. Justice Kephart in the Busser case supported the proposition that any appropriation to care for indigent persons is made in the performance of a governmental duty. This contention was answered, at page 397, as follows:

> "* * * It is argued that the effect of this decision (the Old Age Pension decision) should be applied to the case of the needy poor contemplated by the Act of 1925, and the various direct appropriations to hospitals. But the difference between the two classes is manifest; it lies in the words 'without ability or means to sustain themselves.' On the one hand there are persons totally indigent, as opposed to persons being generally able to take care of themselves, yet when sickness or injury over-

> takes them they are unable to provide proper treatment, and as to that they are indigent."

The Court took the position that an appropriation to a State department, to be used for paying a sectarian institution for services rendered, is equivalent to an appropriation made directly to the sectarian institution. That being so, an appropriation to a State department for feeding or clothing persons or communities must be regarded as equivalent to an appropriation directly to the persons or communities to be benefited.

Under this decision, an appropriation for unemployment relief made to a department, commission or other agency created by law would be just as objectionable as appropriations made directly to the beneficiaries whom the Legislature desires to aid.

A political subdivision of the Commonwealth, whether it be a county, a city, a borough, a township, or a poor district, must necessarily be regarded as a "community" within the meaning of Article III, Section 18 of the Constitution as interpreted by the Supreme Court in the Busser case. Therefore, the Legislature could not make an appropriation for any charitable purpose to any such political subdivision.

Accordingly, we are compelled to answer your first three questions in the negative. The Legislature cannot make appropriations for the payment of money or the furnishing of food, clothing and shelter to unemployed persons and their families either directly or through a State agency or to political subdivisions of the State.

The question remains, could the Legislature appropriate money for unemployment relief to a nonsectarian institution, corporation or association?

It is true that the Supreme Court in the Busser case indicated that by forbidding charitable appropriations to be made to denominational or sectarian institutions, corporations or associations, the people in the Constitution had recognized the right of the Legislature to make such appropriations to nondenominational or nonsectarian institutions, corporations and associations.

However, in considering the Legislature's right to make such appropriations, we cannot ignore the inhibition against appropriations for charitable purposes "to any person or community"; and, if an appropriation were made to a nonsectarian corporation for purposes incident to unemployment relief, the effect would be indirectly to aid a person or group of persons by supplying them with money or its equivalent in food, clothing or shelter. This would be no different from a similar appropriation made to a department or commission of the State government. The real purpose of the appropriation would

be to extend financial aid to those who, for lack of employment, must be given assistance.

Let us suppose, for example, that a corporation were formed to administer an old age pension system. Would the Supreme Court sustain an appropriation to such a corporation "for maintenance?" Obviously, it could not, under the reasoning applied in the St. Agnes Hospital case. Consistently with that decision, the court would look through the form of the appropriation and find that it was in fact an appropriation for old age pensions "to persons," and, therefore. invalid.

But, it may be asked, how then can maintenance appropriations to hospital corporations be sustained? The answer is clear. These appropriations are made for institutional service; and such appropriations are recognized both in Sections 17 and 18 of Article III of the Constitution.

We cannot escape the conclusion that under the cases cited, the Legislature could not, without violating the Constitution, make appropriations for unemployment relief to any charitable corporation or association.

Very truly yours,

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

Formal Opinion No. 32-D.

Department of Justice,
Harrisburg, Pa., December 7, 1931.

Honorable C. J. Goodnough, Speaker of the House of Representatives, Harrisburg, Pennsylvania.

Sir: In accordance with the resolution of the House adopted November 10, I shall give you my opinion regarding the constitutionality of the bills introduced in the House last week.

House Bill No. 69, Providing for the Quarterly Collection of Taxes by City Treasurers in Cities of the Third Class. In my opinion this bill does not come within any of the subjects stated by the Governor in his proclamations convening this Session, and would be unconstitutional if enacted.

House Bill No. 70, Making An Appropriation to the Department of Welfare "for State Aid to Political subdivisions Charged by Law with the Care of the Poor." It is impossible to discuss the constitutionality of this measure without first stating in detail, what it provides.

Section 1 of the bill provides, "That in the exercise of the police power for the protection of the public health safety morals and welfare threatened by existing conditions of unemployment the sum of

ten million dollars is hereby specifically appropriated to the Department of Welfare for payment to political subdivisions charged by law with the care of the poor which appropriation shall be allocated as hereinafter provided * * *."

Section 2 provides that the money appropriated to the Department of Welfare shall be allocated among the several counties of the Commonwealth "* * * on a ratio that the estimated number of unemployed persons in a county bears to the estimated number of unemployed persons in the entire Commonwealth * * *."

Section 3 provides that where a political subdivision charged with the care of the poor, is coextensive with a county the amount allocated to the county shall be paid to such political subdivision; that where political subdivisions charged with the care of the poor and counties are not coextensive, the county's share of the appropriation shall be paid into the county treasury and be allocated among the political subdivisions of the county by the county commissioners, with the approval of the court, "* * * on the basis of unemployed persons resident within the several subdivisions as ascertained from the best sources of information obtainable * * *;" and that in counties coextensive with cities the county's share of the State appropriation shall be paid into the city treasury, and allocated by the Department of Welfare of the city among the various political subdivisions charged with the care of the poor, also "* * * on the basis of unemployed persons within the respective subdivisions as ascertained from the best sources of information obtainable * * *."

Section 4 provides that each political subdivision charged by law with the care of the poor "* * * shall have authority under the provisions of this act any law to the contrary notwithstanding to expend the moneys received from the appropriation made by this act for the purpose of providing food clothing fuel and shelter for residents within their districts who are in need of the same. In no case shall any of said appropriation be used for paying cash commonly known as a 'dole' to persons entitled to relief."

Section 5 provides that the amounts allocated to political subdivisions of the State, under this bill, and expended by them shall be audited by their own auditors "* * * in the same manner and with like effect as other moneys expended by such subdivisions."

It will be observed that the bill does not specify how the State's money shall be expended by any poor district; it merely renders it permissive for poor districts to purchase food, clothing, fuel, and shelter for residents "who are in need of the same." Nor does the bill give to the State any right whatever to supervise, or even inquire into, the manner in which the State funds which it appropriates are to be used.

In a word, the appropriation made by this bill would be in relief of the taxpayers of the poor districts, and not necessarily in relief of the unemployed.

It is apparent on the face of the bill that it was conceived and prepared upon the theory that it could be sustained as constitutional because the appropriation purports to be made "* * * in the exercise of the police power for the protection of the public health safety morals and welfare threatened by existing conditions of unemployment * * *."

Whether this is so, is the first question which must be considered.

Article III, Section 18 of the Constitution provides that "No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community, * * *."

An appropriation made to the Department of Welfare for the single purpose of being by it allocated among and paid to the counties of the State is, in law, an appropriation to such counties or cities. No other conclusion is possible under the Supreme Court's decision in the St. Agnes Hospital Case *(Collins v. Martin,* 290 Pa. 388).

If there were in the bill a requirement that the money should be used for unemployment relief, the appropriation would clearly be for a "charitable purpose." As stated by the present Chief Justice in *Taylor v. Hoag,* 273 Pa. 194, at page 196, "* * * The word 'charitable,' in a legal sense, includes every gift for a general public use, to be applied, consistent with existing laws, for the benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical or social standpoint. * * *" In the St. Agnes Hospital Case, already cited, the Court held definitely that an appropriation for the care and treatment of indigent persons in hospitals was an appropriation for a charitable or benevolent purpose.

There can be no doubt that a county, a city, or a poor district is a "community." The dictionary definition of this word is, "The people who reside in one locality and are subject to the same laws. or have the same interests, etc.; a body politic, whether village, town, city, or state * * *;" and our Supreme Court in *Busser v. Snyder,* 282 Pa. 440, held that "person" and "community," as used in Article III, Section 18, are "* * * not limited to the idea of a single person or place where persons are located; * * *." These words in this section, according to the Court, "* * * are used in an inclusive sense, relating to an individual or a group or class of persons, wherever situated, in any part or all of the Commonwealth. * * *" It was said that the constitutional prohibition "* * * applies to persons, kind, class and place, without qualification. The language of the Constitution is an absolute and general prohibition. * * *"

The Supreme Court in the case last cited also held that the system in effect when our Constitution was adopted "'* * * provided for poor districts, poor directors and overseers, and for the relief of paupers as a matter of local concern. Those who framed the Constitution understood it, * * *The system was left untouched. * * * The conclusion is therefore irresistible that a direct appropriation from the State Treasury to any person or class of persons cannot be sustained on the theory that it is a discharge of the inherent obligation of the State to take care of its paupers.' "

Therefore, we begin with the clear proposition that if the present bill contemplated (which it does not) an appropriation out of the State Treasury to counties, cities, and poor districts which must be used *for unemployment relief,* it would be an appropriation to communities for charitable purposes and would thus come within the prohibition of Articles III, Section 18.

As Former Chief Justice von Moschzisker said in *Collins v. Kephart,* 271 Pa. 428, "When simple words are used in writing the fundamental law, they must be read according to their plain, generally understood. or popular, meaning; * * *."

The appropriation contemplated by this bill, if it became a law, would transfer money from the State Treasury to the treasuries of counties, cities, and poor districts without any mandatory specification of the purpose for which the money must be used and without any State supervision or audit of the use to which the money was actually applied. Such an appropriation would be a gift to the political subdivisions receiving it, and as such would be for "benevolent purposes." See the language of the Supreme Court in *Commonwealth v. Alden Coal Company,* 251 Pa. 134, at page 146, where the Court held unconstitutional an attempt by the Legislature to return to the anthracite producing counties to be used in their discretion, one-half of the tax on anthracite coal.

As it stands, the bill would be a clear violation of the plain and readily understood language of Article III, Section 18.

Can a bill which would otherwise be unconstitutional, be made constitutional by the simple device of declaring that it is passed "in the exercise of the police power?"

"Police power is the power inherent in a government to enact laws, *within constitutional limits,* to promote the order, safety, health, morals, and general welfare of society * * *," 12 Corpus Juris, page 904. This power is always "* * * subject to the limitation imposed by the Federal and State Constitutions upon every power of government, * * *." Cooley's Constitutional Limitations, (8th ed.), page 1229.

In *Commonwealth v. Vrooman,* 164 Pa. 306, at page 316, our Supreme Court said "* * * It (the police power) is therefore a power inherent

in all forms of government. Its exercise may be limited by the frame or constitution of a particular government, but its natural limitations, *in the absence of a written constitution,* are found in the situation and necessities of the state * * *."

Our Constitution contains a number of limitations upon the power of the Legislature. We have already discussed Article III, Section 18, forbidding appropriations for charitable and benevolent appropriations to any person or community. Another limitation is contained in Article IX, Section 4, and is as follows: "* * * No debt shall be created * * * except to supply casual deficiencies of revenue, repeal invasion, suppress insurrection, defend the State in war, or to pay existing debt; * * *." If by a mere recital that a bill is passed in the exercise of the police power, the Legislature can nullify Article III, Section 18, it must necessarily be able also by the same means to nullify Article IX, Section 4. The same reasoning which would sustain the present bill would, therefore, sustain a bill borrowing unlimited sums of money "* * * in the exercise of police power for the protection of the public health safety morals and welfare threatened by existing conditions of unemployment * * *."

Such a proposition is too absurd to merit serious consideration.

The Legislature does have the right in the exercise of the police power to enact any measure calculated to promote the health, safety, morals or general welfare of the public, which is not expressly forbidden by the Constitution; but it cannot, by the mere recital that it is exercising the police power, wipe out a constitutional provision and thus in effect amend the Constitution.

It may be that there are dicta of judges of this and other states, contrary to the opinion here expressed; but I have not been able to find any decision in which any court ignored an express prohibition contained in a written constitution on the theory that the constitutional provision was void if the Legislature elected to declare that it was exercising the police power. Our Constitution can be amended only in the method prescribed by Section 18. Amendments require action by two Legislatures and a vote of the people. They cannot be made by the "say-so" of a court or judge, any more than by an act of the Legislature.

I cannot escape the conclusion that House Bill No. 70 is unconstitutional.

I may add in conclusion that this bill furnishes ample proof of the wisdom of those who framed Article III, Section 18, of our Constitution. The bill is a "wolf in sheep's clothing". It uses the cloak of the present unemployment situation to cover what would be in essence a "dole" from the State to counties, cities and poor districts,—a payment from the State Treasury to local treasuries to be used in

the discretion of local authorities. It would, if enacted and sustained, establish a precedent which would haunt Legislatures for many years to come.

If the bill were a sincere effort to afford direct relief to the unemployed, through a State appropriation to be used, supervised and audited for relief purposes, it would be a very unpleasant duty to hold it unconstitutional, just as it was to write my opinion of October 27 to the Governor, with which you are familiar. But as Attorney General it is my duty to advise State officers according to the Constitution and laws as I find them. It is not my duty to guess whether our courts, by strained constructions, would endeavor to circumvent constitutional provisions. Nor can I, under my oath of office, advise that because certain appropriations in the past have been made in disregard of a constitutional limitation without being attacked in the courts, the Legislature can now disregard the plain and unambiguous language of the Constitution.

For many years the Legislature made appropriations to sectarian institutions, but when, after millions of dollars had been thus expended, the courts were called upon to interfere, they did not hesitate, in Collins *v.* Kephart, 271 Pa. 428, to apply the constitutional prohibition against the practice, however distasteful it may have been to deprive worthy institutions of State aid which they had been receiving for many years.

Finally, it would be impossible under any reasoning to bring the bill within any of the subjects stated by the Governor in his proclamations. It cannot, therefore, be validly enacted at this Session.

House Bill No. 71; Providing for the Imposition of an Income Tax. I have already advised you that in my opinion an income tax does not come within any of the subjects stated by the Governor in his proclamations and would be unconstitutional if enacted at this Session.

House Bill No. 72, Imposing a Tax on Admission to Concerts and Other Public Performances. This bill does not come within any of the subjects specified by the Governor in his proclamations and cannot, in my opinion, be validly enacted at this Session.

House Bill No. 73, Proposes a Constitutional Amendment, and can validly be enacted.

House Bills Nos. 74 and 75, Making Appropriations to the Department of Welfare in Aid of Certain Hospitals Not Owned by the Commonwealth. These bills come within Subject No. 1 of the Governor's supplemental proclamation and would, in my opinion, be constitutional if enacted.

House Bill No. 76, Proposing a Tax upon Malt. For the reasons stated in discussing House Bills Nos. 71 and 72, this bill could not, in my opinion, be sustained if enacted at this Session.

Very truly yours,

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

HOUSE BILL NO. 70

Harrisburg, Pa., December 22, 1931.

To the Governor:

This bill makes an appropriation to the Department of Welfare in the amount of ten million dollars ($10,000,000). According to the title of the bill the appropriation is "for State-aid to political subdivisions charged by law with the care of the poor."

In my opinion the bill is vicious, fraudulent and unconstitutional.

It is vicious because if sustained it will be a precedent for taking out of the State Treasury money contributed by State taxpayers and transferring it to the treasuries of political subdivisions of the Commonwealth.

The bill is fraudulent because it has been misrepresented as an appropriation for unemployment relief, when in fact it does not require a penny of the money appropriated to be expended for this purpose. The money can be expended for any purpose which appeals to the authorities of the political subdivisions into whose treasuries it will be paid.

The bill is unconstitutional because:

1. It violates Article III, Section 18 of the Constitution which prohibits appropriations for charitable or benevolent purposes to persons or communities, and the Supreme Court in the St. Agnes Hospital Case (Collins *v.* Martin, 290 Pa. 388) held that an appropriation to the Department of Welfare which merely flows through it to a spending agency is an indirect appropriation to such agency.

2. It violates Article III, Section 3, which requires the subject of every bill to be clearly stated in its title. This bill imposes duties with regard to the distribution of money upon county commissioners, courts of common pleas and certain officers of cities and counties of the first class. It gives no intimation in its title that duties are imposed upon any of these officers.

3. It violates Article III, Section 25, which prohibits the Legislature at a Special Session from enacting legislation "upon subjects other than those designated in the proclamation of the Governor calling such session." This bill is not upon any subject designated by you in your proclamations.

4. It violates Article IX, Section 4, which forbids any debt from being created by or on behalf of the State except for certain stated purposes. Due to the failure to provide revenue and the fact that the Legislature has already appropriated the full limit of estimated revenue for the biennium, this bill would result in an indebtedness equal to the amount appropriated; and the debt would not be for any of the purposes specified in Article IX, Section 4.

In view of the objections cited, I cannot recommend that you sign the bill, and under ordinary circumstances I should recommend emphatically that it be vetoed.

However, after the Legislature has been in Session for six weeks, this bill is its only product which even resembles a relief measure. Members of both houses and certain lawyers have taken the position that my views regarding the validity of the bill are not correct. I do not retract in the slightest anything I have said about the bill. I cannot read the Constitution or the decisions of the Supreme Court without being convinced that the bill is void. On the other hand, I have no desire to stand between the needy and relief, even to the extent to which this inadequate measure would afford it. In the last analysis, it is for the courts to say what the Constitution and their former decisions mean. My conclusion, if correct, will be sustained by the courts. If it is not correct, I shall cheerfully bow to the courts' final interpretation.

So that there may be a decision by the courts rather than an empty debate regarding the constitutionality of the bill and the responsibility for its failure, I recommend that you neither approve nor veto it but permit it to become a law at the expiration of ten days without action on your part.

Very truly yours,

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

OPINION NO. 38

Highways—State-aid highways in boroughs—Act of 1931, No. 340.

Under the Act of June 25, 1931, P. L. 1369, the Department of Highways no longer has the duty of maintenance, at the expense of the Commonwealth, of

borough streets previously constructed as parts of state-aid highways with the aid of the county but without assistance from the borough, and the status of such streets for the purpose of maintenance reverts to that which existed before the passage of the Act of May 15, 1929, P. L. 1780.

Department of Justice,
Harrisburg, Pa., January 21, 1932.

Honorable Samuel S. Lewis, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have asked to be advised as to the responsibility of your department to maintain, in boroughs, solely at the expense of the Commonwealth, State-aid highways which were heretofore constructed with the aid of counties without any assistance from the boroughs, in view of the provisions of Act No. 340, approved June 25, 1931.

Under the Act of May 16, 1929, P. L. 1780, all State-aid roads constructed with the aid of counties or townships were taken over as State highways. You inform us that after discussion with this office an interpretation was given that this included roads constructed with the aid of counties only, irrespective of their geographical location within the limits of a borough. In pursuance of this interpretation your department maintained such sections of State-aid highways in boroughs at the sole expense of the Commonwealth until the passage of Act No. 340, approved June 25, 1931.

The Act of 1931 above cited specifically repealed the Act of 1929 but re-enacted its provisions for the taking over of State-aid highways under certain limited conditions. One of the conditions is to the effect that the Act shall not be construed "to include or in any manner affect any road, street, or highway in any borough or incorporated town of the Commonwealth."

A borough has no vested right in the relief given it under the Act of 1929 by which its streets, constructed by the State with the aid of the county, were transferred to the State for the purpose of maintenance. The obligation for the maintenance of such streets can be again replaced where it was prior to the Act of 1929. In view of the specific repeal of that Act and the above-quoted condition in the Act of 1931 on the taking over of State-aid highways, we are of the opinion that such State-aid highways in the boroughs revert to the status for the purpose of maintenance in which they existed prior to the Act of 1929.

Nor can such a street constructed as part of a State-aid highway within a borough be considered as a continuation of a State highway through the borough under Section 10 of the Act of 1911, P. L. 468,

as amended by the Act of June 26, 1931, P. L. 1388, Section 2, so as to place upon your department the obligation to maintain such street.

State-aid highways have always had a separate classification under the Sproul Act and its amendments. Those parts of such highways which lie outside of borough limits are taken over under the Act of 1931, No. 340, approved June 25, 1931, under certain limited conditions as above stated. Therefore, when the Legislature placed those conditions on the taking over of State-aid highways as State highways, it did not intend to give to such State highways all of the attributes of the highways established as part of the State Highways System. Only such parts of the general laws relating to State highways as are not inconsistent with Act No. 340 are applicable to the State highways established by that Act.

To say that under Section 10 of the Sproul Act these borough streets are continuations of State highways, which State highways became such only by virtue of Act No. 340 to the limited extent therein specified, would defeat the specific limitation of that Act that it should not be construed to include or in any manner affect borough streets, and would be inconsistent therewith.

Therefore, you are advised that your department is not obliged to continue to maintain as State highways, solely at the expense of the Commonwealth, such borough streets as have heretofore been constructed as parts of State-aid highways with the aid of the county but without assistance from the boroughs themselves. Their status for the purpose of maintenance reverts to that which existed before the Act of 1929.

Very truly yours,

DEPARTMENT OF JUSTICE,
JOHN A. MOSS,
Deputy Attorney General.

OPINION NO. 39

Department of Banking—Supervision over title insurance companies not receiving deposits.

Where a title insurance company incorporated under the Act of April 29, 1874, P. L. 73, does not have the power to receive and does not receive deposits, whether or not it has formally surrendered such power given to it by the Act of May 9, 1889, P. L. 159, as amended, the Secretary of Banking does not have supervision over it and is not required to demand called reports of such company nor to examine it.

Department of Justice,
Harrisburg, Pa., February 8, 1932.

Honorable William D. Gordon, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have requested an opinion on your duty to examine and supervise title insurance companies incorporated under the General Corporation Act of 1874, which do not accept deposits or engage in trust activities.

We understand that there are functioning throughout the Commonwealth a number of corporations created under and by virtue of that portion of Section 2 of the Act of April 24, 1874, P. L. 73, which is designated "Corporations for Profit—Second Class," and which, in subparagraph XIX, provides for the incorporation of companies for the following purpose:

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

Many corporations created under this clause enjoy a variety of powers and privileges given them by the Act of May 9, 1889, P. L. 159, the Act of June 1, 1907, P. L. 382, No. 275, and the Act of May 9, 1923, P. L. 173. Such corporations, popularly known as "trust companies," do a banking and fiduciary business, receiving deposits, making loans, and handling estates. They file with you from time to time called reports and are generally under your supervision.

Other corporations created under the same law have confined themselves strictly to a title insurance business. Some have surrendered their powers to engage in a banking and a fiduciary business by virtue of a formal court decree; others have either never exercised such powers or have ceased to do so and have abandoned them. In any event, such companies, whether or not they still have the power to do so, do not receive deposits and do not act in the capacity of fiduciary.

Section 4 of the Banking Act of June 15, 1923, P. L. 809, which prescribes the extent to which your duties and powers of supervision apply, reads 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. * * *"

In the opinion of this department to your predecessor, former Secretary of Banking Peter G. Cameron, dated June 25, 1930, Official Opinions of the Attorney General of Pennsylvania 1929-1930, page 55, and 14 D. & C. 766, interpreting this section with respect to mortgage guarantee companies not having the power to receive and not receiving money on deposit or for safekeeping, it was stated that such companies were not under the supervision of your department. Consequently, we advised that your department was not required by law to demand called reports of such companies nor to examine them.

The reasons for that conclusion with respect to such mortgage guarantee companies are identical with those compelling a like decision with respect to title insurance companies which do not receive deposits and do not engage in any trust activities.

Therefore, you are advised that a title insurance company which does not have the power to receive and does not receive money on deposit or for safekeeping and does not engage in any trust activities, whether or not it has formally surrendered such powers, is not under the supervision of your department. You are neither required to demand called reports of such companies nor to examine them.

Very truly yours,

DEPARTMENT OF JUSTICE,
HAROLD D. SAYLOR,
Deputy Attorney General.

OPINION NO. 40

Criminal procedure—Parole—Act of June 19, 1911—Escape—Commission of crime while on parole—Right to reparole—Conviction in court not of record—Violation of parole rules—Commutation of sentence—Constitutional power of Governor.

1. The word "parole," as used in section nine of the Act of June 19, 1911, P. L. 1055, means release upon condition, and a prisoner paroled may not be retained in the penitentiary to serve a sentence imposed for another offense.

2. A prisoner who has escaped from the state penitentiary and is sentenced for that offense is not eligible for parole until he has served in full the maximum sentence imposed for his original offense and the minimum sentence imposed for the escape, unless such sentence be commuted by the Governor on recommendation of clemency by the State Board of Pardons.

3. Under section ten of the Act of June 19, 1911, P. L. 1055, as amended by the Acts of June 3, 1915, P. L. 788, and June 22, 1931, P. L. 862, a prisoner who while on parole is convicted in any court of record for another offense punishable by imprisonment, whether or not sentence is imposed thereon, may not be reparoled, but his sentence may be commuted by the Governor on recommendation of the State Board of Pardons.

4. Conviction and sentence of a prisoner on parole by a court not of record, or violation of the rules of the State Board of Pardons governing his conduct, afford ground for his return to the penitentiary, but in such a case he is eligible for reparole.

5. The Governor's right to commute a sentence imposed, upon recommendation of the State Board of Pardons, is conferred upon him by the Constitution, and may not, therefore, be limited by act of the legislature.

Department of Justice,
Harrisburg, Pa., March 16, 1932.

Doctor George E. Walk, Secretary, Board of Trustees, Eastern State Penitentiary, Philadelphia, Pennsylvania.

Sir: You have asked to be advised on two questions which frequently come before your board, sitting as a board of parole for the Eastern State Penitentiary. They are:

First. If during his term in the penitentiary (the sentence having been a minimum and maximum sentence imposed under the Ludlow Act), a prisoner escapes and is sentenced for escape to a minimum and maximum term equal to that originally imposed, is the prisoner eligible for parole before he has completed the maximum sentence for his original offense and the minimum sentence for escape?

Second: If a prisoner has been paroled by the Governor upon the recommendation of your board and is convicted of a crime while on parole and returned to the penitentiary, may he be reparoled prior to the expiration of his maximum sentence?

Clearly, the answer to your first question is that a prisoner who escapes and is sentenced for that offense is not eligible for parole until he has served in full the maximum sentence imposed for his original offense and the minimum sentence imposed for escape.

Your right to parole prisoners is conferred by Section 9 of the Act of June 19, 1911, P. L. 1055. This section permits your board to grant paroles upon application of prisoners "If it shall appear * * * upon an application by a convict *for release on parole,* that there is a reasonable probability" that the prisoner "will live and remain at liberty without violating the law."

The word "parole" is universally understood to mean release upon condition. If a prisoner is paroled under Section 9 of the Act of 1911, he must be released. He cannot be paroled and retained in the penitentiary while serving in whole or in part a sentence imposed for another offense. To speak of paroling a prisoner and at the same time retaining him in custody, would be contradictory and incongruous.

The only procedure under which a prisoner sentenced for escape can be released before he has served in full the maximum sentence for his original offense and the minimum for his escape is upon application

to the State Board of Pardons for clemency. That board can recommend to the Governor the commutation of the maximum sentence for the original offense and the minimum sentence for escape.

To your second question the answer is equally clear. Section 10 of the Act of June 19, 1911, P. L. 1055, as amended by the Acts of June 3, 1915, P. L. 788, and June 22, 1931, P. L. 862, provides:

(1) That if a parolee shall be convicted of a crime punishable by imprisonment under the laws of Pennsylvania and sentenced to any place of confinement other than a penitentiary, he shall, after the expiration of his term in such other place of detention, be compelled to serve in the penitentiary to which he was originally committed the remainder of the term "without commutation," which he would have been compelled to serve if he had not been paroled;

(2) That if for the offense committed while on parole he be sentenced to the penitentiary from which he was released on parole, then the service of the remainder of his original term shall precede the service of the term imposed for the crime committed while on parole; and

(3) If no new sentence is imposed, for a crime of which the parolee is convicted "in any court of record, either by plea or trial," he shall be required to serve in the penitentiary from which he was released, or any other institution to which he may be transferred, the remainder of the term, without commutation, which he would have been compelled to serve if he had not been paroled. This provision was inserted in the law for the first time by the amendment of 1931 which became effective on September 1, 1931.

Your board has no discretion in such cases, and cannot recommend a reparole to the Governor. Section 10 of the act expressly provides in the first and third types of case with which it deals that the sentence shall be served without commutation, and, in our opinion, it was the intention of the Legislature that a similar limitation should apply also in the second class of case.

In this connection we call your attention to two important considerations, as follows:

(1) The Governor's right to commute is conferred upon him by the Constitution and cannot be limited by act of the Legislature.

Therefore, notwithstanding Section 10 of the Act of 1911, as amended, the Governor may commute the terms of prisoners confined under that section, if the State Board of Pardons recommends such commutation.

(2) A person is not "convicted" of a crime within the meaning of the law unless he is sentenced therefor. Therefore an act which applies only to "convictions" of crime would not include cases in which sentence is suspended. This was the state of Section 10 of the Act of 1911, prior to the amendment of 1931, which, as already stated, became

effective on September 1, 1931. However, the 1931 amendment specifically applies to cases in which no new sentence is imposed for a conviction in a court of record, "by plea or trial," of a crime punishable by imprisonment. The Legislature by this expression must have intended to include cases in which sentence was suspended.

Accordingly, prior to September 1, 1931, (when the 1931 amendment became effective), a suspended sentence did not constitute a conviction of crime justifying the return of a parolee to the penitentiary, but if subsequent to that date a parolee has pleaded guilty or has been found guilty by a jury, in a court of record, of a crime punishable by imprisonment, he must be returned to the penitentiary even though no sentence was imposed.

We also call your attention to the fact that Section 10 of the Act of 1911 has no application to a case in which a parolee is returned to the penitentiary for any violation of his parole other than the commission of a crime punishable by imprisonment and conviction therefor in a court of record. Thus, conviction and sentence for crime in a magistrate's court, or violation of the rules of the State Board of Pardons governing the conduct of parolees may result in the return of a parolee to the penitentiary; but in any such case the prisoner is eligible for reparole.

Accordingly, we advise you:

1. That your board cannot recommend for parole a prisoner who has escaped, until such time as he has served in full the maximum sentence for his original offense and the minimum sentence for escape. However, the State Board of Pardons may recommend to the Governor that either or both of such sentences be commuted, and the Governor may act upon that recommendation.

2. That a parolee returned to the penitentiary because of a new sentence imposed for crime committed while on parole, cannot be recommended by your board for reparole; but in this case also, the Governor, upon the recommendation of the State Board of Pardons, may grant clemency.

3. That prior to September 1, 1931, a plea or verdict of guilty, upon which sentence was suspended, was not a mandatory cause for returning a parolee to the penitentiary, and, if in such case a parolee was returned, he may lawfully be recommended by your board for reparole.

4. That subsequent to September 1, 1931, a parolee, under the circumstances stated in the preceding paragraph, must be returned to the penitentiary and cannot be recommended by your board for reparole, unless and until the Governor has granted a commutation upon the recommendation of the State Board of Pardons.

5. That in any other case in which a parolee is returned to the penitentiary,—as for example because he has violated the rules of the State Board of Pardons governing the conduct of parolees,—he may be recommended by your board for reparole; but in such case the recommendation for reparole should be specifically called to the attention of the State Board of Pardons which was responsible for the return of the parolee to confinement.

6. That in every case, the Governor, acting on the recommendation of the State Board of Pardons, may commute a sentence even though the effect be to reparole a prisoner convicted of a criminal offense while on parole.

Very truly yours,

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

OPINION NO. 41

Manufacturers—Upholstered articles—Use of hair—Act of June 14, 1923—Enforcement by Department of Labor and Industry—Validity of rules—Statements on tags required by statute.

The Department of Labor and Industry may, with the approval of the Industrial Board under section 2214 (c) of the Administrative Code of 1929, promulgate a rule requiring manufacturers using hair in articles within the provisions of the Act of June 14, 1923, P. L. 702, as amended by the Act of April 14, 1925, P. L. 237, to state on tags attached to such articles the kind of hair used and, if two or more kinds, the percentage of each, under the authority of section nine of the act; such a rule is a reasonable enforcement of sections six and seven of the statute and does not amount to delegation of legislative power to an executive officer.

Department of Justice,
Harrisburg, Pa., March 30, 1932.

Honorable A. M. Northrup, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: You have asked to be advised as to the authority of your department to promulgate the following rule relating to bedding and upholstered articles filled with hair:

> "*Effective April 15, 1932:* All manufacturers using hair in the manufacture of articles coming under the provisions of the Pennsylvania Bedding and Upholstery Act of April 14, 1925, shall state on the tags attached to such articles the kind of hair used in the filling. In case of a

mixture of two (or more) kinds of hair, the percentages of each kind shall be given. That is, they shall state whether the hair is horse hair (tail or mane), hog hair, cattle tail hair, goat hair, etc., and in the case of mixtures of two (or more) kinds of hair, they shall state the percentages of each, such as:

"60% horse tail hair
"40% hog hair

"40% cattle tail hair
"40% hog hair
"20% goat hair"

The act with which we are concerned is the Act of June 14, 1923, P L. 802, as amended by the Act of April 14, 1925, P. L. 237, known as the Bedding and Upholstery Act. It regulates the manufacture, sale and repair of mattresses, pillows, comfortables, cushions and upholstered furniture filled with various specified materials, including hair.

Section 6 of the Act requires each article covered by the Act to have displayed thereon a tag with a statement printed thereon "showing the kind of materials used in filling said mattress or article."

Section 7 of the Act provides that "It shall be unlawful to make any false, untrue, or misleading statement on such tag, * * *."

By Section 9 of the Act it is made the duty of your department to "make reasonable rules and regulations for the enforcement of this act."

Rules of the Department of Labor and Industry are subject to the approval of the Industrial Board which board, by Section 2214 (c) of The Administrative Code of April 9, 1929, P. L. 177, is given the power to approve or disapprove such rules and regulations. We assume that the proposed rule has been formulated in the manner prescribed by the Code.

Is the rule within the authority of the department to make regulations and is it reasonable?

The Act was designed to prevent manufacturers of upholstered articles from selling to the public articles which were insanitary or which were not what they purported to be. The articles covered by the Act include those which are filled with hair but the Act does not designate all the particular types of hair which might be used. It provides that a tag be fastened to the article with a description thereon of the "kind of materials used" and prohibits the making of any "misleading" statement on such tag.

While it is true that the Legislature cannot delegate to an executive officer the power to legislate upon a particular subject, there is nothing to prevent the executive branch from prescribing the details

necessary effectually to carry out the legislative mandate.

In Lee *v.* Marsh, 230 Pa. 351 (1911), the Department of Health had prescribed a form of certificate of vaccination to be used to evidence the vaccination of school children under the Act of June 18, 1895, P. L. 203. The information required in the certificate necessitated the administration of the serum in a certain manner in order to constitute "vaccination" within the meaning of the Act. The Supreme Court held that this regulation was not legislation and, at page 358, said:

> "* * * all that the department has done in this case, is to regulate the form of the certificate so as to prevent ambiguity, and to require the certifying physician to use words in the same sense with which they are used in the act."

The proposed rule of your department does not purport to require something additional to that required by the Act but merely carries out and makes effective the requirement that the tag shall state the "kind of material used" in such a way that it will not be "misleading." This is certainly reasonable to prevent selling, under the term "hair," articles of an inferior quality which would still come within that term and thereby be misleading.

Therefore, you are advised that your department may promulgate the above rule relating to tags on articles coming within the provisions of the Bedding and Upholstery Act of June 14, 1923, P. L. 802, as amended by the Act of April 14, 1925, P. L. 237.

Yours very truly,

DEPARTMENT OF JUSTICE,
JOHN A. MOSS,
Deputy Attorney General.

OPINION NO. 42

School law—Purchase of insurance or annuity contracts for employes—Power of school district—Act of June 22, 1931—Contribution to State Employes' Retirement Fund—Act of June 27, 1923.

1. School districts are not authorized to purchase or contribute to the purchase of life, health or accident insurance policies or annuity contracts for their employes, by the Act of June 22, 1931, P. L. 844, which creates no new general purpose for which such appropriations or contributions may be made.

2. Under the Act of June 27, 1923, P. L. 858, Sec. 3, as amended by the Act of May 14, 1929, P. L. 1738, school boards have no authority to appropriate money for or contribute toward annuity funds for the benefit of their em-

ployes, except to the State Employes' Retirement Fund, and they may not substitute annuity contracts or otherwise alter their method of contribution to that fund.

Department of Justice,
Harrisburg, Pa., April 5, 1932.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked us whether the Act of June 22, 1931, P. L. 844, authorizes school districts to purchase, or contribute to the cost of group life, health, and accident insurance policies or annuity contracts for their employes.

The pertinent portion of the Act is Section 1, which reads as follows:

> "Be it enacted, &c., That the Commonwealth of Pennsylvania, or any department or division thereof, and any county, city, borough, incorporated town, township, school district or poor district, now or hereafter authorized by law to make appropriations or contributions for any such purpose, may make contracts of insurance with any insurance company authorized to transact business within the Commonwealth insuring its employes or any class or classes thereof under a policy or policies of group insurance covering life, health, or accident insurance, and may contract with any such company granting annuities or pensions for the pensioning of such employes; and, for such purposes, may agree to pay part or all of the premiums or charges for carrying such contracts, and may appropriate out of its treasury any money necessary to pay such premiums or charges or portions thereof."

Your question arises because the authority contained in the act is restricted to school districts and other municipal subdivisions "now or hereafter authorized by law to make appropriations or contributions for any such purposes."

The act creates no new general purpose for which appropriations or contributions may be made. Therefore we must look to the existing law for the answer to your question.

We find no authority given to school districts to appropriate or contribute money for life, health, or accident insurance for their employes. Therefore we advise you that the Act of 1931 does not permit school boards to purchase or contribute toward the cost of any such insurance policies.

Under Sections 2401, 2402, 2403, and 2404, of the School Code of 1911, P. L. 309, as amended by the Act of April 21, 1915, P. L. 162, 24 P. S. 2083—2086, school districts were authorized to establish and

contribute to retirement funds for their teachers, and employes. From these funds retired beneficiaries were entitled to receive annuities. However, we are informed that no such local retirement associations are now in existence. They have all been finally dissolved and have been superseded by the State School Employes' Retirement Association under the Act of June 27, 1923, P. L. 858, Section 3 (3), as amended by Act of May 14, 1929, P. L. 1738.

Therefore we are of the opinion that school boards now have no authority to appropriate money for or to contribute toward annuity funds for the benefit of its employes, except, of course, the State Employes' Retirement Fund. We do not regard contributions to this State fund as within the terms of the Act of 1931, because nothing contained in the act would authorize school districts to substitute annuity contracts for, or otherwise to alter their method of contribution to that fund.

Therefore, we advise you that the Act of June 22, 1931, P. L. 844, does not authorize school districts to purchase or contribute to the purchase of life, health or accident insurance policies or annuity contracts for their employes.

Very truly yours,

DEPARTMENT OF JUSTICE
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 43

Elections—Nomination—Withdrawal of petition—Right to retract withdrawal—Act of July 12, 1913, Sec. 19—Filing of new petition after withdrawal.

A candidate for nomination at a primary election may not, under section nineteen of the Act of July 12, 1913, P. L. 719, as amended by the Act of April 29, 1925, P. L. 214, after withdrawing his nomination petition in accordance with the statute, retract his withdrawal and thus reinstate his nomination petition, but he may file a new nomination petition if the time therefore has not expired.

Department of Justice,
Harrisburg, Pa., April 5, 1932.

Honorable Richard J. Beamish, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether a candidate for nomination at a primary election, who, after filing his nomination petition, withdraws, may thereafter retract his withdrawal and thus reinstate his petition. We understand that the case that you have before you is one in which the offer to reinstate was made before the last day on which withdrawal could have been made, but after the last day on which nominating petitions could be filed. We shall discuss the question on the basis of those facts.

The statutory provision for the withdrawal of primary candidates is found in Section 19 of the Act of July 12, 1913, P. L. 719, as amended by the Act of April 29, 1925, P. L. 361, 25 P. S. 1241. It reads as follows:

> "Any of the candidates for nomination, including candidates for President of the United States, to be voted for at a primary under this act, may, at any time before four o'clock of the seventh day next succeeding the last day fixed for filing nomination petitions, withdraw his name as a candidate, by a request in writing, signed by him and acknowledged before a notary public or justice of the peace and filed with the Secretary of the Commonwealth, if such candidate filed his nomination petition with the Secretary of the Commonwealth, and in all other cases with the county commissioners."

In our opinion after the candidate has filed the withdrawal in your office, the situation is as though no nominating petition had been filed by or on behalf of the candidate. Consequently no later act of the candidate could reinstate the petition. If the time for filing nominating petitions has not expired, a new petition could, of course, be filed, but if the time for filing petitions has expired, there is no method by which the withdrawing candidate can get his name on the primary ballot.

This view of the Act of Assembly is supported by the opinion of the Court of Common Pleas of Dauphin County in Wolfe's Nomination, 31 Dauphin County 343, 11 Pa. D. & C. 626, 1928. In that case exceptions were filed to the nominating petition of the candidate. It appeared that the candidate had mailed a withdrawal request by four o'clock on the last day for the making of such withdrawals, but it had not been received in the office of the Secretary of the Commonwealth until later. The court held that the mailing of the request constituted a withdrawal and that consequently there were no nominating petitions to which exceptions could be filed. For this reason the exceptions were dismissed.

Therefore, we advise you that when a candidate for nomination at a primary election has properly withdrawn, he cannot thereafter retract his withdrawal and thus reinstate his nominating petition.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 44

School law—Deposit of funds—Right to deposit in trust department of trust company—Act of April 11, 1929.

The Act of April 11, 1929, P. L. 512, permitting trust companies to use in their business trust funds awaiting investment or distribution, upon compliance with certain conditions, does not authorize a school board to deposit its funds in the trust department of a trust company, since such action would constitute a surrender of control over its funds by the school district, which is forbidden.

Department of Justice,
Harrisburg, Pa., April 6, 1932.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have stated to us the case of a school board whose funds are deposited in a trust company which has been unable to obtain a depository bond with individual or corporate sureties. You say that it has been suggested that the school funds be deposited in the trust department of the company under the provisions of the Act of April 11, 1929, P. L. 512. You have asked us to advise you whether such a deposit would adequately protect both the school district and the individual members of the board.

The Act of April 11, 1929, P. L. 512, is an amendment to the general corporation law of April 29, 1874, P. L. 73. It deals with the fiduciary powers of trust companies. Prior to the amendment of 1929, trust companies were not permitted to use in their general business any funds held by them in fiduciary capacities. The Act of 1929 changed this to the extent of permitting trust funds awaiting investment or distribution to be used by the trust companies in their business, upon setting aside certain securities to protect the funds so employed. As we view it, the Act of 1929 deals solely with the administration of

funds which trust companies hold as executor, administrator, trustee. guardian or in other fiduciary capacities. It has nothing to do with deposits or depositors.

If a school board were to enter into an agreement whereby the trust company would be created a trustee for the administration of the school funds, in such a manner as to bring the money within the terms of the Act of 1929, the school board would be surrendering control of its funds. This it could not lawfully do. Consequently, the Act of 1929 could not have any application to or be of any help in the situation you have described.

Therefore, we advise you that the Act of April 11, 1929, P. L. 512, does not furnish any authority for the deposit of school funds or any other funds in the trust departments of trust companies. Nor does it afford protection of any kind to school districts or school directors in respect to moneys on deposit. It has no application to such matters.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 45

State government—Contracts—Interest of "member or officer of any department"—Constitution, Art. III, Sec. 12—The Administrative Code of 1929, Sec. 516—Applicability to members of legislature.

1. Article three, section twelve, of the Constitution of Pennsylvania forbids a member of the legislature to make or be otherwise interested in a contract for the sale to the Commonwealth of stationery, printing, paper or fuel, or for repairing or furnishing the halls and rooms used for the meetings of the general assembly or its committees.

2. Section 516 of The Administrative Code of 1929 prevents the executive department from awarding any contract for stationery, printing, paper, fuel, furniture, materials or supplies or for the repairing or furnishing of halls and rooms used for the meetings of the general assembly or its committees, in which any member of the legisalture is in any way interested.

3. The words "member or officer of any department of the government," as used in article three, section twelve, of the Constitution and in section 516 of The Administrative Code of 1929, apply to members and officers of the legislative as well as of the executive and judicial departments of the state government,

Department of Justice,
Harrisburg, Pa., April 11, 1932.

Honorable Alice F. Liveright, Secretary of Welfare, Harrisburg, Pennsylvania.

Dear Mrs. Liveright: You have inquired whether there is any constitutional or statutory provision prohibiting a member of the Legislature from selling supplies to a State institution.

Article III, Section 12 of the Constitution is as follows:

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

Section 516 of The Administrative Code of 1929 (Act of April 9, 1929, P. L. 177) is as follows:

> "No member or officer of any department of the government shall be in any way interested in any contract for furnishing stationery, printing, paper, fuel, furniture, materials, or supplies, to the State Government, or for the printing, binding, and distributing of the laws, journals, department reports, or any other printing and binding, or for the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees."

You will observe that Article III, Section 12 of the Constitution is narrower in its effect than Section 516 of The Administrative Code. The constitutional provision applies only to contracts for stationery, printing, paper, fuel, printing and binding, and the repairing and furnishing of the halls and rooms used for the meetings of the General Assembly and its committees. The Administrative Code, on the other hand, includes in addition furniture, materials, and supplies.

In our opinion the words "no member or officer of any department of the government" apply to members or officers of the Legislature as well as to members or officers of the executive or judicial departments of the government. We interpret the words "any department," as

used in Article III, Section 12 of the Constitution, as applying to any one of the three co-ordinate branches of the government,—legislative, executive, and judicial.

Therefore, a member of the Legislature cannot make or be otherwise interested in a contract to sell to the State stationery, paper, fuel, furniture, materials, supplies, printing or binding, or make or be interested in any contract for repairing and furnishing the halls and rooms used for the meetings of the General Assembly.

The fact that The Administrative Code of 1929 applies exclusively to the conduct of the executive and administrative work of the Commonwealth by the executive department thereof, does not in any way affect our opinion as already expressed. The limitation contained in Section 516 is upon the action of executive officers in entering into contracts of certain kinds. It is true that members and officers of the Legislature and of the judiciary are affected; but the regulation is primarily binding upon the executive department in limiting the scope of its action in awarding contracts.

We are not obliged, in order to answer your question, to construe the meaning of the word "member" as applied to the executive branch of the government. Whether or not an ordinary employe is a member of the executive branch of the government, it is not necessary now to decide; but without deciding the question, it is clear that the spirit, if not the letter, of Section 516 of The Administrative Code forbids any employe of the State from being interested in any contract for the sale to the Commonwealth of any of the articles specified.

Very truly yours,

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

OPINION NO. 46

Unemployment Relief—Appropriation—Extraordinary Session of 1931—Department of Welfare—Allocations—Requisitions. Act No. 7E, 1931, P. L. 1503.

Allocations which the Department of Welfare is required to make under Sec. 2 of Act No. 7E, 1931, P. L. 153, should be based on tables compiled and furnished by the Department of Labor and Industry.

Requisitions against the appropriation should be drawn:—

(a) Where a county and a poor district are co-extensive, the requisitions should be paybale to the county poor district.

(b) Where a county is not coextensive with a poor district, requisitions should be payable to the county treasurer.

(c) Requisitions for the allocations to Philadelphia County should be payable to the City Treasurer of Philadelphia.

Department of Justice,
Harrisburg, Pa., April 11, 1932.

Honorable Alice F. Liveright, Secretary of Welfare, Harrisburg, Pennsylvania.

Madam: You have asked to be advised:

First: Upon what basis to make the allocations which your department is required to make under Section 2 of Act No. 7-E, 1931 Pamphlet Laws 1503; and,

Second: To whom requisitions should be drawn under Section 3 of the same act.

Section 2 of Act No. 7-E provides that your department shall make an allocation during each of the months December, 1931, and January, February, March, April, and May, 1932, of the amounts, aggregating ten million dollars ($10,000,000), set forth in Section 1. The allocation was directed to be among the several counties of the State on a ratio that the estimated number of unemployed persons in a county bears to the estimated total number of unemployed persons in the Commonwealth "as shown by the tables compiled and issued by the Department of Labor and Industry."

The section continues:

> "The December allocation shall be made on the basis of the table contained in Special Bulletin Number thirty-three, Page thirteen, issued by the Department of Labor and Industry in July, one thousand nine hundred and thirty-one, or on the basis of any later table issued by said Department of Labor and Industry prior to the time any allocation is to be made by the Department of Welfare, and the basis of allocation shall be changed from time to time as new tables are issued by the Department of Labor and Industry, which shall be at least every two months."

After Act No. 7-E became a law, because of the failure of the Governor either to approve or veto it within ten days after it was presented to him by the Legislature, you were advised by me not to proceed under the act because, in my opinion, it was unconstitutional. Accordingly, you did not make allocations during December, 1931, and January, February, and March, 1932, as required by Section 2. On April 7, 1932, a majority of the Supreme Court held the act constitutional and it now becomes necessary to comply with its directions.

The Department of Labor and Industry has, subsequent to July, issued two tables showing the number of unemployed persons in the several counties of the State. One was issued as of November, 1931, and the other as of January, 1932.

The question is whether, because no allocation has been made until April, 1932, it is your duty to use the latest table promulgated by the Department of Labor and Industry, or whether it is your duty to use the table which would have been the latest available if allocations had been made in December, 1931, and the months immediately following, as was contemplated when the act was passed.

We are of the opinion that it is your duty to make the allocations for December and January on the basis of the November table issued by the Department of Labor and Industry, and that allocations for months subsequent to January must be made on the basis of the January table, unless prior to the time when allocations are made for April and May a new table is issued by the Department of Labor and Industry, setting forth the unemployment conditions as they existed in March.

With respect to your second question, the situation is as follows:

Section 3 of Act No. 7-E provides that where political subdivisions charged with the care of the poor are coextensive with counties, payment of moneys appropriated by the act shall be made on requisition of your department "to such political subdivisions;" that where the territory of such political subdivisions is not coextensive with the county, the amount allocated to the county shall be paid on requisition of your department "to the county treasury"; and that in counties coextensive with cities, the amounts of the county's allocation shall be paid on requisition of your department "into the city treasury."

Accordingly, we advise you to draw your requisitions as follows:

(a) Where a county and a poor district are coextensive, the requisition should be payable to the county poor district;

(b) Where a county is not coextensive with a poor district, requisitions should be payable to the county treasurer; and,

(c) Requisitions for the allocations to Philadelphia County should be payable to the City Treasurer of Philadelphia.

Very truly yours,

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

OPINION NO. 47

Criminal procedure—Female offenders—Sentence to State Industrial Home for Women—Act of July 25, 1913, Sec. 15—Power of court to transfer to another penal institution.

A court of quarter sessions which has sentenced a female defendant to the State Industrial Home for Women in accordance with section fifteen of the

Act of July 2, 1915, P. L. 1311, as amended by the Act of May 14, 1925, P. L. 697, is without authority to transfer the prisoner from that institution to the county jail of the county in which she was convicted, or to any other penal institution.

Department of Justice,
Harrisburg, Pa., April 23, 1932.

Honorable Leon D. Metzger, Deputy Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether a court of quarter sessions which has sentenced a woman to the State Industrial Home for Women has the power to order the woman transferred from the Industrial Home for Women to the county jail of the county in which she was convicted.

Prior to the effective date of the Act of June 22, 1931, P. L. 859, women were sentenced to the State Industrial Home for Women under Section 15 of the Act of July 25, 1913, P. L. 1311, as amended by the Act of May 14, 1925, P. L. 697.

This section provided that all women under twenty-five years of age must be sentenced to confinement in the State Industrial Home for Women without term; and, in the case of women over twenty-five years of age, sentences were required to be as provided by the so-called "Ludlow Act."

Women sentenced when less than twenty-five years of age could not be confined longer than three years in the State Industrial Home for Women, unless the maximum term for the crime of which the prisoner was convicted exceeded that period, in which event they could be confined or confined and paroled for the period of the maximum sentence for such crime. Women sentenced when more than twenty-five years of age could be paroled at the end of the minimum sentence.

The only provision for transferring inmates from the State Industrial Home for Women to another institution is that contained in Section 17 of the Act of July 25, 1913, P. L. 1311, as amended by the Act of May 14, 1925, P. L. 697. By that section, the Department of Welfare is authorized, in proper cases, to transfer inmates to the Laurelton State Village.

There is no statute on the books which gives to the court of quarter sessions, or any other agency, the general right to transfer inmates of the State Industrial Home for Women to other penal institutions. Without such statutory authority, such transfers cannot be made.

Accordingly, we advise you that the court of quarter sessions which sentences a woman to the State Industrial Home for Women does not

have authority to transfer her from that institution to the county prison of the county in which sentence was imposed.

Very truly yours,

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

OPINION NO. 48

Females—Employment after 9 P. M. on days when overtime work is allowed. Age limit.

1. Under section five of the Act of July 25, 1913, P. L. 1024, no female under twenty-one years of age, except as therein provided, may be permitted to work in any establishment before 6 o'clock A. M. or after 9 o'clock P. M., even on the days when overtime work is permitted under section three of the statute, as amended by the Act of June 1, 1915, P. L. 709.
2. Employment of Females (No. 3), 23 Dist. R. 175, overruled.

Department of Justice,
Harrisburg, Pa., May 11, 1932.

Dr. A. M. Northrup, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether it is permissible under the Act of July 25, 1913, P. L. 1024, for an employer to permit a female under twenty-one years of age to work after nine o'clock in the evening during the three days in a week in which a holiday is observed, provided the maximum number of hours of labor allowed by the act is not exceeded.

Section 3 of the Act of July 25, 1913, P. L. 1024, as amended by the Act of June 1, 1915, P. L. 709, provides, in part, as follows:

> "Section 3. (a) No female shall be employed or permitted to work in, or in connection with, any establishment for more than six days in any one week or more than fifty-four hours in any one week, or more than ten hours in any one day.
>
> "Provided that during weeks in which a legal holiday occurs and is observed by establishment, any female may be employed by such establishment during three days of such week for a longer period of time than is allowed by this act; but no female shall be permitted to work more than two hours overtime during any one of such three days, nor more than the maximum hours per week specified in this act."

Section 5 of the Act of 1913 reads as follows:

> "Section 5. No female under twenty-one years of age shall be employed or permitted to work in, or in connection with, any establishment before the hours of six o'clock in the morning or after the hour of nine o'clock in the evening of any day. Provided That this section shall not apply to females over the age of eighteen years employed as telephone operators."

Under date of December 18, 1913 an opinion of this department was rendered to your predecessor advising him that females under twenty-one could be employed after nine o'clock in the evening on the three days when overtime was allowed by the proviso to Section 3. The writer of that opinion concluded that, as Section 3 allowed "any female," without exception, to work overtime, Section 5 prohibiting females under twenty-one from working after nine P. M. did not apply to such females on days when overtime work was permitted.

We find ourselves unable to agree with the conclusion reached in the former opinion of this department, and so far as it construes the Act of 1913 so as to permit females under twenty-one, who come within its protection, to be employed in any establishment after nine o'clock in the evening, it is hereby overruled.

The sole purpose of Section 3 is to limit the hours of employment for women in industry. Those limits are six days a week, fifty-four hours a week and ten hours a day. To this last limit there is the exception that for three days in a week, in which a holiday is observed, the employe may work a maximum of twelve hours per day but the maximum number of hours per week must not be exceeded.

On the other hand Section 4, as to female employes in manufacturing establishments, and Section 5, as to females under twenty-one in any establishment, limit the employment of such females to that part of the day between six A. M. and ten P. M. and six A. M. and nine P. M., respectively. These sections respectively allot a period of sixteen and fifteen hours of the day during which their employment must take place. Of those allotted hours females are permitted to work only ten hours, except when overtime is allowed, and then only twelve hours, exclusive of the forty-five minutes allowed for a mid-day meal by Section 6 and forty-five minutes, required by Section 7, for rest after any six hours of continuous work.

Under this interpretation both sections can be applied with full effect. A female over twenty-one may be employed in manufacturing establishments on overtime days from six A. M. to six forty-five P. M., or from seven A. M. to eight thirty P. M., or from eight thirty A. M. to ten P. M. In the same way females under twenty-one can be em-

ployed in other establishments the total maximum number of hours on overtime days between the hours of six A. M. and nine P. M.

On principle and in practical application there is no inconsistency between the two sections of the statute. The intention of the legislature to make both applicable is further evidenced by Section 14. Under this section whenever a female is permitted to work after nine P. M. and the Secretary of Labor and Industry or his deputy feels that the individual is under twenty-one, the employer, upon demand, must submit evidence of her correct age. In default thereof a presumption is raised that the employment is illegal. No exception is made as to days when overtime is permitted.

Therefore you are advised that under Section 5 of the Act of July 25, 1913, P. L. 1024, no female under twenty-one years of age, except telephone operators over eighteen years, are permitted to work in any establishment before six A. M. or after nine P. M. on days when overtime is allowed.

Very truly yours,

DEPARTMENT OF JUSTICE,
JOHN A. MOSS,
Deputy Attorney General.

OPINION NO. 49

Motor vehicles—Registration—Passenger or commercial vehicle—Substitution of box body for rear part of touring car—Vehicle Code, Sec. 102.

An automobile originally designed as a touring car, from which the rear part of the body has been cut off and a securely fastened, although removable, box body built thereon, is a reconstructed vehicle within section 102 of The Vehicle Code of 1929, and is not entitled to registration as a passenger vehicle under that section as amended by the Act of June 22, 1931, P. L. 751.

Department of Justice,
Harrisburg, Pa., May 11, 1932.

Honorable Benj. G. Eynon, Commissioner of Motor Vehicles, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether you should register as a commercial motor vehicle, a vehicle originally designed as a touring car from which the rear part of the body, including the seat, has been completely cut off and a securely fastended box body constructed thereon.

In Section 102 of The Vehicle Code of May 1, 1929, P. L. 905 as amended by Act of June 22, 1931, P. L. 751, a commercial motor vehicle is defined as follows:

> "Any motor vehicle designed for carrying freight or merchandise: Provided, however, That a motor vehicle, originally designed for passenger transportation, with a removable box body, shall not be deemed a 'commercial motor vehicle' for the purpose of this act * * *."

You inform us that an applicant for registration bought a vehicle originally designed as a touring car. Subsequently he removed the rear seat, cut down the body, and constructed thereon a one-half ton box body. He now claims that under the definition of a commercial motor vehicle, as quoted above, his vehicle should be registered as a passenger vehicle and not as a commercial motor vehicle. He contends that it was originally designed for passenger transportation and has a removable box body.

We do not agree that such a vehicle is taken out of the commercial motor vehicle class because it was originally designed for passenger transportation if it has been so changed as to alter that original design. If the vehicle had not been materially changed and had merely had a removable box body attached in some way to the rear, it would come within the exception in the definition. It would still be a passenger vehicle "with" a removable box body.

A reconstructed vehicle is defined in Section 102 of The Vehicle Code of 1929 as:

> "Any motor vehicle * * * which, if originally otherwise constructed, shall have been materially altered by the removal of essential parts * * *."

And an essential part is defined by the same section as:

> "All integral parts and *body parts,* the removal, alteration, or substitution of which will tend to conceal the identity, or substantially alter the appearance, of the vehicle."

When the rear portion of the body of the touring car was removed and a box body substituted there was such an alteration that the vehicle lost its identity, ceased to be a passenger vehicle and became a commercial motor vehicle. The mere fact that the body is removable is not enough to bring it within the exception to the definition of a commercial motor vehicle. All truck bodies are removable by merely releasing the necessary bolts. They are none the less commercial motor vehicles.

Therefore you are advised that when a vehicle originally designed for passenger transportation is altered by the removal of the rear seat and the substitution of a removable box body, it becomes a commercial motor vehicle and should be registered as such.

Very truly yours,

DEPARTMENT OF JUSTICE,
JOHN A. MOSS,
Deputy Attorney General.

OPINION NO. 50

Elections—State committeemen—Rules of party—Election of one man and one woman from district—Validity—Act of July 12, 1913—Failure to notify Secretary of Commonwealth—Disregard of rule in certifying results of election.

1. Where a political party changes its rules so as to provide for the election of one man and one woman as members of its state committee in each district where two members are to be elected, but fails to certify the change of rule to the Secretary of the Commonwealth in time to permit printing proper instructions on the ballots, it is the duty of the Secretary of the Commonwealth to certify to the election of the two persons who received the highest number of votes in each district, irrespective of sex.

2. Not decided, whether the state committee of a political party may, under section one of the Act of July 12, 1913, P. L. 719, as amended by the Act of May 18, 1917, P. L. 244, restrict the qualifications for membership on the committee by requiring the election of one man and one woman in districts where two members are to be elected.

Department of Justice,
Harrisburg, Pa., May 17, 1932.

Honorable Richard J. Beamish, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request to be advised regarding the following situation:

On January 14, 1932, the Democratic State Committee changed its rules so as to provide for the election of one man and one woman as members of the committee in all districts in which two members are elected. However, the officers of the committee neglected to certify this change of rule to your office prior to the primary held on April 26, 1932.

Accordingly, in transmitting to the county officers instructions for the preparation of the ballots for the primary, you gave them the instructions which had theretofore been given for voting for Dem-

ocratic committeemen in districts in which two were to be elected, namely, "Vote for two."

Throughout the State the ballots used at the primary did not direct members of the Democratic Party, in districts in which two committeemen were elected, to vote for one man and one woman.

After the primary you were requested by the Chairman of the Democratic State Committee to certify to the election of the man who received the highest number of votes cast for men and the woman who received the highest number of votes cast for women in any district in which two candidates were to be elected at the April primary.

You have also received protests against this course of action. These protests raise two questions as follows:

1. In view of the failure to notify voters to cast their votes for one man and one woman, can you now certify to the election of a man and a woman as requested by the Chairman of the Democratic State Committee; and

2. In any event, can a party validly specify that in each district in which two committeemen are to be elected one man and one woman shall be chosen?

You ask us to advise you what course to pursue under the circumstances.

Members of the State Committee are elected under Section 1 of the Act of July 12, 1913, P. L. 719, as amended by the Act of May 18, 1917, P. L. 244. This section provides that:

> "* * * Each Senatorial district shall be entitled to elect two members of the State committee, except where a Senatorial district is composed of more than one county or part of a county; in which event the electors residing in each county or part of a county embraced in the said Senatorial district shall be entitled to elect one State committeeman. * * *"

Also:

> "The State committee of each political party may make such rules for the government of such State committee, not inconsistent with law, as it may deem expedient; * * *"

It is an interesting question whether the right to make rules "for the government of" a State committee confers upon the committee the right to restrict the qualifications for membership upon the committee according to sex, when the Legislature has provided without any sex qualification that each senatorial district shall be entitled to elect "two members."

However, this is a question which it is unnecessary for us to consider at this time.

In view of the neglect of the officers of the Democratic State Committee to notify you of the change in the rules of the committee prior to the time when it was your duty to furnish instructions to county commissioners for the preparation of the ballots for the spring primary, you were entirely justified in sending to the county commissioners throughout the State instructions in the form which had previously applied to the election of members of the committee.

Members of the Democratic Party who used the primary ballots on April 26, 1932, did not have it called to their attention that they were to vote for one man and one woman instead of for two persons irrespective of sex as theretofore. Had instructions to vote for one man and one woman appeared on the ballot, the result might readily have been different in a number of districts. Clearly, you could not now certify to the election of a woman as a member of the State committee who received less votes than the second highest man in her district. Such a certification would represent a mere guess as to the result of the election if the voters had been informed that they could vote for only one man and one woman instead of for two persons irrespective of sex.

Therefore, only two alternatives are open to you,—either to certify to the election of the two persons, irrespective of sex, who received the highest number of votes, or to make no certification upon the theory that there was no election because the ballots did not conform to the party rules.

In our opinion it is your duty to adopt the former alternative and to certify to the election of the two persons who received the highest number of votes in any district, irrespective of sex. The Act of Assembly provides for the election of State committeemen; the members of the Democratic Party voted for candidates for these offices, and the ballots were prepared in accordance with the latest information which had been certified to you by the officers of the Democratic State Committee. Under the circumstances it would be an absurdity, to take the position that through the neglect of the officers of the committee, the directions of the Legislature were defeated and the votes cast by the members of the Democratic Party were voided.

Therefore, you are advised to certify to the election of the two persons in each senatorial district where two members of the committee were to be elected who received the highest number of votes for Democratic State Committeeman, irrespective of sex.

Very truly yours,

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

OPINION NO. 51.

Appropriations — Preferred Appropriations — Non-Preferred Appropriations — Abatements—General Appropriation Bill—Violation of Art. IX, Sec. 4 by the "Talbot Act," Extraordinary Session of 1931, P. L. 1503—Supreme Court Opinion, Commonwealth v. Liveright et al May Term 1932, No. 16.

1. Items in the General Appropriation Act, its amendments and supplements, are either in the preferred class or void. They cannot be abated.

2. The only preferred appropriations made by the regular and special sessions of 1931, other than those made by the General Appropriation Act, its amendments and supplements, are those made by the Talbot Act, Act No. 19-A, the Act of June 12, 1931, P. L. 575, the Act of June 25, 1931, P. L. 1376, and Act No. 1-E. All other appropriations made at the regular and special sessions of 1931 must abate proportionately.

3. In determining the amount of money available for the present biennium, the Auditor General and State Treasurer must be governed by the estimate of the Budget Secretary, presented to the Governor after the adjournment of the regular session of the Legislature of 1931, upon the bassis of which the Governor acted in approving appropriation acts.

4. The abatement of appropriations must be made as of the effective date of the Talbot Act—December 28. 1931—except that the abatement cannot affect appropriations actually expended prior to that date, and that the abatement cannot in any case disturb contracts lawfully and validly executed prior to the decision of the Supreme Court in the Talbot Act Case.

Department of Justice,
Harrisburg, Pa., May 23, 1932.

Honorable Charles A. Waters, Auditor General, Harrisburg, Pennsylvania; Honorable Edward Martin, State Treasurer, Harrisburg, Pennsylvania.

Gentlemen: We have your joint request to be advised concerning the effect of the opinion of the majority of the Supreme Court in Commonwealth *v.* Alice F. Liveright, et al., May Term, 1932, No. 16, sustaining as constitutional the so-called "Talbot Act," which became effective December 28, 1931, (Pamphlet Laws, page 1503).

Your inquiry arises out of that part of Mr. Justice Kephart's opinion dealing with the question whether the Talbot Act violated Article IX, Section 4, of the Constitution. That section reads as follows:

> "No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or to pay existing debt; and the debt created to supply deficiencies in revenue shall never exceed in the aggregate, at any one time, one million dollars; * * *."

Mr. Justice Kephart said:

"* * * The balance of estimated revenue for the biennium, after the regular session of the legislature, was $192,915,000, and the authorized appropriations were $192,394,000. At the special session, prior to the Talbot bill, $716,000 was appropriated; with it the appropriations of that session totaled $10,716,000. Defendants contend that since the appropriation made by this bill with prior appropriations already made, exceeded the estimated revenues for the biennium, the excess appropriations were invalid.

"The court below held that though strict constitutional limitations were imposed on municipalities in the creation of debts, this was not so with respect to the sovereign state; that there was no limitation to the debt the latter might incur except when created to supply deficiencies in revenue. This conclusion is erroneous. * * * Under the constitution, neither the legislature, the officers or agents of the State, nor all combined, can create a debt or incur an obligation for or on behalf of the State except to the amount and in the manner provided for in the fundamental law. This section was intended to restrict legislative acts which incurred obligations or permitted engagements on the credit of the State beyond revenue in hand or anticipated through a biennium, and establishes the principle that we must keep within current revenue and $1,000,000. There can be no such thing as a floating debt created through appropriations in excess of revenues and $1,000,000. Such debt may not be directly incurred by statute, nor through an appropriation in excess of current revenue for a gratuity or any purpose. * * *

"Among constitutional requirements is the provision (Art. IX, Sec. 12) that 'The monies of the state, over and above the necessary reserve, shall be used in the payment of the debt of the State, either directly or through the sinking fund,' and by Art. IX, Sec. 13, 'The monies held as necessary reserve shall be limited by law to the amount required for *current expenses.*' * * * A survey of the Constitution would indicate that the ordinary current expenses of government would be the expenses of the executive, judicial, and legislative departments of government, and of public schools, as provided for in that instrument. It was the intention of the framers of the fundamental law to safeguard and protect these ordinary expenses that the government might exist as such. Therefore, they have a preference or prior claim on all moneys of the Commonwealth over all other expenditures, expenses, debts, or appropriations. * * * The Constitution requires a reserve to be set up sufficient to take care of these preferred claims, and that such reserve be limited by law; but if the legislature fails to so limit it, it is the

duty of the fiscal officers to safeguard the ordinary current monthly expenses of government.

"The provision relative to the sinking fund state debt requires only $250,000 annually to be paid, and the transfer of a part of the revenue to that fund, that part, of course, being in the discretion of the legislature. But the ordinary expenses of government and the sinking fund payment are not the only preferred claims on revenues thus established and first entitled to payment. Art. III, Sec. 17, permits moneys to be given to charities and normal schools, money for charities if passed by a two-thirds vote. Money given to normal schools has priority on the general fund over an appropriation to charities, etc.; McLeod v. Central Normal School Association, 152 Pa. 575, 589. The balance of the general revenue, subject to constitutional limitations, is in the absolute and complete control of the General Assembly. It follows that it may create preferential appropriations for any purpose which, in its judgment, it deems necessary in the interest of government, and such appropriations would have a claim on this surplus prior to other appropriations not so favored. * * * Any appropriation which embodies an intention to pay the amount therein stated before any other appropriation made at the same session of the legislature or any appropriation which stipulates the time at or within which it must be paid, will take rank as an appropriation next to the ordinary expenses of government. Priority is a question of intention and prior claims rank equally unless there is an intention shown to the contrary or expressed through the Constitution.

"The fiscal officers of the Commonwealth are required to treat such appropriations as having such priority, provided always, that at the time payment is directed, there are funds available in the treasury to meet such payment above all requirements for the current expenses of government. No administrative custom or scheme of payments under unpreferred appropriations will avoid these consequences or that of a deliberate legislative act in preferring an appropriation. If other appropriations are compelled to suffer because of this preference, the complete answer is that it is the legislative will, and as the sovereign people have thus spoken through their designated agent, no one can complain. If appropriations for other charities and hospitals, equally as meritorious and perhaps some more deserving, are made to suffer because of insufficient revenue, the fault lies with the legislature in not providing means when it had the opportunity. If there are ample funds on hand, of course, or if funds later become available, no difficulty will be experienced.

"The Talbot bill, known as Act 7-E, specifically appropriates $10,000,000, to the Department of Welfare, and contains a mandatory direction to the State Treasurer to

pay certain sums at fixed periods; $1,000,000, in December, 1931, $2,000,000, in each of the succeeding four months, and the remaining and final $1,000,000 in May, 1932. The amount, the time, and the purpose of payment, are thus definitely stated in the Act. The legislature intended these payments to take priority over other payments at the times mentioned, and the purpose stated in the Act furnishes a reasonable basis for such action. When we as judges consider this mandate it is of no moment to us acting in a judicial capacity that other appropriations may suffer. To effectuate its purpose, it was not necessary for the legislature to expressly state, 'this appropriation shall take precedence over all other appropriations;' that is done by the Act's mandatory provisions, which accomplish the same result. We assume the legislature must have considered the possible revenues when it issued its mandatory decree to the State Treasurer to pay this money as it directed, and that it also considered the condition of the treasury.

"But, it is urged, that notwithstanding this preference, the legislature had already appropriated all the estimated revenues at the general session, and that as there were no funds or anticipated revenues against which this appropriation could be preferred, it is void. But this contention wholly overlooks the fact that under our financial scheme of government, while the receipts of revenue come in daily or yearly, our fiscal period is biennial, and revenues for that period are the subject of legislative distribution. This can only be made from revenue accruing during the biennium, and any other available cash assets on hand that may be used for that purpose. From this sum all appropriations, whether made at a general or special session must be met. An appropriation does not speak from the date of approval of the measures, but from a consideration of that appropriation and other appropriations during the same biennium, and the estimated revenue; and if there is a shortage of revenue beyond $1,000,000, it is not a given appropriation, the last one made, that is singled out for rejection by the fiscal officers, but all must suffer alike and abate proportionately. If the budget is not ballanced by the Governor, then all appropriations must suffer proportionately except those in the preferred class. There is no priority among appropriations of the same class in any one biennium. * * * Therefore, appropriations made at a special session must be considered in connection with and in relation to appropriations of the general session just as new revenue is included in and is a part of the general revenue for the two year period.

"To give effect to the Talbot bill it was not necessary that there should be a specific repeal of any particular prior appropriation. The Act itself effected a repeal of

so much of other appropriations not in its class as would be necessary to make good this express mandate of the legislature. The result is that a debt is not and cannot be created by merely making appropriations which direct expenditures in excess of anticipated revenue, and the legislature cannot make it so. Appropriations in excess of estimated revenues and $1,000,000 are simply ineffective; they incur no liability or obligation on the part of the State, they simply abate pro rata to be within the biennium receipts and cash in hand.

"* * * An appropriation may contain in it all the elements of a contract which, when carried through, may of itself create a debt. On the other hand, where the appropriation authorizes the payment of a gratuity, it is not a debt within the meaning of the Constitution, if there is not sufficient revenue provided to meet it, and a debt must not be created either by issuing warrants, lending credit, borrowing or otherwise to meet it, such appropriation, or such part of it that cannot be met, simply falls. It is invalid.

"The record shows that on June 1, 1931, the State had cash in the bank amounting to more than $49,000,000, and since that date up to December 31, 1931, when this first payment was due under the Talbot bill, revenue had been collected up to another $49,000,000 or a total of $98,-000,000, more than half of the anticipated revenue for the biennium. It is apparent there was a prima facie right on the part of the appellees to have their claim paid, and it follows that no objection could successfully be made against this appropriation on account of Art. IX, Sec. 4."

In your communication you say:

"We are satisfied that sufficient moneys will not be availab'e to pay all the appropriations made by the regular and special sessions of the Legislature of 1931, and it, therefore, becomes our duty in authorizing and paying non-preferred appropriations to consider the proportionate amount of such appropriations which should be abated. In determining this question, the following problems are presented:

"1. Should all items in the General Appropriation Bill be considered by us as ordinary expenses of the government to be paid before any other appropriation?

"2. Which of the appropriations not included in the General Appropriation Bill should be treated as preferred appropriations under the decision of the Supreme Court?

"3. In determining the amount of money to be available for the present biennium, is the estimate by which we should be governed the estimate of the Budget Secretary, as presented by him to the Governor after the adjournment of the regular session, and upon which the General Appropriation Bill was approved.

> "4. As of what date should the proportionate abatement of non-preferred appropriations be determined. In other words, if the State must keep within current revenue and one million dollars, is it the duty of the fiscal officers to withhold payment of non-preferred appropriations, except in amounts as the changing fiscal picture might indicate from time to time?"

We shall discuss your inquiries in the order in which you state them.

I

Should all items in the General Appropriation Act be treated as ordinary expenses of the government to be paid before other appropriations?

Article III, Section 15, of the Constitution provides that:

> "The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the Commonwealth, interest on the public debt and for public schools; all other appropriations shall be made by separate bills, each embracing but one subject."

In discussing "ordinary expenses" of municipal government, the Supreme Court said, in Brown, et al. *v.* City of Corry, 175 Pa. 528 (1896), at 531:

> "* * * Any expense that recurs with regularity and certainty, and is necessary for the existence of the municipality or for the health, comfort and perhaps convenience of the inhabitants, may well be called an ordinary expense."

This statement is equally applicable to "ordinary expenses" of the State government. It was thus regarded by Attorney General Bell in an opinion rendered to the Auditor General on November 11, 1913. 62 Pittsburgh Legal Journal 77.

The title of the General Appropriation Act of 1931 (Act No. 15-A, Appropriation Acts, p. 16) is:

> "An act to provide for the ordinary expenses of the Executive, Legislative, and Judicial Departments of the Commonwealth, interest on the public debt, and the support of the public schools * * *."

Clearly, the items in this act are either for "ordinary expenses," and therefore valid, or not for "ordinary expenses" and therefore

unconstitutional. There is no middle ground. It would be impossible to abate them as unpreferred appropriations. If they are not for "ordinary expenses," they are void.

The Legislature has declared every item in the General Appropriation Act to be for "an ordinary expense" of the State government. The action of the Legislature is presumed to be constitutional. In the Talbot Act Case, Mr. Justice Kephart said, "A statute will be declared unconstitutional only 'when it violates the Constitution *clearly, palpably, plainly;* and in such a manner as to leave *no doubt* or hesitation' in the mind of the Court."

Applying this test to the items contained in the 1931 General Appropriation Act, all of them are presumptively for "ordinary expenses" of the State government; the Legislature has thus described them.

By Informal Opinion No. 96, dated May 21, 1932, we advised the Department of Public Instruction, that it could not expend the item appropriating $50,000 "for expenses incident to the observation of the Two Hundred Fiftieth Anniversary of the first landing of William Penn in America." This clearly is not an appropriation for an "ordinary expense" of the government.

We have examined the other items in the General Appropriation Act, its amendments and supplements (Act of December 23, 1931, P. L. 1499 and Act of January 26, 1932, P. L. 1511). With a very few exceptions, there is no doubt but that they cover "ordinary expenses" of the State government.

The doubtful items follow:

1. For the painting of portraits of Governor Fisher, Lieutenant Governor James, Secretary of the Commonwealth Johnson, and Secretary of Internal Affairs Woodward, each in the amount of $750.

2. Appropriations to the Department of Military Affairs:

(a) For the installation of sewerage, the disposal of sewage, and the making of improvements, additions, or repairs to existing buildings, roads, and utilities on the State Military Reservation in the sum of $119,500 and increased by amendment (Act No. 9-E, approved January 26, 1932) to $419,500;

(b) For the marking of graves and burial places of soldiers of the Revolutionary War and the War of 1812 in the sum of $5,000;

(c) For the preparation and compilation of statistics and records of the soldiers, sailors, marines, and nurses from Pennsylvania who participated in the World War and for the furnishing of assistance to any soldiers, sailors, marines, and nurses who served from Pennsylvania in any of the wars of the United States in prosecuting claims which they may have for assistance under Federal law, in the sum of $45,000, and

(d) After payment of the administrative expenses of the State Veterans Commission, to enable that agency to furnish funds to purchase the necessities of life for and to assist otherwise Pennsylvania veterans of any war or the widows or infant children or dependents of such veterans who are sick, disabled, or indigent, in the amount of $100,000, increased by supplement (Act No. 4-E, approved December 23, 1931) to $200,000.

3. An appropriation to the Pennsylvania State Police for installing, operating, and maintaining a teletypewriter system for disseminating and receiving police information in the amount of $400,000.

1. It has been the custom of the Legislature for many, many years at the close of an administration to appropriate funds for painting the portraits of the Governor, Lieutenant Governor, and certain other State officers. While it is doubtful whether these are ordinary expenses of the government, nevertheless, in our opinion, through long usage these items have come to be considered as within that classification. We cannot say that their inclusion in the General Appropriation Act clearly, palpably, and plainly violates the Constitution.

2(a) It is certainly an ordinary expense of the government to maintain an efficient National Guard. That being so, we cannot say that it is a clear violation of the Constitution to include within the General Appropriation Act an item for conditioning, ready for use, an addition to the State Military Reservation which is used solely for the purpose of training members of the National Guard.

2(b) While it may be a governmental function to mark the graves and burial places of soldiers of the early wars in which the United States participated, this cannot be regarded as an "ordinary expense" of the State government. The item for this purpose is, in our opinion, unconstitutional.

2(c) It is certainly a function and an ordinary expense of the State government to have on file for proper governmental purposes statistics and records of the soldiers, sailors, marines, and nurses, residents of Pennsylvania who participated in the World War. We cannot say that the inclusion of an appropriation for this purpose is a palpable violation of the Constitution.

2(d) The Legislature has created the State Veterans Commission and authorized it to engage in certain activities looking to the welfare of distressed veterans and their families. The Legislature having declared this to be a function of the government, we cannot say that an appropriation for the work of this commission is not for an "ordinary expense" of the government.

3. The installation, operation, and maintenance of a means of communication between the Pennsylvania State Police and other police

officers in Pennsylvania and elsewhere can certainly not be regarded as outside of the scope of the General Appropriation Act. Anything which enables the Commonwealth to perform well that part of the police activities of the State which it has assumed is clearly within the scope of the ordinary business of the State. In any event, the teletypewriter system has been fully installed and paid for.

Accordingly, we are of the opinion that none of the items in the 1931 General Appropriation Act, as amended and supplemented, is clearly unconstitutional and void, except the one which we have already held void in our Informal Opinion No. 96, and the small item for marking the graves of Revolutionary soldiers.

Therefore, it is our opinion that the entire amount included in the General Appropriation Act, less $55,000, must be treated as preferred within the meaning of the opinion of the majority of the Supreme Court in the Talbot Act Case.

The amount in which the Governor approved the act was $150,391,-967.62. Amendments and supplements passed by the special session of 1931 added $930,000 making the total for the regular and special sessions $151,321,967.62. Deducting $55,000, the amount of this act which must be treated as preferred is $151,266,967.62.

II

Which appropriations not included in the General Appropriation Act of 1931 should be treated as preferred appropriations under the decision of the Supreme Court?

Obviously, the appropriation made by the Talbot Act in the amount of $10,000,000 must be thus treated. The Supreme Court has specifically so ruled.

In addition, in our opinion, the following appropriations must be treated as preferred:

1. The appropriation made by Act No. 19-A, approved June 19, 1931 (Appropriation Acts, p. 82), for renovating, repairing or replacing the roof on the main capitol building, in the amount of $200,000. We cannot conceive any appropriation item which more fully comes within the classification, "expenses of the government," than this. Presumably the Legislature was convinced of the necessity for this expenditure; and necessary repairs to the roof of the building in which the seat of government is established are clearly such an expense as must be regarded as having a preferred status.

2. The appropriation made by the Act of June 12, 1931, P. L. 575, providing $250,000 for the Delaware River Joint Commission, which was to be available only if New Jersey made a like appropriation. New

Jersey did make a like appropriation with the result that the appropriations of both States are, in our judgment, bound by contract to remain unimpaired.

3. For like reasons, the appropriation made by the Act of June 25, 1931, P. L. 1376, must be treated as preferred. That act appropriated $50,000 to the Department of Labor and Industry to be used in conducting an experimental employment agency in Philadelphia. The appropriation was conditioned upon the donation by a private corporation, organization or foundation, of a like amount; and such a donation has been made by the Spelman Fund and accepted by the Commonwealth.

4. The appropriations made by the Act of December 1, 1931, P. L. 1495 (Act No. 1-E), for the payment of the expenses of the special session of the Legislature which convened on November 9, 1931. Their amount was $366,553.04.

These are the only items in addition to those contained in the General Appropriation Act and the Talbot Act, which in our opinion, may be treated as preferred. Their total is $866,553.04.

We have not overlooked the claims of certain other appropriation acts to be regarded as preferred.

The Legislature in 1931 established the Greater Pennsylvania Council. It is a governmental body, but it was not incorporated in the permanent structure of the State government, by including it in The Administrative Code. It is so to speak, an experimental agency which may later be permanently embodied in our governmental structure. Its work is not as yet essential work of the government. Therefore, we have adopted the view that its expenditures are not preferred and must abate.

The same situation exists respecting the work of all temporary governmental commissions.

We regret exceedingly our inability to treat as preferred the appropriation for mothers' assistance, for State-aided hospitals, for State-aided educational institutions, and for the State's payment to county and poor district homes for the maintenance of the indigent insane. All of them represent gratuities for most worthy purposes. But we cannot treat any of them as governmental expenses within the meaning of the majority opinion of the Supreme Court in the Talbot Act Case. Mr. Justice Kephart undoubtedly had this situation in mind when he said:

> "* * * No administrative custom or scheme of payments under unpreferred appropriations will avoid these consequences or that of a deliberate legislative act in preferring an appropriation. If other appropriations are compelled to suffer because of this preference, [that given

> to the Talbot Act] the complete answer is that it is the legislative will, and as the sovereign people have thus spoken through their designated agent, no one can complain. If appropriations for other charities and hospitals, equally as meritorious and perhaps some more deserving, are made to suffer because of insufficient revenue, the fault lies with the legislature in not providing means when it had the opportunity."

We have also considered most carefully Act No. 18-A, appropriating $9,646,010 for State welfare, educational and military buildings, Act No. 17-A appropriating $3,000,000 for the new Eastern State Penitentiary, and other building appropriations; but we have concluded that appropriations for new buildings are not to be treated as preferred expenses of the government.

To summarize, the preferred appropriations are:

Ordinary expenses of the State government, as set forth in the General Appropriation Act, its amendments and supplements	$151,266,967.62
Talbot Act	10,000,000.00
Act No. 19-A	200,000.00
Act of June 12, 1931, P. L. 575	250,000.00
Act of June 25, 1931, P. L. 1376	50,000.00
Act No. 1-E	366,553.04
Total	$162,133,520.66

III

In determining the amount of money available for the present biennium, should you be governed by the estimate of the Budget Secretary presented to the Governor after the adjournment of the regular session of the Legislature in 1931, and upon the basis of which the Governor acted in approving appropriation acts?

Under the law as it now exists the Department of Revenue is the agency of the State government primarily charged with the collection of revenues either directly or as agent for other departments, boards and commissions; it is charged with the responsibility for the collection of every penny of revenue flowing into the State Treasury, with the single exception that the State Treasurer himself is required to collect from State depositories interest on State deposits. The amount involved in this exception is so trivial as to be negligible.

In making collections from a number of the State's major sources of revenue, the Department of Revenue is obliged by law to obtain the approval of the Department of the Auditor General to tax settlements; but this approval is not required in the collection of revenues flowing into the treasury from many other major sources.

Thus while the Department of the Auditor General must approve settlements of capital stock and gross receipts taxes it has no function to perform in the collection of inheritance taxes or mercantile or any other license taxes.

It is an incontrovertible fact that the only agency of the State government which is in a position, from first-hand information and experience, to make a comprehensive estimate of the revenues which should be collected during any given period, is the Department of Revenue.

That this is so was argued at length in *Commonwealth v. Liveright et al.*, and apparently the majority of the Supreme Court endorsed the soundness of this position. That part of the opinion which we have quoted begins by stating that "The balance of estimated revenues for the biennium, after the regular session of the legislature, was $192,915,000." This was the estimate submitted to the Governor by the Budget Secretary at the close of the regular 1931 session of the Legislature. It included the estimate of revenue furnished by the Department of Revenue and the surplus on hand as calculated by the office of the Budget Secretary.

Therefore we are of the opinion that the only official estimate of revenue which can be recognized by the fiscal officers in the performance of their duties is that submitted to the Governor through the Budget Secretary by the Department of Revenue.

Can the estimates of revenue be reduced by the Budget Secretary and the Department of Revenue after the Governor has acted upon them in approving and vetoing appropriation legislation passed by the Legislature?

This question arises because the Secretary of Revenue is now of the opinion that the estimate of $192,915,000 is at least $5,000,000 too high.

Thus, stated differently, the question is whether $5,000,000 of appropriations which were valid when approved, can later be invalidated by a downward change in the budget estimates.

We are firmly of the opinion that the budget estimates as officially submitted to the Governor as a basis for his action on appropriation measures at the close of the regular biennial session of the Legislature must be treated as the inflexible test by which fiscal legislation is evaluated for the biennium. It is true that an estimate is not a fact but only a prediction, and that the prediction may fail by being either too high or too low. That, however, is an inescapable uncertainty in the administration of any budget system. An estimate of revenue can never be guaranteed as accurate. In times of prosperity it is almost certain to be too conservative and in times of depression it is almost certain to be the reverse; but we cannot believe that it was the intention of the framers of our Constitution and of the people who adopted

it, to provide a system under which an appropriation valid on the date of its approval could later be invalidated by the action of a single executive officer.

IV

As of what date should the proportionate abatement of non-preferred appropriations be determined? In other words, if the State must keep within current revenue and one million dollars, is it the duty of the fiscal officers to withhold payment of non-preferred appropriations, except in amounts as the changing fiscal picture might indicate from time to time?

We have already answered the second part of your question. The answer is, no.

The Talbot Act became effective on December 28, 1931. It is the passage of this act,—which a majority of the Supreme Court has held to be a valid act,—which requires the proportionate abatement of other appropriations made by the Legislature at the regular and special sessions of 1931. The court held that, "The Act itself effected a repeal of so much of other appropriations not in its class as would be necessary" to balance the budget. That repeal could occur only on the date when the Talbot Act became effective.

Therefore, the proportionate abatement which is required must be made as of December 28, 1931; and once made it will remain effective unless and until the Legislature by further enactments makes appropriations restoring the amounts which have been abated. This can be done under the decision of the Supreme Court only if and when revenue is rendered available equal in amount to the abatement which has been effected by the passage of the Talbot Act.

In this connection we call your attention to the fact that the abatement cannot be made proportionately with respect to all appropriations of the non-preferred class passed by the Legislature at its 1931 sessions.

If an appropriation theretofore made by the Legislature had been fully expended prior to December 28, 1931, it could, of course, not be abated by legislation which became effective on that date. Similarly, if more of the appropriation had actually been expended than the proportionate part which would be available under the abatement, the money already expended cannot be restored to the State Treasury. It is gone.

Again, if prior to December 28, 1931, binding contracts had been entered into under authority of law encumbering or obligating appropriations made prior to December 28, 1931, these contracts cannot be impaired by legislation effective on that date. The Constitutions both of the United States and of Pennsylvania forbid this. Therefore, no

appropriation can be abated to a point below the extent to which it has actually been encumbered by contract validly and lawfully entered into prior to December 28, 1931.

A complication arises from the fact that in certain instances contracts were entered into after December 28, 1931 and prior to April 7, 1932, when the Supreme Court rendered its decision in the Talbot Act Case. As there was no possible way of anticipating the conclusion reached by a majority of the Supreme Court,—as the formula which it adopted was not presented to it by any of the lawyers who were in the case,—it is our opinion that the contracts entered into during this period must be regarded as having been validly and effectively made. There is, therefore, no possible way of abating appropriations below the amounts for which they were obligated or encumbered by contracts entered into prior to April 7, 1932. Subsequent to that date, under instructions from this office, there have been no new contracts made.

Most of these cases have occurred in the expenditure of the appropriation made by Act No. 18-A (Appropriation Acts, p. 77) for various building projects. However for the purposes of this opinion, that appropriation must be treated as a single appropriation of $9,646,010. This total can be abated proportionately with other non-preferred appropriations. Within the lump sum of the appropriation as abated, the Department of Property and Supplies should endeavor to abate specific items as nearly as possible in the same proportion, but for the reason stated it will not be possible to make an absolutely proportionate abatement.

V

Summary

To summarize, we advise you that:

1. Items in the General Appropriation Act, its amendments and supplements, are either in the preferred class or void. They cannot be abated.

2. The only preferred appropriations made by the regular and special sessions of 1931, other than those made by the General Appropriation Act, its amendments and supplements, are those made by the Talbot Act, Act No. 19-A, the Act of June 12, 1931, P. L. 575, the Act of June 25, 1931, P. L. 1376, and Act No. 1-E. All other appropriations made at the regular and special sessions of 1931 must abate proportionately.

3. In determining the amount of money available for the present biennium, you must be governed by the estimate of the Budget Secre-

tary, presented to the Governor after the adjournment of the regular session of the Legislature in 1931, upon the basis of which the Governor acted in approving appropriation acts; and

4. The abatement of appropriations must be made as of the effective date of the Talbot Act,—December 28, 1931,—except that the abatement cannot affect appropriations actually expended prior to that date, and that the abatement cannot in any case disturb contracts lawfully and validly executed prior to the decision of the Supreme Court in the Talbot Act Case.

In conclusion we wish to say that the subject-matter of this opinion has been most carefully considered by all of the members of the Board of Finance and Revenue, consisting of the Auditor General, the State Treasurer, the Secretary of Revenue and the Attorney General, at several lengthy conferences.

Your request was the result of those conferences, and the advice herein rendered, while in form an opinion of this department, represents not only the judgment of the Attorney General and his deputies, but also of all of the other members of the Board of Finance and Revenue.

VI

Application of This Opinion

In conferring upon the questions discussed in this opinion, the Auditor General, the State Treasurer, and the Attorney General have agreed that the effect of the majority opinion in the Talbot Act Case, as herein interpreted, is as follows:

The total estimated revenues for this biennium as certified to the Governor by the Budget Secretary at the close of the 1931 regular session of the Legislature amounted to $192,915,206.22. To this amount there can be added, under the decision of the Supreme Court, $1,000,000. Therefore, the total valid appropriations for this biennium cannot exceed $193,915,206.22.

As we have already pointed out, the preferred appropriations for this biennium total $162,133,520.66.

The difference,—$31,781,685.56,—is the amount available for the payment of non-preferred appropriations.

The total of appropriations made by the regular and special sessions of the Legislature in 1931 was $203,690,570.49, which reduced by the $55,000 which we have ruled unconstitutional, amounts to $203,635,570.49. Deducting from this amount the aggregate of preferred appropriations, $162,133,520.66, we have a balance of $41,502,049.83, of non-preferred appropriations.

To apply to these appropriations there is available, as above stated, $31,781,685,56.

We are advised that non-preferred appropriations fully expended, or expended in excess of what would otherwise have been their abated amount on December 28, 1931, totaled $136,091.38. This figure must be deducted from both of the amounts just given. Also the total amount of non-preferred appropriations encumbered prior to April 7, 1932, by valid contracts in excess of the amounts of the abated appropriations. This total is $1,127,985.37. This figure includes $940,000 appropriated by Act No. 3-A (Appropriation Acts, p. 5) for buildings for State College, all of which was contracted for prior to April 7, 1932.

The result is that there will be $30,517,608.81 available to pay $40,237,973.08 of non-preferred appropriations.

Therefore, the abatement of every non-preferred appropriation must be 24.16 per centum of the amount appropriated for the biennium.

Very truly yours,

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

OPINION NO. 52

Public Schools—Minimum Salaries to Teachers—School Code May 18, 1911. P. L. 309, Sec. 1210 as amended.

The provisions of Section 1210 of the School Code of May 18, 1911, P. L. 309, as amended, which prescribed minimum basic salaries and required increments for teachers, are inseparable parts of a single salary schedule, and the increments are to be based only on the statutory basic minimum, irrespective of the actual salaries at which the teachers enter the employ of the districts.

Where a teacher enters the employe of a school district at a salary above the statutory basic minimum, the School Code does not require the district to increase her salary until the time at which she would have been entitled to a larger salary if she had entered the district at the statutory minimum.

Department of Justice,
Harrisburg, Pa., June 7, 1932.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether, under clause 10 of Section 1210 of the School Code of May 18, 1911, P. L. 309, as last amended by the Act of May 23, 1923, P. L. 328, 24 P. S. 1173, a teacher who enters the employ of a school district at a salary higher

than the statutory basic minimum applicable to such a teacher is entitled thereafter to receive all of the salary increments prescribed by the Code, or whether the maximum number of required increments is to be computed as though starting from the statutory basic salary.

If we conclude that the total of required increments is to be determined on the statutory basic minimum, a secondary question will arise. It is as to when a teacher who enters a district at a salary above the basic minimum but below the maximum required salary is entitled to receive the increments necessary to bring her to that maximum. For example, is she entitled to receive an increment in her second year of service in the district, although her original salary will even then be above the statutory basic minimum plus the first required increment?

We shall consider these questions in turn.

Section 1210 of the Code contains the minimum salary schedule for teachers. Clause 10, to which you refer, follows the provisions which prescribe these salaries. It reads as follows:

> "The increments herein provided for are applicable only where the beneficiaries thereof remain in the service of the same school district. Where such teachers enter a new district, they shall enter at a point in the schedule to be agreed upon between said teachers and the employing districts, which agreement shall be made a part of the contract between them."

Our problem is to determine what is meant by the direction that each teacher shall enter the employ of a school district "at a point in the schedule" to be agreed upon between teacher and school district.

The form in which the salary schedule is prescribed by Section 1210 is illustrated by the following excerpt from the first portion of the section, (as amended by the Act of March 12, 1929, P. L. 18):

> "1. The minimum salaries of all teachers, supervisors, principals and superintendents in the public schools of the Commonwealth, except as otherwise hereinafter provided, shall be paid by the several classes of districts in which such persons are employed, in accordance with the following schedules.
>
> "2. Districts of the first class.—Elementary teachers, minimum annual salary one thousand two hundred dollars ($1,200), minimum annual increment one hundred dollars ($100), minimum number of increments ten (10); assistant high school teachers, minimum annual salary one thousand five hundred dollars ($1,500), minimum annual increment one hundred dollars ($100), minimum number of increments three (3); * * *"

Clause 9 of the same section, as last amended by the Act of May 23, 1923, P. L. 328, contains the following:

> "9. The foregoing schedules prescribe a minimum salary in each instance, and where an increment is prescribed it is also a minimum. It is within the power of the boards of education, boards of public school directors, or county conventions of school directors, as the case may be, to increase, for any person or group of persons included in this schedule, the initial salary or the amount of an increment or the number of increments or the minimum qualifications set forth in this act. * * *"

From these portions of the Code it is clear that the provisions for minimum basic salaries and required increments must be regarded as inseparable parts of a single schedule of total minimum salaries. And it is that single schedule to which clause 10 of Section 1210 refers.

The object of the Legislature in enacting the minimum salary provisions of the Code, was to insure that at the end of any given period of service in a particular district, each teacher would be entitled to receive a total salary of at least the amount fixed by the law. These amounts were intended to be definite and uniform for all teachers in the same classification. The division of the schedule into two parts, namely, minimum basic salaries, and required increments, was made for the sake of convenience, and not to indicate that the two were to be regarded as distinct and independent requirements. The Legislature was interested in prescribing minimum total salaries and not in guaranteeing increments irrespective of the basic salary received by the teacher.

We regard the net result of these provisions of the Code to be the same as if, instead of fixing a basic minimum and designated increments, the law had specified the total salary required to be paid to each teacher in a particular class during each year of her service in a district. The increments are to be computed on the statutory basic minimum only, and when a teacher is being paid a salary as large as or larger than the amount that she would have been entitled to receive in that year if she had entered the district at that basic minimum, all questions of increase are to be regulated by her agreement with the school directors.

The secondary question, which we stated in the second paragraph of this opinion, is as to the time when increments may be required by teachers who have entered a district at a salary above the statutory minimum.

We may use the case of an elementary teacher in a first class district as an illustration. Under the statutory schedule, which we have quoted, it is clear that such a teacher would be entitled to receive, by

requirement of law, a salary of $1600 in the fifth year of her service in the district, but not before; and her statutory maximum of $2200 would be reached in her eleventh year. But if the teacher enters the district at a salary of $1500, the question is whether she shall receive $1600 in her second year, and subsequent increments that will bring her to the $2200 maximum in her eighth year, or whether the board may continue to pay her $1500 until the end of her fourth year of service.

Clause 10 of Section 1210 of the Code clearly makes this a matter for agreement between teacher and school district. They must agree as to the point in the schedule at which the service shall begin. This includes an agreement as to when increments shall begin. Needless to say, the terms of the contract should be explicit on that subject and nothing should be left to implication. The times and amounts of all increments should be clearly stated.

However, we understand that you want us to advise you as to what result must follow where the question of the time for increments in such cases has not been expressly provided for in the teacher's contract.

In our opinion there would be no warrant for implying into such a contract an obligation on the part of the school district to pay at a particular time, any greater salary than is expressly stated in the contract or is required by law. We have seen that the law does not require payment of a salary of $1600 to the teacher we have been considering, until her fifth year of service. The contract in question imposes no heavier burden. Consequently, no increment need be made until the teacher has completed four years of service in the district.

Therefore, we advise you that clause 10 of Section 1210 of the School Code means that when a teacher enters the employ of a new district, the district is free to enter into any agreement with her as to her basic salary and increments, so long as it provides a total salary in each year which shall not be less than the statutory basic minimum plus the required increments. And in the absence of a contract expressly providing otherwise, no school district is required by the School Code to pay to any teacher in any year a salary greater than such teacher would be entitled to receive in that year if she had entered the employ of the district at the statutory minimum basic salary.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 53

Trees—Removal of, on state highways—Power of shade tree commissions. First class townships.

The State Highway Department is not required to obtain the consent of township shade tree commissions before cutting or removing trees along state highways in first class townships. However, the cutting or removal of trees along state highways in townships is subject to the restrictions contained in the Act of April 1, 1909, P. L. 97, No. 58.

Department of Justice,
Harrisburg, Pa., June 8, 1932.

Honorable S. S. Lewis, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have asked to be advised to what extent your department's power to cut and remove trees in and along State highways in townships is affected by the powers of shade tree commissions and the rights of abutting owners.

Section 6 of the Act of May 31, 1911, P. L. 468, Title 36 P. S., Section 971 provides that the highways taken over by that act:

> "* * * shall be under the exclusive authority and jurisdiction of the State Highway Department * * *."

Under the above provision of the "Sproul Act" your department has broad powers but they must be exercised by you in accordance with and as limited by any other Acts of Assembly that relate to the highways under your supervision.

The Act of April 1, 1909, P. L. 97, No. 58, was passed to protect trees growing along the roadside or within the legal limits of highways. Section 5 makes the act applicable to the officials of the Department of Highways, supervisors, road-masters and their employes. It was not specifically repealed by the "Sproul Act" of 1911 nor can the above quoted part of Section 6 of that act be interpreted to repeal it by implication. The two are not inconsistent. The Act of 1909 merely regulated, in respect to trees, the manner in which you shall exercise your exclusive authority over the State highways.

As to trees along highways through forested, wild or uncultivated lands the act permits you to cut down any tree within fifteen feet of the center line. Beyond that and within the legal limits of the highway you may cut down any tree under four inches in diameter. Over that thickness you may do so only with the consent of the abutting property owner or on order of a judge of the county court.

Along a highway through improved or cultivated lands, you may remove any tree which interferes with public travel. If, to maintain

the highway at its best and highest efficiency, you believe it necessary to remove a tree within the limits of the highway, even though it does not interfere with public travel you may remove it only with the consent of the owner or on the order of a county judge.

The Act of 1909 does not limit your power to build new roads or widen old ones where the removal of any trees within the limits of the highway is *necessary* in order to construct the road. In our opinion the Act of 1909 was not intended to apply to such new construction so as to hinder you in the performance of your duty to build and construct roads.

By the Act of June 24, 1931, P. L. 1206, Sections 3020-3031, townships of the first class are permitted to create shade tree commissions. The general power of such commissions is defined in Section 3023 as follows:

> "The commission shall have exclusive custody and control of the shade trees in the township, and is authorized to plant, remove, maintain, and protect shade trees on the public highways in the township."

Under Section 3024 the commission may adopt rules and regulations for the care and protection of the shade trees of the township provided they are first approved by the commissioners. As a sample of such regulations you have submitted an ordinance of one of the townships approving the regulations of the shade tree commission of that township. Among other things it prohibits the planting, cutting, trimming or removal of any shade tree by any person without a permit from the commission. It defines "shade tree" as any shade tree, shrub or woody plant on any public highway in the township, and "person" as any individual, firm, association, or corporation.

The Act of 1931 relates solely to the affairs of townships and in our opinion cannot be construed to limit the exclusive jurisdiction of your department over the State highways. Under Section 17 of the Act of May 31, 1911, P. L. 468, as amended by Act of June 26, 1931, P. L. 1388, Section 5, your department has the power to plant trees along State highways. Nothing is said about the necessity of applying to the shade tree commissions of first class townships for permission to do so. Both acts were passed at the same session of the Legislature and must be construed together.

The townships are merely agencies of the State. They have only such powers as are granted to them by the Legislature. Such powers are subservient to the sovereign power of the Commonwealth. Statutes granting powers to townships should not be construed to restrict the Commonwealth in the performance of its functions in the absence of a clear intent to do so.

It is the duty of your department to construct and maintain the State highways in an efficient and safe condition for the traveling public. The discretion lodged in you as to what must be done to carry out your duty has not in our opinion been affected in any way by the Act of 1931 creating shade tree commissions in townships of the first class. Your duty to maintain the highways is paramount to the power of townships in relation to shade trees.

Therefore, you are advised that you are not required to obtain the consent of township shade tree commissions before cutting or removing trees along State highways in first class townships. However, the cutting or removal of trees along State highways in townships is subject to the restrictions contained in the Act of April 1, 1909, P. L. 97, No. 58, as herein interpreted.

Yours very truly,

DEPARTMENT OF JUSTICE,
JOHN A. MOSS,
Deputy Attorney General.

OPINION NO. 54

Highways — Defective Material — Inspection — Responsibility of Contractor — Duties of Chief Engineer in Certifying Completion of Contract.

The Chief Engineer of the Department of Highways would not be warranted in certifying to the Secretary of Highways the completion of a contract until and unless the contractor remedies the defective work and completes his contract, in accordance with the specifications, and in the manner which meets with the approval of the Chief Engineer.

Department of Justice,
Harrisburg, Pa., June 30, 1932.

Honorable Samuel Eckels, Chief Engineer, Department of Highways.
Harrisburg, Pennsylvania.

Sir: You have asked to be advised as to your duties as chief engineer, under your contract form No. 408 of April 1930, in the matter of certifying completion of the contract for final settlement with the contractor under the following circumstances.

The contract was entered into for the construction of a road under which the contractor could use slag as a coarse aggregate in the concrete surface course. The source of supply from which the contractor procured the slag was approved by your department, and your inspector did not discover any defective material after inspection of the

stock pile from which the contractor secured the slag. After approximately three thousand feet of road had been laid, certain blow-ups were discovered, which after inspection were found to have been caused by pieces of flux stone which had been in the aggregate and had not been discovered either by your inspector or by the contractor. You state that there is no question about the good faith of the contractor or any of the inspectors of the department, and that the presence of flux stone in slag is extremely difficult to detect.

Section 78 of Contract No. 408 gives the specification for slag to be used in concrete surface course:

> "Crushed slag shall consist of clean, tough, durable pieces of aircooled blast furnace slag, * * * free from * * * flux stone. * * *"

The defect in the work under the facts above stated was due to the failure of the material to comply with Section 78 of the specifications above quoted in that the slag used as the aggregate had some flux stone in it. Therefore, the only question involved is whether the contractor is relieved of responsibility under his contract, because first, he used due diligence and acted in good faith, and secondly, because the source of material was approved and the material inspected by your department before its incorporation into the work.

The material portions of the contract which state the contractor's obligation, are found on pages 26, 27, 28 and 29 of the contract, and read as follows:

> "* * * the contractor, * * * covenants and agrees to furnish and deliver all the materials and to do and perform all the work and labor in the improvement of a certain section of highway * * *
>
> "The contractor further covenants and agrees that all of said work and labor shall be done and performed in the best and most workmanlike manner and that all and every of said materials and labor shall be in strict and entire conformity, in every respect, with the said specifications and drawings and shall be subject to the inspection and approval of the chief engineer of the Department of Highways, * * *
>
> "The contractor further covenants and agrees that all and every of the said materials shall be furnished and delivered and all and every of the said labor shall be done and performed, in every respect to the satisfaction and approval of the chief engineer * * *
>
> "The contractor hereby further agrees * * * in all respects to complete said contract to the satisfaction of the said Secretary of Highways:"

Section 40 of the specifications provides in part as follows:

> "The contractor shall be responsible for the entire work, in accordance with the specifications and contract, from the date of the execution of the contract until it is accepted by the final payment. * * *"

The phraseology of the contract in question above quoted is almost identical with the wording of the contract in the case of *Commonwealth ex rel. v. Nelson-Pedley Construction Co., 303 Pa. 174 (1931).* In our opinion the decision in that case, namely: that the contractor was obligated to deliver to the Commonwealth completed work in accordance with his contract and specifications, controls this case. The court there said, (at page 178):

> "* * * Under this language, the contractor must complete the work in accordance with the plans and specifications, to the satisfaction and acceptance of the department, for this it has expressly agreed to do. Until it has done so, it has not complied with its contract, though the building ad interim has been damaged by fire; the cost of restoration, in that event, being upon the contractor and not upon the Commonwealth: * * *"

The several provisions in the contract which provide that your department, through its engineer and inspector shall have the right to inspect the work and to inspect the materials before their incorporation into the road, do not in any way relieve the contractor of his responsibility. Such provisions, allowing an inspection, merely state what the owner would be allowed to do in the absence of any such clause in the contract. *Rogue River Fruit & Produce Ass'n v. Gillen-Chambers Co., 165 Pac. 679 (Oregon 1917).* They are for the benefit of the Commonwealth. Their purpose is to allow the state to follow the work of the contractor. That this is so is clearly evidenced by Sections 37 and 38 of the contract which impose upon the contractor the obligation at any time to remove or replace defective work already completed. Furthermore, under Section 40, above quoted, the contractor, in clear and unmistakable language, assumed sole responsibility for doing the work in accordance with the specifications and contract up until the time of final payment.

It is our opinion that the contractor in this case is solely responsible for remedying the defect in the highway caused by the presence of flux stone in violation of the specifications, even though that violation was not the result of any negligent act or bad faith on the part of the contractor, and though the material had been inspected and approved by your inspector.

Therefore, you are advised that you would not be warranted in certifying to the Secretary of Highways the completion of this contract until and unless the contractor remedies the defective work and completes his contract, in accordance with the specifications, and in a manner which meets with your approval.

Yours very truly,

DEPARTMENT OF JUSTICE,
JOHN A. MOSS,
Deputy Attorney General.

OPINION NO. 55

Constitutional Amendments—Publication—Art. XVIII, Sec. 1 of the Constitution of Pennsylvania.

Publication of proposed constitutional amendments in at least two newspapers in every county in which such newspapers shall be published, by one advertisement appearing not less than three months before the next general election, is a full compliance with Art. XVIII, Sec. 1 of the Constitution of Pennsylvania.

Department of Justice,
Harrisburg, Pa., July 15, 1932.

Honorable Richard J. Beamish, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request for an opinion concerning the number of times proposed amendments to the Constitution of Pennsylvania must be published in order to comply with the provisions of Article XVIII, Section 1, of the Constitution of Pennsylvania.

The pertinent part of that section provides:

> "Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and, if the same shall be agreed to by a majority of the members elected to each House, such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon, and the Secretary of the Commonwealth shall cause the same to be published three months before the next general election, in at least two newspapers in every county in which such newspapers shall be published; * * *"

This section requires one advertisement in at least two newspapers in every county in which such newspapers shall be published, appearing not less than three months before the next general election.

In re North Whitehall Township, 47 Pa. 156 (1864) is controlling. In that case an order of the court prescribing the notice to be given of the time and place of meeting of the commissioners appointed under the provisions of the Act of May 14, 1857, P. L. 304, required it to be given "three weeks before the time of the meeting." The court in its opinion, Strong, J., construing the language of the order, said that this requirement had reference not to the number of insertions in the newspapers of the county nor to any intervals between insertions, but that its plain purpose was to give to all persons interested in the proposed division of the township a defined period before the action of the commissioners to prepare for their meeting.

In *Currens v. Blocher,* 21 Pa. Super. 30 (1902), the court in its opinion, by Porter, J., said:

> "The distinction between a requirement that notice be given three weeks before the time of an event, and an order that notice be given during three successive weeks, or by a given number of insertions in newspapers in successive weeks, was recognized by Mr. Justice Strong, in the case of North Whitehall Township, 47 Pa. 156."

See also: *Commonwealth v. King,* 278 Pa. 280 (1923).

Therefore you are advised that publication in at least two newspapers in every county in which such newspapers shall be published, by one advertisement appearing not less than three months before the next general election, is a full compliance with the constitutional direction.

Yours very truly,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION NO. 56

School Districts—Employment of accountants—School Code May 18, 1911, P. L. 309, Sections 2601, 2603; Act of April 30, 1925, P. L. 382.

School districts of the second class may employ certified public accountants under Section 2603 of the School Code of 1911, P. L. 309, as last amended by the Act of April 30, 1925, only within sixty days from the close of a fiscal year. Boards of school directors may, however, at any time, employ accountants to obtain evidence for civil or criminal proceedings against persons alleged to have misappropriated school moneys.

Department of Justice,
Harrisburg, Pa., July 18, 1932.

Honorable James N. Rule, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether the provisions of Section 2603 of the School Code of May 18, 1911, P. L. 309, as last amended by the Act of April 30, 1925, P. L. 382, prevent boards of school directors in districts of the second class from employing certified public accountants after the expiration of sixty days from the close of a fiscal year.

The section to which you refer must be read with Section 2601. These sections follow:

> "2601. The finances of every school district in this Commonwealth, in every department thereof, together with the accounts of all school treasurers, school depositories, teachers' retirement funds, teachers' institute funds, directors' association funds, sinking-funds, and other funds belonging to or controlled by the district, shall be properly audited as follows:
>
> * * * * * * *
>
> "2603. In all school districts of the second and third class, by the proper city, borough, or township controller or auditors therein. When in any school district of the second class the annual expenditures, exclusive of moneys received from the sale of bonds, shall exceed the sum of five hundred thousand dollars, such district may employ a certified public accountant within sixty days from the close of the fiscal year."

In our opinion the language of Section 2603 constitutes a definite limitation on the time within which the school board in any case may employ a certified public accountant under the authority of the section. If it were not so, the sixty day limitation so clearly expressed by the Legislature would have no meaning.

However, we regard the section as applying only to the employment of certified public accountants to assist in or to check on the regular annual audit. If at a time more than sixty days after the close of the fiscal year the board has reasonable grounds to believe that there has been fraud or misapplication of school moneys, and there remain available to the board civil remedies against the wrongdoers, or if criminal prosecution may be brought, we are of the opinion that the board, under its general authority to administer the affairs of the district, would have authority to expend a reasonable sum to obtain evidence for such a proceeding. If to obtain such evidence a skilled accountant

must be employed, we believe that such employment is proper and lawful.

In *Morton Borough School District*, 18 Del. Co. 84 (1926), the Court of Common Pleas of Delaware County held illegal an expenditure of fifty dollars paid to an accountant by a school district of the fourth class. The court pointed out that the School Code expressly authorized employment of accountants in districts of the second class only. However, the accountant in that case was employed simply to check up on the official auditors. The additional audit was not made in the course of any attempt to recover misappropriated moneys or to prosecute an offending official. We do not believe the principle of that decision is contrary to the conclusions we have just expressed.

Therefore, we advise you that under Section 2603 of the School Code as amended, school districts of the second class may not employ certified public accountants to assist in or check on the usual annual audits unless such accountants are employed within sixty days after the close of the fiscal year, but that, if there is reason to believe that fraud has been committed, and if civil or criminal proceedings are available against the wrongdoers, such districts, in the course of reasonable efforts to secure evidence for such proceedings, may employ skilled accountants even though more than sixty days have elapsed since the close of the fiscal year.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 57

Public Instruction. Constitutional Law. Art. X, Sec. 1. School Code. Sec. 401. Power of legislature to authorize public kindergartens for children under the age of six years. Act of May 29, 1931, P. L. 243.

Section 401 of the School Code as last amended by the Act of 1921, P. L. 243, does not violate Art. X, Sec. 1 of the State constitution, in authorizing the establishment of public kindergartens for children under the age of six years.

Department of Justice,
Harrisburg, Pa., August 1, 1932.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked us whether the portion of Section 401 of the School Code of May 18, 1911, P. L. 309, as last amended by the Act of May 29, 1931, P. L. 243, which authorizes school districts to establish kindergartens for children between the ages of four and six years violates Section 1 of Article X of the State Constitution in affording school facilities for children less than six years old.

That Section of the Constitution is as follows:

> "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose."

In our opinion there is no conflict between these statutory and constitutional provisions.

Section 1 of Article X was included in the Constitution for the purpose of prescribing a minimum amount of aid to be given by the State to the cause of education. Previously, State appropriations had been small and irregular, and the principal burden had fallen on the local school districts: *In re School District of Beallsville,* 21 Pa. C. C. 642, 653 (1897). We find in the section no evidence of an intent to limit the Commonwealth to that minimum. If the phraseology of the section were that the Commonwealth *may* provide for the education of children above the age of six years, there might be ground for reading into it an implied prohibition against any extension of the system to younger children, or to adults. But no such implication can arise here. The language of the section is in no sense restrictive.

The Legislature is at liberty to adopt such legislation as it sees fit, as long as it does not overstep any limitations fixed by the Constitution. In *Sharpless* v. *Mayor of Philadelphia,* 21 Pa. 147, 161 (1853), Chief Justice Black said:

> "* * * To me, it is as plain that the General Assembly may exercise all powers which are properly legislative, and which are not taken away by our own, or by the federal constitution, as it is that the people have all the rights which are expressly reserved."

That principle is fundamental, and it governs in this case. Extension of educational facilities to children under the age of six years is a proper subject of legislation. Nothing in the Constitution forbids it.

Therefore, we advise you that the statutory provision authorizing establishment of public kindergartens for children under the age of

six years does not conflict with Section 1 of Article X of the Constitution.

Yours very truly,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 58

Administrative Departments and Departmental Boards—Construction of and Alteration to Buildings—Jurisdiction of Department of Property and Supplies where cost exceeds $10,000.

Under Section 508 of The Administrative Code, no administrative department or departmental board, except the Department of Property and Supplies, may erect or alter buildings where the total cost exceeds $10,000.

The amounts of separate contracts involved in a project must be included with the amount of any so-called general contract in determining whether the total cost exceeds $10,000, and whether the work must be conducted by the Department of Property and Supplies.

Department of Justice,
Harrisburg, Pa., August 23, 1932.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have stated to us that you desire to have certain alterations and additions made to a building which is under the control of your department, and that the cost of the work has been estimated as follows: General construction—$9,000.00, plumbing—$7,000.00, heating—$1,000.00, and electrical work—$500.00. You ask whether, by separating the contract for the general construction from those covering other work, the project may be carried out directly by your department, rather than through and by the Department of Property and Supplies.

The situation is governed by Section 508 of The Administrative Code of April 9, 1929, P. L. 177, as amended by the Act of June 1, 1931, P. L. 350, 71 P. S. 188. The relevant portion of that section is as follows:

> "(a) No administrative department, except the Department of Property and Supplies, and no administrative board or commission, shall, except as in this act otherwise specifically provided, erect or construct, or contract for the erection or construction of, any new building, or make, or contract for making, any alterations

> or additions to an existing building, involving an expenditure of more than ten thousand dollars ($10,000), and, in any case in which any other department or any board or commission is by this act authorized to erect or construct buildings, or make alterations or additions, such erection or construction shall be under the general supervision of the Department of Property and Supplies."

In our opinion the foregoing statutory provision clearly forbids the Department of Public Instruction to undertake the project you have outlined to us. We cannot read the $10,000.00 limitation of that section as applying only to the general contract, and having no regard to the total cost of the whole operation. The prohibition is not against simply the making of *a contract* involving over $10,000.00, but it forbids your department, as well as others, to "make, or contract for making, *any alterations or additions* * * * *involving an expenditure* of more than $10,000.00."

The making of the alterations and additions to the building in question will be a single project. The installation of heating, plumbing and electrical equipment is as essential to its completion as is the work done under the so-called general contract.

To attempt to regard this operation as consisting of several distinct undertakings, each involving less than $10,000.00, for the purpose of retaining jurisdiction of your department, would be to ignore both the word and the spirit of Section 508 of The Administrative Code. If it could be done in this case, a program involving $100,000.00 could be split up into numerous small contracts of less than $10,000.00 each, and thereby deprive the Department of Property and Supplies of authority which the Legislature intended it to have. Examples of cases in which similar principles were involved and like conclusions reached are set forth in 44 C. J. 101, Note 59.

Therefore, we advise you that the proposed alterations and additions may not be made by your department but must be made by the Department of Property and Supplies.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 59

Keystone Pipe Line Company—Exercise of Eminent Domain for Transportation of Gasoline—Quo Warranto—Function of Attorney General.

Where an owner of private lands over which a pipe line company has purported to exercise the power of eminent domain for the transportation of

gasoline, on a petition for quo warranto, has shown the presence of substantial questions as to the statutory and constitutional authority for the exercise of such power, the Attorney General will allow the petition.

It is not the function of the Attorney General to determine the disputed issues involved in such a case, but to ascertain whether there are substantial questions of importance to the public. If such questions are present, it is the duty of the Attorney General to permit them to be passed upon by the Courts.

Neither the granting of a charter to a corporation nor the issuance of a certificate of public convenience by The Public Service Commission can estop the Commonwealth from instituting quo warranto proceedings to test the legality of an exercise of eminent domain by the corporation.

Department of Justice,
Harrisburg, Pa., September 12, 1932.

In re petition of Ben T. Welch for a writ of quo warranto against Keystone Pipe Line Company.

Ben T. Welch has filed with the Attorney General a petition asking that the Commonwealth institute a quo warranto proceeding against Keystone Pipe Line Company to oust the Company of certain corporate rights and privileges which the Company claims to exercise under its charter and the laws of the Commonwealth. For the sake of brevity the respondent company will hereafter be referred to as the Company.

The Company filed an answer and testimony was taken.

The petitioner alleged and proved that he is the owner of a tract of land in Philadelphia County across which the Company has constructed a pipe line, for the purpose of transporting gasoline, and which is now being used for that purpose.

He alleged that the pipe line was located on his premises as the result of an exercise of eminent domain by the Company, and the issue is whether the Company may exercise the power of eminent domain for such a purpose.

The Company, in addition to asserting its legal right to exercise the power of eminent domain under these circumstances, also contended that there was no exercise of such power in respect to the land of the petitioner.

The specific objections raised by the petitioner are, in substance (1) that the Company's charter and the Acts of Assembly under which the charter was granted did not confer the right of eminent domain for the purpose of transporting gasoline, and, (2) that in operating the pipe line in question the Company is not a public service corporation or a common carrier, and therefore even if the Acts of Assembly and the charter purport to confer the power of eminent domain, they are unconstitutional.

The Company is a Pennsylvania corporation incorporated on May 19, 1931, under the Act of April 29, 1874, P. L. 73, "and the several supplements thereto."

The charter states the purpose of the corporation to be "the transporting, storing, insuring and shipping petroleum and refined petroleum products, and to construct, maintain and operate such pipe lines, tanks and facilities as are necessary and proper for the conduct of certain business, said pipe line or pipe lines to run within the Commonwealth of Pennsylvania, including a pipe line or pipe lines beginning at or near the vicinity of Point Breeze, Philadelphia" and extending through certain counties and to certain points therein named.

Prior to the issuance of the charter, the Public Service Commission of the Commonwealth had issued a certificate of public convenience, approving the incorporation of the Company, as required by law.

The Company seems to rely for the basis of its charter on the Act of June 2, 1883, P. L. 61, (which was a supplement and amendment to the General Corporation Act of 1874) as amended by the Act of April 30, 1929, P. L. 896. This Act of 1883 provided for the incorporation of companies with power to transport, store, insure and ship petroleum. The second section of the act refers to companies incorporated for the transportation and storage of oil. The Act of 1929 amended the second section but did not alter the use of the words "petroleum," or "oil."

If these supplements to the General Corporation Act of 1874 were the only ones upon which this charter could be based there might arise a question as to the right of the Company to transport gasoline at all. However, the supplementary Act of May 11, 1909, P. L. 515, which authorized the formation of corporations "for any lawful purpose not specifically designated by law," is full warrant for the present charter. The petitioner, recognizing the scope of the Act of 1909, does not contend that this Company may not in any event transport gasoline. Eminent domain is the sole issue.

The Company's first contention is that it has not exercised eminent domain as to this petitioner.

It is to be noted in passing that Mr. R. C. Tuttle, the respondent's Vice President and General Manager, testified that in the construction of its pipe lines the Company had dealt with approximately six hundred tracts of land, and that in about one hundred thirty-five cases condemnation bonds were filed in court, and in two cases in addition to the present one, other litigation was instituted. Thus it is apparent that the Company has purported to exercise the power of eminent domain in the construction of its lines. However, it will not be necessary for us to consider whether that admission would be sufficient

grounds on which to base a proceeding in quo warranto in the absence of the exercise of eminent domain as to the particular petitioner.

The circumstances concerning the construction of the line across this petitioner's premises were developed at length in the testimony. Briefly they were these.

Some time in July, 1931, the Company's right-of-way agent interviewed the petitioner with the object of purchasing a right-of-way for the pipe line across petitioner's land.

A number of conferences took place, and the Company made certain offers, all of which Welch rejected. No agreement was ever reached. About July 31, 1931, the Company's agent tendered to the petitioner the following letter:

"July 31st, 1931.
EO-KPL-P.

"Mr. Ben. T. Welch,
"Penfield Building,
"Philadelphia, Pa.

"Dear Sir:

"Referring to your conference with Mr. C. Edwin Hunter, please be advised that this Company hereby undertakes to pay you such an amount of damages as you shall be entitled to receive after the same has been agreed upon or assessed in the manner prescribed by law by reason of this Company's entry upon your lands located at or near 70th Street and the Chester Branch of the Philadelphia and Reading Railroad Company, Philadelphia, as shown on the survey attached hereto and made a part hereof, to the extent of a right of way easement for the purpose of locating and maintaining an eight inch pipe line thereon.

"This Company further undertakes, if you so desire, to deliver to you at any time upon request its bond with the Independence Indemnity Company as surety for such damages as mentioned in the first paragraph of this letter.

"Very truly yours,

"KEYSTONE PIPE LINE COMPANY,

"By
"(Signed) R. C. TUTTLE,
"*Vice-President.*

"OHP:G

"The above is hereby agreed to."

Welch never signed the agreement which was prepared at the end of the letter.

Thereafter there was an offer by the Company to give a bond. The petitioner inquired whose bond it would be, and when given the name of the surety company which the respondent proposed to offer, the petitioner said that it would not be satisfactory. The Company's agent then suggested the National Surety Company, and the testimony is that Welch did not object to it. An open-end bond was prepared and was handed to him. He received it and has retained it. This was done some time in the first week of August.

The petitioner testified that he never consented to the entry of the Company on his land, and that in the course of his conversation with the agent, he was told that if they could not agree on a price, the Company would take the right-of-way by eminent domain. He said that the Company had already entered his land on August 4. The bond given to him by the Company bears that date.

In view of these facts, we are not impressed by the Company's argument that its entry on the petitioner's land was the result of a voluntary grant of a right-of-way. Nothing in the record even tends to sustain that argument except the fact that Welch received and did not affirmatively reject the bond that was given to him. But the bond itself was conditioned for the payment to the petitioner of such damages as he "shall be entitled to receive after the same have been agreed upon or assessed in the manner prescribed by law in such case made and provided, by reason of the entry upon, use, occupation and appropriation by the Keystone Pipe Line Company of the said land to the extent of a right-of-way easement for the purpose of locating and maintaining a pipe line * * * under or across said land." The letter which we have quoted used similar phraseology.

The form of the bond is clearly that of a condemnation bond. The conversations that passed between the petitioner and the agent of the Company all clearly indicate an intention of the Company to enter the land and lay its pipe irrespective of whether the owner should consent thereto or not. The fact that the Company had already entered the land on the date of the execution of the bond, confirms this conclusion. Moreover the tender of the bond was in exact conformity with the procedure prescribed by Section 3 of the Act of June 2, 1883, P. L. 61, for cases in which pipe line corporations are unable to agree with the owner or owners of lands which they propose to occupy.

Therefore, we conclude that the petitioner has established, prima facie at least, that the Company has appropriated his land without his consent.

It is further argued by the Company that this proceeding must fall because the petitioner would have an adequate remedy under the Act of June 19, 1871, P. L. 1360. That act gives to individuals the right

to test by bill in equity the exercise of corporate powers in certain cases.

In view of the construction placed on this act by the Supreme Court in *Gring v. Sinking Springs Water Co.*, 270 Pa. 232 (1921) and *Croyle v. Johnstown Water Co.*, 259 Pa. 484 (1918) it is extremely doubtful whether this petitioner could raise the present questions under the Act of 1871.

In *Heller v. Susquehanna Pipe Line Co.*, in the Court of Common Pleas of Lancaster County, Equity Docket No. 8, page 96, (1930) the complainant attempted to raise by bill in equity under the Act of 1871, the same questions that are raised in the present proceeding. Except for the fact that that case was instituted before the defendant company had laid its pipe lines, the situation was the same as involved here. The court ruled that the bill could not be maintained under the Act of 1871, saying that only the Commonwealth could raise such questions. For its decision, the court relied on *Gring v. Sinking Springs Water Co., supra, Blaugh v. Johnstown Water Company,* 247 Pa. 71 (1915), *Mountz v. Pittsburgh, Bessemer and Lake Erie Railroad Company,* 265 Pa. 67 (1919).

Irrespective of what might be the petitioner's rights under the Act of 1871, nothing in that act limits the right of the Commonwealth to question corporate activities which it may consider to be in violation of charter or constitutional limitations. The present proceeding is a petition calling upon the Commonwealth to exercise those powers, and if a proper case for such exercise is shown, the fact that the petitioner might have a private remedy is not a bar to action by the Commonwealth.

The petitioner's first contention is that the acts of assembly under which the Company is chartered did not grant to it a power of eminent domain for the transportation of gasoline.

It is first said by the petitioner that the Company has no power of eminent domain whatsoever, because the Act of June 2, 1883, P. L. 61, which purports to confer the power, has been repealed by later legislation. From this premise he would conclude that the Act of April 30, 1929, P. L. 896, which purports to amend the Act of 1883, is a nullity.

It is argued that the Act of 1883 is no longer in force because after 1883 certain further supplements and amendments to Clause 18 of Section 2 of the General Corporation Act of 1874 were adopted, which omitted reference to the amendment contained in the Act of 1883. It is contended that since these later amendments, notably the Act of May 21, 1889, P. L. 259, purported to state the clause in full, without reference to the amendment of 1883, that amendment must be regarded as having been repealed.

In our opinion this argument cannot prevail. In *Wasson v. Woods*, 265 Pa. 442 (1919) and *Mercersburg College v. Mercersburg Bor.*, 53 Pa. Super. 388 (1913) the Supreme and Superior Courts respectively considered Acts of Assembly that had been amended more than once, the later amendments not referring to the prior ones. In both of these cases, the courts assumed that the intermediate amendment would stand as a valid part of the original act.

Moreover, in *Lehigh Valley Coal Co. v. U. S. Pipe Lines Co.*, 3 Pa. Dist. 70 (1893), Judge Woodward, of the Court of Common Pleas of Luzerne County held that the Act of 1883, P. L. 61, was not dependent for its validity on the re-enactments and amendments of the portion of the corporation act of 1874, to which it was a supplement. That case decided that the pipe line company there involved had the power of eminent domain under Section 2 of the Act of 1883.

Therefore, in our opinion, the Act of June 2, 1883, P. L. 61, and the amending Act of April 30, 1929, P. L. 896, must be treated as in force.

Thus we come to the question whether the grant of the power of eminent domain contained in the Act of June 2, 1883, P. L. 61, for the transportation of oil or petroleum is to be construed as authorizing the exercise of that power for the transportation of gasoline. In other words, can it now be said that when the Legislature used the terms "oil" and "petroleum" in the Act of 1883, and when it again used the word "oil" in the amending Act of 1929, it included within those terms gasoline?

We have examined the host of definitions of gasoline and oil and the many opinions which have been cited on the question whether gasoline is oil. The question is one of considerable difficulty. If it were the function of the Attorney General to make a judicial determination of it, we should feel obliged to analyze in detail these many conflicting definitions and opinions. However, it is not our duty to decide whether gasoline is oil within the meaning of the Acts of Assembly, but simply to determine whether there is a substantial question affecting the public interest, which would warrant submission of the issue to a court of proper jurisdiction.

Accordingly, we shall merely state briefly the general nature of the evidence presented to us.

At the hearing each side produced an expert whose testimony conformed to the contention of the party calling him. The petitioner's witness was Samuel S. Sadtler, an experienced consulting and analytical chemist. Mr. Sadtler expressed his professional opinion that gasoline was not included in the accepted meaning of the word oil.

The Company called Thomas G. Delbridge, who described himself a supervisor of research. He has been an employe of the Atlantic

Refining Company for twenty-two years, four years as a chemist, five years as a plant superintendent, two or three years as chief chemist, and since 1923 he has been director of research for the company. He is Vice-President of the Petroleum Committee of the American Society for Testing Materials.

Mr. Delbridge expressed the opinion that gasoline is oil and that the term "oil" includes gasoline.

Judicial definitions from other jurisdictions have been referred to copiously in the briefs. While they might be of some value in determining the ultimate question, those cases would all have to be considered on their own facts, and their applicability to the present case carefully analyzed. Many of them involved the construction of oil and gas leases, where it was necessary to classify casing-head gas (a natural product of certain wells which is practically gasoline) either as gas or oil. The leases in question provided for royalties on gas and oil obtained from the wells in question, but stipulated no price for possible casing-head gas. Therefore, in order to give the lessors any return from this valuable product, it was necessary to bring casing-head gas within one of those two terms. The value of such cases here is questionable.

Necessarily none of these cases from foreign jurisdictions dealt with the intent of the Act of 1883, which, after all, is our real concern.

Both parties have referred us to the various legislative uses of the terms "oil," "petroleum," "petroleum products," and "gasoline" in our own State.

A number of our statutes obviously use the words "oil," and "petroleum" as practically synonymous.

The Act of August 10, 1864, P. L. (1865) 948, incorporated "Humboldt Petroleum Works," with power to market, transport, etc. "mineral oil and other similar products." The Act of September 8, 1868, P. L. (1869) 1393, incorporated "Atlantic Petroleum Storage Company," authorized to store "oil, petroleum, benzine, and articles of like nature."

The Act of May 15, 1874, P. L. 189, was entitled "An act to provide for the better security of life and property from the dangers of coal and petroleum oils." Section 1 of the act imposed regulations upon the sale of "refined petroleum, kerosene, naptha, benzole, gasoline, or any burning fluid, be they designated by whatsoever name."

That act would indicate an effort by the Legislature to include gasoline within the general term "petroleum oils" used in the title. But any implication that could be derived from that fact would beg the present question, for if the contention of the plaintiff here is correct, that gasoline is not oil, then the title to the act of assembly would be open to the charge that it did not, in fact, include gasoline.

On the other hand, the Acts of June 15, 1923, P. L. 834 and June 29, 1923, P. L. 969, define liquid fuels as including, "all distillates of and condensates from, petroleum, natural gas, coal, coal tar and vegetable ferments,—said distillates and condensates being ordinarily designated as gasoline, naptha, benzol, benzine, and alcohols so usable. * * *" Similar language was carried into later legislation. The acts of May 21, 1931, P. L. 149, and June 1, 1931, P. L. 298, used slightly different definitions of liquid fuels from those previously used. but the changes were immaterial as far as our present question is concerned.

These acts and others referred to by the parties show no consistency in our legislation in the use of the terms oil, petroleum, gasoline, etc. It would appear that the words oil and petroleum are frequently used interchangeably. Whether they were meant to include gasoline might in each particular case be the subject of a controversy such as we have here. Some of the acts to which we have referred would point to such an inclusion. Others appear to distinguish between oil or petroleum and the refined products of petroleum, of which gasoline is one.

Reference is made in the briefs to financial journals which refer to all petroleum industries as oil industries and to other similar failures to make any distinction between petroleum and gasoline or other refined products. On the other hand, we doubt whether any motorist drawing up to a service station and asking for oil would expect to get gasoline. Certainly a great body of people without technical knowledge do not think of gasoline as an oil.

In addition to all this, it must be remembered that the Act of 1883 which gave rights of eminent domain to pipe line companies was passed at a time when gasoline formed a comparatively small portion of the products of oil companies and that the authority given by the second section of that act was for the exercise of eminent domain for the carrying of *oil* "from any point or points in any of the counties in which petroleum is produced to any railroad, canal, navigable river, port or city within this Commonwealth." From this it is apparent that when the Act of 1883 was passed, its object was to facilitate the movement of oil from the wells to railroads and cities, and, of course, to the refineries. It was not until the Act of April 30, 1929, P. L. 896, amended the Act of 1883, that the exercise of eminent domain was permitted for the carrying of oil in any direction other than that prescribed by the above quoted passage. However, when the Act of 1929 was adopted the Legislature retained the use of the word "oil" alone as designating the product which might be transported in pipes laid under the power of eminent domain. If the Legislature did not intend to include refined petroleum products when it used the term oil in 1883 (and of course that question is in issue here), can it be

said that the amendment of the Act of 1883 in 1929 without change of phraseology in this respect, evidences an intention of the Legislature to enlarge the number of products that may be carried in such pipe lines? We think not.

And finally, it is not without some significance that this present respondent in applying for its charter, sought power to transport not only oil or petroleum, but seemed to feel the necessity of adding to those words the phrase "and refined petroleum products." The use of this phrase does not conclude the matter, but it is an indication that the Company, intending to carry gasoline, was not satisfied to rest its power to do so on a charter allowing transportation of oil or petroleum only.

Webster's New International Dictionary, (1927), defines gasoline and petroleum as follows:

> "Gasoline: A volatile inflammable liquid used as a solvent for oils, fats, etc., as a carburetant, and to produce heat and motive power."
>
> "Petroleum: Rock oil, mineral oil, or natural oil, a dark brown or greenish inflammable liquid, which at certain points exists in the upper strata of the earth whence it is pumped, or forced by pressure of the gas attending it. It is found in many localities, the most celebrated of which are Pennsylvania and Baku. Petroleum consists of a complex mixture of various hydrocarbons, and varies much in appearance, composition and properties. * * * Petroleum is refined by fractional distillation, yielding successively volatile products, kerosene, lubricating oils and paraffin. The table below gives a list of the best known volatile products from American petroleum, in order of volatility. Cymogene is gaseous except at low temperatures; the others are liquids. Since these products are mixtures there are no rigid boundaries between them; * * * According to some, petroleum ether includes both rhigolene and gasoline.
>
> "Product
> "Cymogene
> "Rhigolene
> "Petroleum ether
> "Gasoline
> "Naptha
> "Ligroine
> "Benzine"

These illustrations of judicial, technical and legislative uses of the terms oil and petroleum and the various refined petroleum products make it apparent that there is a very real question of construction present in this case. If the respondent Company has the power of eminent domain for the transportation of oil but not for the trans-

portation of gasoline, then the petitioner's contention would seem to be sound. The only way in which this may be decided is by a judicial construction of the acts of assembly under which the Company claims its power.

The second principal contention of the petitioner likewise presents difficulties. It goes to the very constitutional foundation of the Company's claim of a right to exercise eminent domain. Petitioner insists that the Company is not a quasi public corporation, at least as to the operation of the pipe line here in question, and that the guarantees of Article I, Section 10, of the Constitution prevent the exercise of eminent domain under the circumstances even if the Legislature has purported to grant the right.

The pipe line of this Company originates in the vicinity of Point Breeze, Philadelphia, and extends northwestward to Montello in Berks County, where it divides into two branches. One branch continues northward to Kingston, Luzerne County, and the other goes westward to Mechanicsburg, in Cumberland County. Delivery stations are located at various places along the routes of the lines.

At the Point Breeze terminal the Company now has a connection with the pipes of the Atlantic Refining Company from which company it receives all of the gasoline that is shipped through the pipes. No other commodity has been transported and no other customer has been served. Refineries of the Gulf Refining Company were stated to be within about a mile and a half of this terminal, of the Pure Oil Company about five miles distant, and of the Standard Oil Company of Pennsylvania about a half mile away. In order to make it possible for the Keystone Pipe Line Company to serve any of these other companies it would be necessary to construct connecting pipe lines over those distances.

It was testified by the Company's vice-president that there had been some casual conversations between officers of the Keystone Company and representatives of one or two of these neighboring companies concerning the possibility of the Keystone Company accepting gasoline for transportation from those companies. However, these conversations were of a most indefinite character, and apparently they had not been pursued with any intention of effecting transportation contracts within the immediate future.

It was testified that the present capacity of the company's system is approximately 12,300 barrels of gasoline per day, and that the Atlantic Refining Company, at the time of the hearing was shipping about 6,000 barrels a day. It was also stated that by installation of additional pumps the pipes could carry about 30,000 barrels per day. The witnesses were unable to say what would be the capacity of the system for the transportation of heavier liquids, such as crude oils or lubri-

cating oils. To date only gasoline has been transported, and the tariff filed with the Public Service Commission provides only for the transportation of that commodity.

It was testified that the present capacity of the company's system is ferent lots of gasoline for different shippers at reasonable intervals, the different lots being separated by what is called a water plug. However, it was admitted by Mr. Tuttle the vice-president, that it would be impossible for the Company to serve from day to day various customers some of whom would furnish gasoline for shipment and others who would furnish heavy oils. That is an obvious conclusion because pipes that have conveyed heavy oil would necessarily contain a residue which would be picked up by gasoline following it; this would contaminate the gasoline.

The testimony shows, as we have above stated, that at present the Atlantic Refining Company is the sole customer of the Keystone Pipe Line Company. Moreover, practically all of the stock of the Keystone Pipe Line Company is owned or controlled by the Atlantic Refining Company, and there are no officers of the Keystone Company who are not also employes of the Atlantic Refining Company. The capital provided for the incorporation of the Keystone Pipe Line Company was furnished by the Atlantic Refining Company by means of the stock purchase.

The charter of the Company in no way states directly that the purpose of the corporation was to serve the public, but the testimony of the officers of the Company was without exception, that such was the purpose of the corporation. In line with this stated intention, it was shown that the Company has obtained a certificate of public convenience from the Public Service Commission, and has filed tariffs with the Commission for the transportation of gasoline.

Do these facts disclose that the Company is rendering such public service as would warrant the taking of private property by eminent domain to conduct its operations?

Article I, Section 10, of the Constitution forbids the taking of private property except for public use. Neither the Commonwealth nor any corporation acting under authority of an Act of Assembly may take private property against the will of the owner for the purpose of devoting it to such a use as the courts consider of a private nature: *Pennsylvania Mutual Life Ins. Co. v. Philadelphia,* 242 Pa. 47 (1913).

The authorities which discuss the public or quasi-public nature of certain corporations fall into two groups. One group considers the liability of the corporations to public regulation of one kind or another. The other group deals with the privilege of the corporations to be exempted from certain taxation and their qualifications for the exercise of eminent domain. Both classes discuss the elements of public service;

both use similar terms and phrases. But the standards are not the same. To decide that a corporation is engaged in a business of such a quasi-public nature that it is subject to public regulation (e.g. *Munn v. Illinois,* 94 U. S. 113 (1877)) does not determine that the activities of the corporation involve such a public necessity for the acquisition of private property that the company may be granted the privilege of taking it by eminent domain.

Therefore, these two types of cases must be distinguished: This case is of the latter type, involving the claim of the corporation to the right of eminent domain.

No complete definition of what constitutes a public use warranting the exercise of eminent domain has been formulated. A thorough discussion of the question is to be found in the opinion of the Supreme Court in *Pennsylvania Mutual Life Ins. Co. v. Philadelphia,* 242 Pa. 47 (1913). In the course of that opinion, at page 54, appears the following:

> "* * * Mr. Justice Pearce, delivering the opinion in *Arnsperger v. Crawford,* 101 Md. 247,, 253, says: 'There will be found two different views of the meaning of these words which have been taken by the courts; one, that there must be a use, or right of use, by the public, or some limited portion of the public; the other, that they are equivalent to public utility or advantage. If the former is the correct view, the legislature and the courts have a definite, fixed guide for their action; if the latter is to prevail, the enactment of laws upon this subject will reflect the passing popular feeling, and their construction will reflect the various temperaments of the judges, who are thus left free to indulge their own views of public utility or advantage. We cannot hesitate to range this court with those which hold the former to be the true view.'
>
> "We think this interpretation of the words 'public use' is in accord with their plain and natural signification and with the weight of the best considered authorities. It furnishes a certain guide to the legislature as well as to the courts in appropriating private property for public use. It enables the state and the owner to determine directly their respective rights in the latter's property. If, however, public benefit, utility or advantage is to be the test of a public use then, as suggested by the authorities, the right to condemn the property will not depend on a fixed standard by which the legislative and judicial departments of the government are to be guided, but upon the views of those who at the time are to determine the question. There will be no limit to the power of either the legislature or the courts to appropriate private property to public use except their individual opinions as to what is and what is not for the public advantage and

utility. If such considerations are to prevail, the constitutional guarantees as to private property will be of small moment."

The most recent expression on this subject by our Supreme Court is found in *Philadelphia Rural Transit Company v. Philadelphia,* Pa. , (January Term 1931, No. 359, filed March 14, 1932). That case did not involve a decision of the question of the exercise of the right of eminent domain, but the right of a particular company to exemption from local taxation on the alleged ground that it was such a public service company as is entitled to exemption. The opinion of the court, by Mr. Justice Maxey, discusses public service, exemption from taxation, and exercise of eminent domain at length. Among other things the opinion says:

> "* * * If every corporation that must perform public service as it is set forth in the Public Service Law of 1913 is to be classed as quasi public and therefore entitled to exercise the power of eminent domain and to be exempted from local taxation on its essential property, the result would be so obviously opposed to public interest as to forbid judicial acceptance of that formula. The implications of this doctrine are that all public service companies as defined by the Public Service Law are quasi public corporations. This doctrine becomes further patently unacceptable when it is realized that under the Public Service Law not only corporations engaged respectively in twenty-six different kinds of business but also *persons* engaged for profit in the same kind of business are expressly included in the term 'public service company.' All these varieties of corporations and also all persons engaged in the same kind of business are equally subject to the duties and liabilities of public service companies as set forth in Article 2, section 1, of the Public Service Company Law, * * *
>
> "The possession of a certificate of public convenience does not, as contended, make a corporation quasi public, for this certificate merely evidences the Public Service Commission's approval of the organization of a public service company and of this company's beginning the exercise of any right, power, franchise or privilege under any ordinance, municipal contract or otherwise. The issuance of this certificate is in the nature of a license to organize and do business rather than, like the conferring of the right of eminent domain, official recognition by the Commonwealth that the corporation is performing service of such vital importance to the public that it is virtually engaged in the administration of a public trust.
>
> "The argument that an omnibus company is entitled to the same tax exempting privileges on its essential property as a railroad company because like a railroad company it is engaged as a common carrier in the

transportation of passengers and property, is plausible only when superficially considered. Railroads render a service that is both important and publicly indispensible. * * * Public use does not mean merely general convenience or advantage. Cooley on Constitutional Limitations, 8th Ed., Vol. 2, page 1124, says: 'The right of eminent domain does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer. (citing, inter alia, *Mayor et al. v. Scott*, 1 Pa. 309.) * * * Nor could it be of importance that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises; the public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies * * * The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare, which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful and needful for the government to provide.'

"In *Jacobs v. Water Supply Co.*, 220 Pa. 388, this court held that the power to take private property for public use can only be invoked when public exigency or necessity requires the exercise of this sovereign right, and that the use of the property taken must be a public one, and that 'the legislative determination of what constitutes a public use presumptively makes the purpose so declared a public one. This is only a presumption, however, and does not conclude parties from raising the question before the courts for judicial determination.'

"The question whether or not a corporation is quasi public is for the courts to determine on the facts of each case. A corporation cannot obtain judicial recognition as quasi public unless the services it renders to the public or a large part of it are so essential to public well being that any interference with its functions by local administrative agencies would be insufferable to the sovereign commonwealth. * * *"

The Philadelphia Rural Transit Company Case is pertinent because the issue there, as here, was as to the right of the corporation to a privilege of a special nature. Of course in that case there was no express grant by the Legislature of the privilege sought. In the present case there is the grant of the power of eminent domain to carriers

of oil by pipe lines. Nevertheless, the general standards to be applied in both cases are the same.

Our problem is whether the facts of the present record so clearly disclose a case of a corporation whose activities meet the standards thus laid down by the courts, that we would be warranted in refusing to permit the case to be made the subject of judicial determination.

For 45 years oil pipe line companies have exercised the power of eminent domain under the Act of 1883. Courts recognized the right, and it was scarcely questioned that these companies were common carriers and that the condemnation of land by them was for a public use.

Is there any element which would lead to a different view of the matter now?

As we have noted, the Act of 1883 limited the exercise of eminent domain to the purpose of conveying oil *from* the oil producing counties towards the refineries. The Keystone Pipe Line Company, acting under the amendment of 1929 carries gasoline from the refinery to the vicinity of retail distribution. It seems to us that the only difference that the change of direction could make in respect to the right of eminent domain, from a constitutional standpoint, would depend on the number of the public that it was possible to serve. In carrying from the oil fields, every owner of a well within a reasonable distance of the line was a potential customer. In the present case there are not over half a dozen potential customers, some of whom already use other pipe line facilities. The nature of the business, carrying refined products, necessarily limits the Company's customers to oil refining companies. By reason of the huge investment necessary for such a refinery the number of such customers is very narrowly limited.

Therefore, the operation of the present Company's line must be considered in the light of these facts: Its customers are necessarily limited to the large refiners or shippers of oil and oil products. Of necessity these customers are few. The line itself can from day to day, carry but a single oil product, and to change to some other commodity would require cleaning of pipes, and other operating changes.

The Company would seem to be a common carrier. Its profession of readiness to carry for the public is clear. But the Philadelphia Rural Transit Company Case says that the fact that a corporation is a common carrier does not of itself determine its status as a quasi public corporation entitled to public privileges.

The question then becomes whether a common carrier, operating under the conditions disclosed by this record, is performing functions of such public necessity as to constitute the use of private lands by it a public use.

In *Pennsylvania Mutual Life Ins. Co.* v. *Philadelphia,* 242 Pa. 47 (1913), supra, the Supreme Court has said that the purposes for which land may be taken by eminent domain must be uses by the public or some limited portion of the public. In the Philadelphia Rural Transit Company Case the court stressed the additional requirement of public necessity for the use.

In *Jacobs* v. *Clearview Water Supply Company,* 220 Pa. 388, 393 (1908) it was held that the fact that a water company had but one customer at the time of the litigation, would not be sufficient to deprive it of the right of eminent domain. Whether or not it is of particular significance here, it should be noted that the defendant in that case was organized to supply water and not simply to transport it. The number of potential customers of a water supply company is obviously large, and the opportunity to serve the public is correspondingly extensive.

In *Struse & Sons* v. *Reading Company,* 302 Pa. 211 (1931) the Supreme Court sustained an exercise of eminent domain by a railroad company for the purpose of constructing a spur track to reach the plant of a single customer, Sears, Roebuck & Co. Other cases allowing similar extensions were cited. It is to be observed, however, that in sustaining the railroad's power in the Struse Case, the court stressed the extent to which the public would in fact be served by the track in question. It pointed out that the terminus of the spur was an established railway mail terminal, in which seventy-five postal employes are employed; that in a year prior to the litigation, the Reading Company had carried approximately four million consignments of merchandise for Sears, Roebuck & Co. over an old spur, later destroyed, reaching the same point.

Therefore, the fact that there is but a single immediate customer does not prevent the exercise of eminent domain, provided that there is in reality substantial service to the public. If other customers appear, the carrier may be compelled to serve them.

However, whether or not there is actual service to a sufficient number of the public, and whether or not there is such public necessity for the service as to warrant the exercise of eminent domain are questions that must depend on the facts of each case: *Philadelphia Rural Transit Company* v. *Philadelphia,* supra. And the Attorney General should not presume to determine such questions, unless they are free from all doubt.

Here we have a company at present serving a single customer, and whose potential customers are few; a carrier whose facilities permit transportation at restricted intervals, of only a very limited list of commodities, which may also be carried by established carriers. Cer-

tainly the case is not so clear that the Attorney General should stand in the way of a proper judicial consideration of it.

It has been argued that the granting of the charter of the Company and the issuing of a certificate of public convenience to it by the Public Service Commission, together with the fact that other pipe line companies have transported gasoline without interference on the part of the Commonwealth, would in some way work an estoppel which would prevent the institution of quo warranto proceedings in the present case.

We recognize the unfortunate situation in which the company must necessarily find itself if the courts should determine that the power of eminent domain claimed by it may not be exercised. The record shows that this Company has invested approximately two million dollars in its pipe lines and equipment. However, we fail to see how the legal principles involved can be affected by that situation, or that the Commonwealth has done anything which would bar its right to proceed by quo warranto to question the Company's actions.

Certainly the grant of the charter to the Company could have no such effect. If the issuance of a charter estops the Commonwealth from later questioning the activities of the corporation, quo warranto proceedings could never be brought against any corporation.

Nor does the fact that the Public Service Commission issued a certificate of public convenience bear on the subject. As was pointed out in the Philadelphia Rural Transit Co. Case, a company may be a common carrier and yet not be entitled to a grant of the power of eminent domain. The certificate of public convenience could not guarantee to the Company the right of eminent domain. Both of our appellate courts have decided that even where certain public service companies have obtained express consent of the Public Service Commission to the exercise of eminent domain in particular cases, under the Act of May 21, 1921, P. L. 1057, the granting of the certificate by the commission, "determines neither the validity nor the scope of subsequent proceedings by eminent domain; it evidences only the preliminary approval by the regulatory body of whom general regulation of the service of such companies was entrusted as specified in the statute": *Dickel* v. *Bucks-Falls Electric Company,* 306 Pa. 504, 511 (1932).

We cannot escape the conclusion that the petition, answer and testimony produced before us disclose substantial questions as to the authority of the Keystone Pipe Line Company to exercise the power of eminent domain for the transportation of gasoline, and that determination of those questions is of importance not only to the petitioner but to the public at large.

Therefore, it is our opinion that the case is a proper one for the institution of quo warranto proceedings.

Counsel for the petitioner may prepare and submit a form of suggestion for a writ of quo warranto.

HARRIS C. ARNOLD,
Deputy Attorney General.

WM. A. SCHNADER,
Attorney General.

OPINION NO. 60

Public Instruction—Townships of the first class—Substitution of auditors appointed by the court for elected auditors—Tenure of selected officers so displaced—First Class Township Law of June 24, 1921, P. L. 1206, Sec. 520.

Where, under Section 520 of the First Class Township Law of June 24, 1921, P. L. 1206, a township of the first class avails itself of its option to substitute an auditor appointed by the court in place of elected auditors, the office of elected auditors is at once abolished and all such officers are immediately removed.

Department of Justice,
Harrisburg, Pa., September 13, 1932.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have called our attention to Section 520 of the First Class Township Law of June 24, 1931, P. L. 1206, which authorizes townships of the first class to provide for the audit of their accounts by a single auditor appointed by the court of common pleas instead of by three elected auditors or a controller. You then ask the following questions:

> "1. Has the court authority under the act to appoint an auditor in townships of the first class who shall audit the accounts of the school district when the term of office of the legally elected auditors has not expired?
>
> "2. Should the court appoint an auditor under said act, would the auditors elected continue in office and the school district be required to compensate both the auditor appointed by the court and the duly elected auditors for auditing the accounts of the school district?"

Section 520 of the First Class Township Law, to which you refer, provides as follows:

> "Any township may, instead of electing three auditors as above provided or one controller as hereinafter provided, provide, by ordinance, for the audit of its accounts by an auditor appointed by the court of common pleas of

> the county, who shall be either a person or firm licensed as a certified public accountant, or a person skilled in auditing work; and where such an ordinance is so adopted, such auditor shall be appointed by the court, on or before the first Monday of January each year, to audit the accounts of the township for the fiscal year then closing. Any such appointed auditor shall have and possess all the powers and perform all the duties provided in this act for elected auditors. The compensation of any such appointed auditor shall be fixed by the court. In townships so providing by ordinance for an appointed auditor, the office of elected auditor is hereby abolished."

Under Sections 2601, 2603 and 2604 of the School Code of May 18 1911, P. L. 309, the finances of school districts in townships are audited by the township controller or auditors.

The legislative provision which is the immediate cause of your inquiry is the following portion of Section 104 of the First Class Township Law:

> "Any person, holding office under any act of Assembly repealed by this act, shall continue to hold such office until the expiration of the term thereof, subject to the conditions attached to such office prior to the passage of this act."

In our opinion, this provision of Section 104 presents no difficulty in the present situation. The substitution of an appointed auditor for an elected controller or auditors is not brought about by the repeal of any prior law, but by the express terms of Section 520 of the same Act of Assembly. Therefore, we may dismiss Section 104 from further consideration.

The rest is simple. The Legislature has directed that upon appointment of a single auditor by the court of common pleas, the office of elected auditor shall cease to exist. When that occurs the terms of auditors previously in office end immediately.

The office of township auditor is not a constitutional office, but exists solely by will of the Legislature. In a long line of cases it has been consistently held that the Legislature may at any time abolish such an office and thereby oust the incumbent during the running of the term for which he was elected or appointed: Milford Township Supervisors' Removal, 291 Pa. 46, 51 (1927); *Lloyd* v. *Smith,* 176 Pa. 213 (1896), and cases there cited; *Commonwealth* v. *Weir,* 165 Pa. 284 (1895).

Therefore, in our opinion, it is clear that under Section 520 of the First Class Township Law, where an appropriate ordinance has been adopted, the court of common pleas has authority to appoint a single auditor to audit the finances of a first class township although the terms of elected auditors have not expired. And it is equally clear

that the elected auditors do not continue in office after the appointment of the new auditor by the court of common pleas.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 61

State Aeronautics Commission — Appropriation — Cancellation — Licenses — Extraordinary Session of 1932. Act No. 50.

Act No. 50 of the Extraordinary Session of 1932, reduced the appropriation made to the State Aeronautics Commission by the General Appropriation Act of 1931, leaving no balance available for further activities of the Commission.

As no valid action can be taken by the Commission, there is no authority for the issuing of licenses under the Aeronautics Act of 1929, P. L. 724 as amended by the Act of 1931, P. L. 650.

Department of Justice,
Harrisburg, Pa., September 15, 1932.

Honorable Philip H. Dewey, Secretary of Internal Affairs, Harrisburg, Pennsylvania.

Sir: We have your letter of August 24, 1932, in which you inquire as to the effect of the cancellation of the remainder of the appropriation made by the Legislature in 1931 for the payment of the expenses of the State Aeronautics Commission. Particularly, you desire to be advised whether the duty of issuing licenses under the Aeronautics Act of April 25, 1929, P. L. 724, as amended by the Act of June 22, 1931, P. L. 650, devolves upon you.

Act No. 50 of the Special Session of 1932 is an amendment to the General Appropriation Act of 1931. So far as the State Aeronautics Commission is concerned, it reduced the commission's appropriation to one hundred thousand dollars ($100,000), which leaves no balance available for further activities of the commission.

The act did not repeal or modify in any way the Aeronautics Act of April 25, 1929, supra, or the amending Act of June 22, 1931, supra. It does not abolish the State Aeronautics Commission, nor does it transfer any of its duties to the Secretary of Internal Affairs, or to any other department, board, or commission.

Consequently, the State Aeronautics Commission is still the only body authorized by law to perform any of the acts required by the Aeronautics Act, and you have no authority, as Secretary of Internal Affairs, to perform its functions.

We understand that, owing to the failure of the Senate to confirm the appointments of members of the State Aeronautics Commission, there is at the present time only one member of the commission in addition to yourself. Therefore, it is impossible to obtain a quorum of the commission, and no valid action can be taken by the commission. Consequently, no licenses or certificates can be lawfully issued under the Aeronautics Act at the present time. The result may be that the provisions of the Aeronautics Act will be violated with impunity. If so, the responsibility rests upon the Legislature, and not upon the State Aeronautics Commission or upon you as Secretary of Internal Affairs.

Therefore, you are advised that you do not have authority to issue licenses under the Aeronautics Act.

Very truly yours,

DEPARTMENT OF JUSTICE,
LUCIEN B. CARPENTER,
Assistant Deputy Attorney General.

OPINION NO. 62

Insurance—Floater policies—Right of fire and marine companies to write—Extent of coverage—Section 202 of Insurance Company Law of 1901—Act of May 13, 1927, P. L. 998.

Domestic stock fire, stock marine and stock fire and marine insurance companies may issue all-risk floater policies on personal property not having a fixed location, but may not issue them on personal property ordinarily stationary, except when in course of transportation or while being packed or awaiting shipment and except when the coverage includes risks not insurable by casualty companies.

Department of Justice,
Harrisburg, Pa., September 20, 1932.

Honorable Charles F. Armstrong, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether domestic stock marine insurance companies may issue what are known as floater policies covering loss of or damage to property, whether in the course of transportation or otherwise.

Section 202 of The Insurance Company Law of 1921, approved May 17, 1921, P. L. 682, prescribes the purposes for which domestic companies may be incorporated. Stock fire, stock marine, and stock fire

and marine insurance companies are given the power, under paragraph (2) of subsection (b) to do the following:

> "For making insurances—
> "Upon vessels, boats, cargoes, goods, merchandise, freight and other property,—against loss or damage by all or any of the risks of lake, river, canal, and inland navigation and transportation; upon automobiles, airplanes, seaplanes, dirigibles, or other aircraft, whether stationary or in operation or in transit, against loss or damage by fire, explosion, transportation, collision, or by burglary, larceny, or theft; not including, in any case, insurances against loss by reason of bodily injury to the person; and to effect reinsurance of any risk provided for in this clause."

You state that under this clause, such companies have issued what is colloquially known as a "personal property floater" or "tourist floater" policy, which insures the owner of jewelry, furs, baggage and other personal possessions against all risks of loss or damage from any cause whatsoever, whether the property insured be in transit or at rest in the residence of the insured or elsewhere. The question arises whether, in covering risks to such personal belongings while not in the course of transportation, such companies are exceeding their powers.

Paragraph (2) of subsection (b) of Section 202 indicates that the risk that may be insured by fire or marine companies is that resulting from loss or damage due to navigation or transportation and not such loss or damage as arises when the article insured is not in transit. This section specifies that the insurance may be made, "against loss or damage by all or any of the risks of lake, river, canal, and inland navigation and transportation" as far as such loss or damage applies to "vessels, boats, cargoes, goods, merchandise, freight and other property." Jewelry, furs, guns, cameras, and other personal property must necessarily be included in the words "other property."

The remaining phraseology of paragraph (2) referring to automobiles, airplanes, etc. includes loss of or damage to them "whether stationary or in operation or in transit." Inclusion of the word "stationary" in the clause relating to these subjects of insurance indicates that the Legislature did not intend to give the power to fire and marine companies to insure "other property" while stationary. As far as this section is concerned, it would seem that fire and stock companies do not have the right to issue floater policies, by whatever name they may be known, insuring personal property while not in transit.

However, we are informed that it has been the long-established custom of marine insurance companies to insure against loss of or damage to wearing apparel, guns, furs, cameras, etc., whether actually in the course of transportation or at rest in a more or less fixed location,

These companies contend that such articles do not have a definite or fixed location but are subject to constant movement and transit and that there is on other way of adequately insuring them.

In our opinion, the Legislature has recognized this custom in Section 1, subsection (a) of the Act of May 13, 1927, P. L. 998, which defines the terms "marine insurance," "marine business" and "marine risks" as follows:

> "Vessels, craft, aircraft, cars, automobiles, and vehicles of every kind (excluding automobiles operating under their own power, or while in storage not incidental to transportation), as well as all goods, freights, cargoes, merchandise, effects, disbursements, profits, moneys, bullion, precious stones, securities, choses in action, evidences of debt, valuable papers, bottomry, and respondentia interests, and all other kinds of property and interests therein in respect to, appertaining to, or in connection with any and all risks or perils of navigation, transit or transportation, including war risks, on or under any seas or other waters, on land or in the air, or while being assembled, packed, crated, baled, compressed, or similarly prepared for shipment, or while awaiting the same, or during any delays, storage, transhipment or reshipment incident thereto, including marine builder's risks, and all personal property floater risks;"

The Legislature did not confine its definition of marine insurance to the insuring of vehicles and goods while being prepared for and awaiting shipment, and in the course of transportation. It added the words, "and all personal property floater risks." We must assume that the Legislature in framing this definition considered the personal property floater risk to be a form of marine insurance. As such, a marine company may clearly write it.

However, it does not necessarily follow that a floater policy which a marine company may write is a marine policy, or that a floater policy is limited in its coverage to the usual coverage of a marine policy. In writing a floater policy a marine company is not restricted by the limitations imposed upon it when writing a marine policy.

It is true that under the powers granted by Section 202 of the Act of 1921, subsection (c), stock casualty companies may be incorporated for a large variety of purposes. These include insurance against loss by burglary or larceny or theft or forgery. Furs, jewelry, guns, cameras, etc., while at rest in their owner's house or elsewhere may be insured by casualty companies. But such coverage is not as broad as that given by floater policies; it does not cover loss or damage occurring while the insured article is elsewhere than in the situs specified in the policy, or loss or damage from causes other than burglary, larceny, or theft.

Through a floater policy a marine company gives broader coverage than a casualty company can give. This policy covers articles which, by reason of their nature and use, do not have a fixed location and are not susceptible of coverage by a casualty policy. Unless an owner can obtain a floater policy from a marine insurance company, or a fire or fire and marine company which may also write it under the provisions of Section 202 (b),—he would be obliged to take out a new casualty policy whenever his property came to rest at any place, his home or elsewhere.

While the floater policy fills a need for such insurance coverage as it affords, it must not be used to cover the field which the policies of casualty companies properly occupy. For example, there is no reason why a floater policy should cover while stationary, objects of art, pictures, paintings, etc., which ordinarily have a fixed situs; they may be insured against burglary, theft and larceny by a casualty company policy. While in transit or packed and awaiting shipment, they may be insured by a marine policy. While stationary these articles should be insured by a floater policy only against damage resulting from causes other than burglary, theft and larceny. This is based on the distinction between articles having a permanent situs and articles of personal adornment or such as guns, cameras, etc., which are constantly in the course of transportation by their owners or by carriers. This distinction is based on the character of the property itself or upon the use to which it is put. For this reason it is our opinion that the "all risk personal property floater policy" may be written by marine companies (and fire and fire and marine companies) to cover articles, whether in the course of transportation or otherwise, which, by reason of their nature and use, ordinarily do not have a fixed location. They may not be written to cover those articles which ordinarily do have such a situs, except with respect to damage or loss resulting from causes other than burglary, theft and larceny.

Therefore, you are advised that domestic stock marine insurance companies (and also domestic stock fire, and fire and marine insurance companies) may issue floater policies insuring against all risks of loss of or damage to personal property which, by reason of its nature and use, does not have a fixed location. They may not issue such policies to cover personal property which is ordinarily stationary, except when in the course of transportation or while being packed or awaiting shipment and except when the coverage includes risks not insurable by casualty companies.

Very truly yours,

DEPARTMENT OF JUSTICE,
HAROLD D. SAYLOR,
Deputy Attorney General.

OPINION NO. 63

Insurance—Group accident policies insuring members of firemen's relief associations and firemen's companies—Workmen's Compensation Act.

The Insurance Commissioner may approve group accident policies insuring the members of volunteer fire companies and firemen's relief associations, even where the employer has compensation insurance, as such policies do not conflict with the workmen's compensation policy clause restricting recovery thereunder to the proportion the coverage thereof bears to the whole amount of valid and collectible insurance.

Department of Justice,
Harrisburg, Pa., September 21, 1932.

Honorable Charles F. Armstrong, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have requested the opinion of this department on the legality and advisability of approving group accident insurance policies insuring the members of firemen's relief associations and fire companies in the Commonwealth.

You express the fear that because The Workmen's Compensation Act imposes a duty upon various governmental subdivisions of the Commonwealth to provide for compensating volunteer firemen for personal injuries, it might be that a group accident policy, running in favor of the individual members of a volunteer fire company or relief association, would constitute such a duplication of insurance as would result in no increased benefits to the firemen, although additional premiums would be paid.

That the members of volunteer fire companies in the Commonwealth are employes in the sense in which that term is used in The Workmen's Compensation Act of 1915 (Act of June 2, 1915, P. L. 736), is made clear by a supplement to that act approved May 14, 1925, P. L. 714, reading as follows:

> "That in addition to those persons included within the definition of the word 'employe,' as defined in section one hundred and four of the act to which this is a supplement, there shall be included all members of volunteer fire companies of the various cities, boroughs, incorporated towns, and townships who shall be and are hereby declared to be 'employes' of such cities, boroughs, incorporated towns, townships for all the purposes of said act, and shall be entitled to receive compensation in case of injuries received while actually engaged as firemen or while going to or returning from any fire which the fire companies of which they are members shall have attended."

There is a duty on all cities, boroughs, incorporated towns, and townships to pay damages for injuries received by a volunteer fireman in

the course of his duties as such, and to secure protection by insurance against losses sustained by reason of such injuries. This protection is secured by these governmental subdivisions under the Standard Workmen's Compensation and Employer's Liability Policy, which generally contains a clause reading as follows:

> "If this Employer carries any other insurance covering a claim covered by this Policy, he shall not recover from the Company a larger proportion of any such claim than the sum hereby insured bears to the whole amount of valid and collectible insurance."

In addition to securing workmen's compensation insurance certain communities have purchased for the benefit of the members of their volunteer fire companies, or firemen's relief associations, what are known as group accident policies which are issued by casualty companies in the name of the fire company, or of the executive officer of the governmental subdivision, and which protect the volunteer firemen from loss due to bodily injuries and death occurring in line of duty. This form of policy, although not specifically required by law may, in certain cases, be purchased by a governmental subdivision of the Commonwealth under the provisions of the Act of June 22, 1931, P. L. 844. It may be issued and sold by the insurer under the authority of Section 629 of The Insurance Company Law of 1921, approved May 17, 1921, P. L. 682, as amended by the Act of June 23, 1931, P. L. 904, which reads in part as follows:

> "(a) Nothing in subdivision (b) of this article shall apply to or affect any policy of workmen's compensation insurance; or any general or blanket policy of insurance issued to any municipal corporation or department thereof, or to any corporation or individual employer, police or fire department, where the officers, members, or employes or classes or departments thereof, are insured, for their individual benefit, against specified accidental bodily injuries or sickness, while exposed to the hazards of the occupation or otherwise, in consideration of a premium intended to cover the risks of all the persons insured under such policy."

Such a group accident policy insures each member of the fire company or association covered by it who is in good standing, against injuries, fatal or otherwise, suffered by him while actually on duty as a member of the fire company. It provides for the payment of weekly indemnity for partial or total disability, indemnity for medical treatment of non-disabling injuries, and for loss of eyes, limbs or life. The policy runs in favor of the individual himself, and in the event of his death, in favor of the beneficiary named therein. It does not insure the governmental subdivision as "employer" or otherwise.

You inquire whether in the event that the governmental subdivision, in which his fire company or relief association is located, has purchased such group accident policy for volunteer fireman, and paid for it in whole or in part, a fireman injured in the performance of his duties could collect full benefits under the workmen's compensation policy, or whether he is limited to a fractional share of the amount of compensation he would be entitled to thereunder had the group policy not been written.

In our opinion each policy is of an entirely distinct nature and affords an insurance coverage not similar in character to the other.

The workmen's compensation policy insures the governmental subdivision as employer and provides for the payment of compensation to its employes. The premium thereon is paid by the employer.

On the other hand, the group accident policy insures the volunteer firemen themselves although the policy is written in the name of the employer for the benefit of the members of the fire company or association, and is held by such employer. The premium may be paid in full either by the governmental subdivision, or by the firemen or by both jointly.

The clause in the workmen's compensation policy above quoted concerns only other policies of a similar character prescribed by law. It has no reference to any insurance coverage not required by law but afforded by contract voluntarily entered into for the benefit of the firemen themselves. Such coverage does not protect the city, borough, incorporated town, or township in which the members of volunteer companies or firemen's relief associations function as firemen.

Therefore, you are advised that you may approve for sale within this Commonwealth group accident policies insuring the members of volunteer fire companies and firemen's relief associations. The advisability of giving such approval to a specific form of policy arises only where such policy contains clauses or phraseology objectionable to good insurance standards followed by your department. If there be no objection on this ground, there is no reason for withholding approval.

Very truly yours,

DEPARTMENT OF JUSTICE,
HAROLD D. SAYLOR,
Deputy Attorney General.

OPINION NO. 64

Bonds—County Officers—Custody—Premiums—Secretary of the Commonwealth—Act of May 2, 1929, P. L. 1278, construed.

The Act of May 2, 1929, P. L. 1278, repealed all statutes in force at the date of its enactment relating to the filing of qualifying bonds with the Secretary of the Commonwealth by prothonotaries, clerks of the several courts, recorders of deeds, registers of wills, sheriffs and coroners in all counties except counties of the first class.

In counties of the first class, the qualifying bonds of the prothonotary, clerks of the several courts of the county, recorder of deeds, register of wills, sheriff and coroner, must be filed with the Secretary of the Commonwealth.

The premium on any bond filed with the Secretary of the Commonwealth must be paid by the officer tendering the bond in the absence of statutory authority for payment thereof from public funds.

Department of Justice,
Harrisburg, Pa., September 21, 1932.

Honorable Richard J. Beamish, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request to be advised upon the following questions:

First: Does the Act of May 2, 1929, P. L. 1278, amend or repeal the statutes in force at the date of its enactment relating to the filing of bonds with the Secretary of the Commonwealth by prothonotaries, clerks of the several courts, recorders of deeds, registers of wills, sheriffs and coroners?

Second: What county officers, if any, are required to file bonds in the office of the Secretary of the Commonwealth?

Third: What condition shall be incorporated in any such bond?

Fourth: Is the Commonwealth liable for the payment of the premium on any bond required to be filed with the Secretary of the Commonwealth?

I

The Act of May 2, 1929, P. L. 1278, the "General County Law," applies to all counties of the Commonwealth, except counties of the first class.

Section 51 of the act defines "county officers" and includes within that term prothonotaries, clerks of the several courts, recorders of deeds, registers of wills, sheriffs and coroners.

Section 54 places the custody of all qualifying bonds of these officers with the county controller, except in counties where the office of county controller has not been established. In these counties the

custody of the qualifying bonds of these officers belongs to the county commissioners.

The act repealed all legislation existing at the time of its enactment which required bonds taken from prothonotaries, clerks of the several courts, recorders of deeds, registers of wills, sheriffs and coroners to be filed with the Secretary of the Commonwealth, except the Acts of April 6, 1830, P. L. 272, Section 9, and the Act of June 7, 1917, P. L. 415, Section 1, Subsection 2.

The bonds which are required from county officers by the "General County Law" are such bonds as are prerequisite to entry into office.

II

In addition to the bonds which are required by the "General County Law" from "county officers" as prerequisite to their entry into office, prothonotaries and recorders of deeds are required by the Act of April 6, 1830, P. L. 272, Section 9, and registers of wills are required by the Act of June 7, 1917, P. L. 415, Section 1, Subsection 2, to file statutory bonds with the Secretary of the Commonwealth. These bonds are given to secure the payment of taxes or commissions which these respective acts direct these officers to collect and transmit to the Commonwealth. See also Sections 611 and 613 of The Fiscal Code (Act of April 7, 1929, P. L. 343).

In addition to the bonds which must be filed with the Secretary of the Commonwealth pursuant to the Act of April 6, 1830, P. L. 272, and the Act of June 7, 1917, P. L. 415, bonds which are required by any statute to be given by a county officer to the Commonwealth must be filed with the officer of the Commonwealth designated as its custodian by the statute requiring the bond or by general statute.

III

The condition of the bonds required to be filed with the Secretary of the Commonwealth by prothonotaries and recorders of deeds in compliance with the Act of April 6, 1830, P. L. 272, is prescribed by Section 9 of that act. The condition of the bonds required to be filed with the Secretary of the Commonwealth by registers of wills by the Act of June 7, 1917, P. L. 415, is prescribed by Section 1, Subsection 2, of that act.

IV

The premium to be paid for any bond which is required to be given to the Commonwealth and filed with the Secretary of the Commonwealth must be paid by the officer tendering the bond in the absence of statutory authority for payment from public funds. There is no authority for payment by the Commonwealth of the premium on bonds

required by the Act of April 6, 1830, P. L. 272, or the Act of June 7, 1917, P. L. 415, Section 1.

V

Before the Secretary of the Commonwealth transmits a commission to the Governor for any sheriff or coroner he must obtain from the county controller a certificate showing that the bond required from such officer has been delivered into the custody of the county controller or, in counties where the office of controller has not been established, into the custody of the county commissioners; and in addition thereto, he must require from each prothonotary, and recorder of deeds, a bond conforming to the provisions of the Act of April 6, 1830, P. L. 272, Section 9, and from each register of wills a bond conforming to the provisions of the Act of June 7, 1917, P. L. 415, Section 1, Subsection (b) 1. The certificate should be prescribed by your office and should disclose that the bond filed by the county officer conforms to statutory requirements as to amount, form and approval.

VI

The Act of March 12, 1791, 3 Smith's Laws 8, Section 1, 71 P. S. 801, directs that bonds and recognizances required from the officers hereafter named, after being duly entered in the office of the recorder of deeds, shall be by him transmitted to the Secretary of the Commonwealth and by the Secretary filed in his office. This act has not been repealed as to counties of the first class. The bonds of such officers in counties of the first class must be filed in the office of the Secretary of the Commonwealth.

The prothonotary, clerks of the several courts (Quarter Sessions, Oyer and Terminer, Orphans' Courts), must give bonds in such sums as the Governor shall judge sufficient. These bonds and the conditions thereof are prescribed by the Act of April 14, 1834, P. L. 333, Section 76, 17 P. S. 1481.

The recorder of deeds must give a bond in the sum of 1500 pounds conditioned as prescribed in the Act of March 14, 1777, 1 Smith's Laws 443, Section 3, 16 P. S. 1661. This bond was formerly given to the Speaker of the House of Assembly, but this was subsequently changed by the Act of March 12, 1791, 3 Smith's Laws 8, 71 P. S. 801, to the Commonwealth of Pennsylvania.

Sheriffs must enter into a recognizance and become bound in a bond in the sum of $80,000; Act of April 15, 1834, P. L. 537, Sections 62, 63; 16 P. L. 1531, 1631. The condition of the required recognizance and bond is prescribed by Sections 64 and 65 of the act.

Coroners must enter into a recognizance and become bound in a bond in one-fourth of the sum which is by law required from the

sheriff of the same county. Such bond is required, and the condition thereof is prescribed, by the Act of April 15, 1834, P. L. 537, Sections 66 and 67; 16 P. S. 1562, 1563.

The register of wills must give a bond in a sum equal to half the sum required by law for the official bond of the sheriff. This bond is required, the condition thereof prescribed, and the custody thereof placed with the Secretary of the Commonwealth, by the Act of June 7, 1917, P. L. 415, Section 1; 20 P. S. 1842, 1843, 1844.

In addition to the bonds required as above noted from the prothonotary and recorder of deeds, each of these officers is required by the Act of April 6, 1830, P. L. 272, 72 P. S. 3172, 3173, 3213, to become bound to the Commonwealth in an obligation in one-third of the amount fixed by law for sheriffs' bonds. The condition of this bond is prescribed by Section 9 of that act.

The Governor has fixed the following amounts for bonds required from officers in Philadelphia County, as he is required to do by the Act of April 14, 1834, P. L. 333, according to information furnished to us by the Secretary of the Commonwealth: Prothonotary, $50,000; clerk of Oyer and Terminer, $1,000; clerk of Quarter Sessions, $10,000; clerk of Orphans' Court, $10,000.

VII

Summarizing the conclusions stated above:

The Act of May 2, 1929, P. L. 1278, repealed all statutes in force at the date of its enactment relating to the filing of qualifying bonds with the Secretary of the Commonwealth by prothonotaries, clerks of the several courts, recorders of deeds, registers of wills, sheriffs and coroners in all counties except counties of the first class. But before the Secretary of the Commonwealth may transmit a commission to the Governor for any sheriff or coroner in such counties, he must obtain from the county controller a certificate as stated in Section V above.

In a county of the first class, the qualifying bonds respectively of the prothonotary, clerks of the several courts of the county, recorder of deeds, register of wills, sheriffs and coroner, in the amounts prescribed by the acts referred to in Section VI above, must be filed with the Secretary of the Commonwealth.

The Act of May 2, 1929, P. L. 1278, does not repeal the Act of April 6, 1830, P. L. 272, or the Act of June 7, 1917, P. L. 415. Therefore, bonds required from prothonotaries and recorders of deeds by Sections 3, 4, and 9 of the Act of 1830, and from registers of wills by Section 1, Subsection (b) 2, of the Act of 1917, must be filed with the Secretary of the Commonwealth by these officers in all counties of the Commonwealth, in addition to the qualifying bonds referred to

in the preceding paragraph. The amounts and conditions of these bonds are prescribed by the Acts of 1830, P. L. 272, and 1917, P. L. 415, respectively.

The premium on any bond filed with the Secretary of the Commonwealth must be paid by the officer tendering the bond in the absence of statutory authority for payment thereof from public funds.

Very truly yours,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION NO. 65

Banking—Power of Secretary of Banking in possession of closed institutions to sell or exchange listed and unlisted securities—The Banking Act of 1923, as amended by the Act of July 20, 1932.

The Secretary of Banking in possession of closed institutions under his supervision may without leave of court, sell, transfer and deliver listed and unlisted securities to such parties, at such times, on such terms, and for such prices as to him seems best for the interests of the estate without leave of court unless he obtains therefor an obligation not reduced in amount of principal or rate of interest, of which the maturity date is not postponed, and for which no concession in the priority of the lien has been given.

Department of Justice,
Harrisburg, Pa., September 22, 1932.

Honorable William D. Gordon, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have asked whether your powers as Secretary of Banking in possession of closed institutions with respect to the disposition of personal property consisting principally of stocks and bonds, include the following:

1. The right, without leave of court, and for any price, to sell listed and unlisted securities belonging to the estates of institutions in your possession.

2. The right, without leave of court, to exchange securities in connection with the reorganization or readjustment of the obligations of corporations issuing them.

Section 29 of The Banking Act 1923, approved June 15, 1923, P. L. 809, prescribes your powers and duties when in possession of the business and property of any corporation or person subject to the jurisdiction of the Department of Banking. Section 29, as amended

by the Act of May 5, 1927, P. L. 762, and by Act No. 2 of the Extraordinary Session of 1932, approved July 20, 1932, gives you the powers of a receiver appointed by any court of equity in this Commonwealth, and vests in you, in your official capacity, all the rights, powers and duties of the corporation or person whose business and property you have taken into possession. It gives you title to all the property of such corporation or person.

> "* * * including debts due, liens, or securities therefor, and rights of action or redemption, whether or not the property of such corporation or persons, including debts due, liens, or securities therefor, and rights of action or redemption, are held in the name of such corporation or person, or in the name of some other corporation or person, but actually the property of the corporation or person of which, or of whom, the secretary has possession."

Section 32 of The Banking Act 1923 prescribes your powers with respect to the sale of real estate and personal property, including listed and unlisted securities.

Subsection (b) of that section as amended by the Act of May 28, 1931, P. L. 193, and by Act No. 2, approved July 20, 1932, provides as follows:

> "The secretary may sell at public sale any or all of the real and personal property of such corporation or person without any order of court. He may, with leave of court, after such notice to creditors by advertising or otherwise as the court may direct, sell either real or personal property at private sale upon such terms and under such conditions as the court, upon petition of the secretary, may direct, and all sales theretofore made may be approved by the court.
>
> "He may, without leave of court, sell either real estate or personal property at private sale, under such terms as to him may appear reasonable and proper, provided that the net consideration realized from such sale shall not be less than the appraised value of the asset so sold, as set up and established in the inventory and appraisement, filed in the court having jurisdiction over the estate of such corporation or person, as required by section thirty-eight of this act as amended. Sales under this section may be either all for cash or partly for cash and partly for evidences of indebtedness approved by the court."

Subsection (d) of Section 32, as amended by the Act of May 5,

1927, P. L. 762, and by Act No. 2, approved July 20, 1932, provides that:

> "Listed and unlisted securities may be sold on any of the stock exchanges or otherwise, at such time or times, and in such manner, as may be determined by the secretary to be necessary for the best interests of the estate of said corporation or person."

In these sections, as amended, will be found legislative authority for your disposition of personal property of the character to which your inquiry refers.

Subsection (b) of Section 32 of The Banking Act 1923, as amended, permits you to sell, without leave of court, any real estate or personal property at private sale on any terms reasonable and proper, provided the net consideration realized is not less than the official appraised value of the asset sold. This subsection deals generally with sales of real and personal property. In making sales under authority of this subsection, you are obliged to obtain at least the appraised value thereof. However, subsection (d) of the same section, as amended, applies specifically to the sales of listed and unlistel securities; it does not subject you to the restrictions imposed by subsection (b) with respect to property generally.

In our opinion the sale of listed and unlisted securities without leave of court is governed exclusively by subsection (d) of Section 32. Subsection (b) must be limited in its effect to property other than that expressly mentioned in subsection (d).

This is in accord with the well-settled rule of construction to the effect that specific provisions in an act, relating to a particular subject, must govern in respect of that subject as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to embrace the subject to which the particular provisions relate: *Robert Thomas v. Rex Hinkle et al.*, 126 Pa. 478, 483 (1889); *Kolb, Appellant, v. Reformed Episcopal Church of the Reconciliation*, 18 Pa. Superior Ct. 477, 481 (1901). See also *Endlich on the Interpretation of Statutes*, Section 216. Such a construction removes all inconsistency, and permits the two sections to be read together.

Therefore, it is our opinion that you are permitted, under this section, as amended, to dispose of any stocks, bonds or other securities at any time, to any party, for any price, and subject to such terms as in your best judgment will benefit the estate for the corporation or person owning the same.

The answer to the first question answers in part the second. Having the right to sell a bond or share of stock for less than its face or appraised value, clearly you have the right, without leave of

court, to protect it as an asset, where necessary or advisable, by exchanging it for other securities of the same or a related issuing company, if the result be no diminution of the value of the security. Where the effect of the exchange is to give to you an obligation subordinated in position to that exchanged or paying interest at a lesser rate there would result such diminution in value as to constitute the transaction a compromise or a composition with the debtor.

Section 34 of The Banking Act 1923, as amended by the Act of May 5, 1927, P. L. 762, reads as follows:

> "The secretary may, with leave of court, compound or compromise any debt, claim, or judgment due to the corporation or person, and discontinue any action or other proceeding pending therefor, if done in good faith and after proper inquiry; and may require all mortgages, conditional contracts, pledges, and liens of or upon any real or personal property of such corporation or person, to be satisfied, cancelled, or assigned to him, as he may deem best, or he may sell the property subject thereto."

This section has particular reference to obligations owing by individuals or corporations, including mortgages, pledges, liens, etc., the face value of which it is found impossible to collect in full. It provides for procedure to be taken where in your judgment as Secretary of Banking it is proper to accept in settlement therefor less than such face amount. In cases of this character leave of court is necessary.

If, in your opinion, the best interests of the estate are served by effecting an exchange of securities for other obligations of the same debtor where the transaction does not entail a loss because of a reduction of the principal debt, the rate of interest, the date of maturity, or a concession in the priority of the obligation, you may consent to such exchange without leave of court. However, if the transaction results in any of the foregoing changes, then it becomes a compromise or a composition and to accomplish such an end you must obtain leave of court.

To summarize, you are advised that as Secretary of Banking in possession of closed institutions you enjoy the same unrestricted right and power to sell, transfer and deliver listed and unlisted securities as was enjoyed by the person or corporation owning them before you took possession of his or its business and property. You may, without leave of court, and without notice to depositors, creditors and stockholders of the closed institution, so dispose of any and all listed or unlisted securities in your possession belonging to such institution to such parties, at such times, on such terms and for such

prices as to you may seem best for the interests of the estate concerned. Where you desire to exchange securities for other obligations you may do so without leave of court only where, as a result of the transaction, you obtain an obligation which is not reduced in amount of principal or rate of interest, of which the maturity date is not postponed, and for which no concession in the priority of the lien has been given. In all other cases it is necessary to obtain leave of court to effect such exchange.

Very truly yours,

DEPARTMENT OF JUSTICE,
HAROLD D. SAYLOR,
Deputy Attorney General.

OPINION NO. 66

Corporations—Capital Stock—Returns to Secretary of the Commonwealth on Actual Increases of—Bonus Acts of 1901, P. L. 3; 1929, P. L. 343; 1929 P. L. 671; 1927, P. L. 322, Sec. 6.

A corporation which authorized an increase of its capital stock by a corporate election, and which made a partial increase within the amount authorized, should have made a return to the Secretary of the Commonwealth of the amount of each increase, whether such amount was less than the full amount, or the full amount authorized, within thirty days after the increase was made. It was likewise required to pay to the Commonwealth the bonus assessable on such increase within a like period of time. Acts of 1901, P. L. 3; 1927, P. L. 322, Sec. 6; 1929, P. L. 343; 1929, P. L. 671.

Department of Justice,
Harrisburg, Pa., September 22, 1932.

Honorable Richard J. Beamish, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request to be advised as to the time when a corporation is required to make a return to the Secretary of the Commonwealth of the amount of any increase of its capital stock, and when such corporation must pay the bonus due on such increase.

You direct our attention to the report of an audit of the affairs of the Department of State made in accordance with the Act of April 9, 1929, P. L. 343, for the period from June 1, 1929, to December 1, 1931, with particular reference to that section of the report (Page 14) relating to "returns on actual increase of capital stock."

The Act of February 9, 1901, P. L. 3, provides the procedure for corporate elections to increase stock. Section 3 of that act provides that it shall be the duty of such corporations, if consent is given to

such increase, to file in the office of the Secretary of the Commonwealth within thirty days after such election one of the copies of the certificates of the president and secretary of the annual meeting, or one of the copies of the return of such election at the special meeting, with a copy of the resolution calling the same thereto annexed; and thereafter the increase may be made at such time or times as shall be determined by the directors. The other provisions of that section dealing with the return by the president of the actual increase within thirty days to the Secretary of the Commonwealth have been reenacted in the Act of April 20, 1927, P. L. 322, Section 6.

The Act of 1927 is an act to amend, revise, consolidate, and change the laws relating to bonus. It was subsequently amended by the Act of April 25, 1929, P. L. 671, and supplemented by the Act of April 9, 1929, P. L. 343, (The Fiscal Code) Article VII, Section 705 (a), and Article VIII, Section 805 (a).

Section 6 of the Act of April 20, 1927, P. L. 322, requires the president or treasurer of a corporation whose stockholders have consented to the increase of the capital stock to make a return of the amount of increase actually made, within thirty days thereafter, and concurrently therewith to pay to the Secretary of the Commonwealth the bonus due on such increase of capital stock.

Section 7 of that act directs that the Secretary of the Commonwealth shall not permit the filing in his office of the proceedings for such increase until he is satisfied that the bonus upon such increase of capital stock has been paid. That is to say, the Secretary of the Commonwealth may not accept a return by the president or treasurer of a corporation of the actual increase of its capital stock until the bonus upon such increase has been paid.

The Act of April 20, 1927, P. L. 322, and its amendments, are revenue acts: *Commonwealth v. Independence Trust Company,* 233 Pa. 92 (1911). They should be construed so as to effectuate the purpose of their enactment: that is, to raise revenue whenever any corporation avails itself of its lawful right to increase its capital.

The Act of April 20, 1927, P. L. 322, as originally enacted and as amended by the Act of April 25, 1929, P. L. 671, permits the directors of a corporation which has, by a corporate election, authorized an increase of its capital stock, to carry such authorization into effect at "such time or times as shall be determined by the directors." It follows, therefore, that after the return of an election to increase its capital stock has been filed by a corporation with the Secretary of the Commonwealth, there is no certainty when the corporation will avail itself of its license to make the increase in fact by the issuance of its stock.

The transactions to which your attention has been directed by the report of an audit of the affairs of your department indicate that

some corporations withheld a return or returns of partial increases of capital stock authorized until the full amount of the capital increase authorized at the corporate election had been made in fact. They paid the bonus due to the Commonwealth concurrently with such return. This practice is in violation of the statutes noted above.

While the provisions of the applicable statutes to which we have referred make it possible for a corporation to authorize an increase of its capital stock without the necessity of availing itself presently of its authority to issue stock to the full amount of the increase authorized or obligating it to pay presently the bonus assessable upon the full amount of the increase authorized to the Secretary of the Commonwealth, they at the same time require the corporation to file a return on any increase less than the amount authorized by the corporate election within thirty days after the "actual increase" and concurrently to pay the bonus. The uncertainty as to the time when a return of any increase shall be made and the bonus thereon shall be paid, which would otherwise exist by reason of the open authorization to the Board of Directors to determine the time when an actual increase shall be made in its capital stock, is eliminated by this requirement.

The Legislature, by the use of the word "actual," in the statutes, has made manifest its intention to distinguish between the corporation's license to increase its capital stock and the exercise by the corporation of its power under such license to issue the additional capital stock so authorized.

If the Legislature intended to require but one return to be made and that return to be filed within thirty days after the capital had been increased to the full amount authorized at the corporate election, then there would be no reason for the provision that "the return made to the Secretary of the Commonwealth shall show the amount of increase *actually* made."

A partial increase of its capital by a corporation adds to its capital funds and is, therefore, an increase of its capital in fact. If we adopted an interpretation which permitted a corporation to wait until its capital stock had been increased to the full amount authorized at the corporate election, then it would not need to make a return unless the *total amount* of increase should actually be made. Such construction would be equivalent to saying that a corporation having authority to increase its capital to $3,000,000, which exercises its license only to the extent of an increase to $2,000,000, need not file a return, and, concurrently therewith pay to the State Treasurer a bonus on $2,000,000. Such construction is not warranted by the language of the applicable statutes. If we adopted it, we would do violence not only to the language of the statutes but also to the purpose for which they were enacted.

On the other hand, the language of the Act of April 20, 1927, P. L. 322, does not permit us to conclude that the Legislature intended to require the corporation to pay the bonus on any increase of capital stock concurrently with the filing of the return of the corporate election. If that were the intendment of Section 7 of the act, there could be no reason for requiring the additional return of the "actual" increase of capital stock and directing that payment of the bonus should be made concurrently with the latter return, as is provided in Section 6 of the Act of April 20, 1927, P. L. 322, and Sections 705 (a) and 805 (a) of the Act of April 9, 1929, P. L. 343 (The Fiscal Code).

Therefore, you are advised that a corporation which authorized an increase of its capital stock by a corporate election, and which made a partial increase within the amount authorized, should have made a return to the Secretary of the Commonwealth of the amount of each increase, whether such amount was less than the full amount, or the full amount authorized, within thirty days after the increase was made. It was likewise required to pay to the Commonwealth the bonus assessable on such increase within a like period of time.

The provisions of the Act of February 9, 1901, P. L. 3, in this respect are the same as those of the Act of April 20, 1927, P. L. 322. Consequently all increases of capital stock made between 1901 and 1927 were subject to the same requirement as to return of such increases and as to payment of bonus as has been in effect since the enactment of the Act of 1927.

Yours very truly,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION NO. 67

Public schools—Vaccination—Authority of school districts to provide for free vaccination.

School districts are without authority to expend public moneys for the purchase of vaccine and to provide free vaccination for school pupils.

Department of Justice,
Harrisburg, Pa., September 28, 1932.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether boards of school directors may expend school funds for the purchase of vaccine and

to provide free vaccination for children attending the public schools.

The School Code of May 18, 1911, P. L. 309, contains no express authorization of expenditures of this kind, and no general power which we could construe to include such authority. Section 1511, which was added to the School Code by the Act of July 17, 1917, P. L. 1032, 24 P. S. 1511, permits school districts to provide for care and treatment of defective eyes and teeth of school children, but there is no mention of vaccination.

Our conclusion is supported by the general policy of the Commonwealth in respect to the so-called compulsory vaccination provisions of the Act of June 18, 1895, P. L. 203, 53 P. S. 2181, 2182. Ever since its enactment its enforcement has been regarded as the function of the health authorities and not of the school districts. In *Stull v. Reber,* 215 Pa. 156, 160 (1906), the Supreme Court said of the act:

> "But the act is in no proper sense a regulation of school districts. It is an act entitled 'for the more effectual protection of the public health in the several municipalities of the Commonwealth' and is a general statute on that subject. What bearing it has on schools and school districts is altogether incidental to them as constituents of the community. * * *"

A similar ruling was made in *Commonwealth v. Gillen,* 65 Pa. Super. Ct. 31, 34 (1916).

In addition to the matters just mentioned, it is to be noted that Sections 22 and 27 of the Act of June 26, 1895, P. L. 350, 53 P. S. 9062, 9069, permit bureaus of health in cities of the second class to provide free vaccination, and Section 2309 of the Act of June 23, 1931, P. L. 932, 53 P. S. 1298, 2309, affords a similar authority to boards of health in cities of the third class.

Therefore, we advise you that boards of school directors do not have authority to purchase vaccine and to furnish free vaccination facilities to school pupils.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 68

Public School Employes' Retirement Board—Superannuation retirement—Employment of persons over seventy years of age by school districts—Act of July 18, 1917, P. L. 1043, Sec. 14.

The law does not prohibit a school district to employ persons over the age of seventy years, even though such persons were in the employ of the

district before reaching that age and were members of the Public School Employes' Retirement Association.

Section 14 of the Act of July 18, 1917, P. L. 1043, as amended, does not authorize the Public School Employes' Retirement Board to interfere with such employment where no claim is made by the employe for superannuation retirement allowances.

Department of Justice,
Harrisburg, Pa., October 6, 1932.

Honorable W. M. Denïson, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you what action the School Employes' Retirement Board should take in respect to the following case:

A school attendance officer, a member of the school employes' retirement association, has reached the age of seventy years but has not applied for superannuation retirement, or for any retirement fund benefits. Instead, he has chosen to continue in the service of the school district, as a school janitor, and the school board has employed him in that capacity.

No question of the administration of the retirement funds or the payment of any benefits or annuities is involved in your inquiry. It concerns only the simple fact that the school board has employed a man who is over seventy years old.

In our opinion there is nothing in the situation which requires or would warrant any action by the Retirement Board.

We have not overlooked the provisions of the Act of July 18, 1917, P. L. 1043, Section 14, subsection 2, as last amended by the Act of May 15, 1929, P. L. 1759, which are as follows:

> "2. Each and every contributor [to the school employes' retirement fund] who has attained or shall attain the age of seventy years shall be retired by the retirement board, for superannuation, forthwith, or at the end of the school term in which said age of seventy years is attained."

That passage, however, must be read in light of the scope of the authority and functions of the School Employes' Retirement Board as defined by the act. An examination of the legislation on this subject makes it clear that the board was established to administer the funds of the retirement system. Nowhere do we find any ground for concluding that the board may dictate or in any way control the employment or discharge of employes of school districts. Nor does the school law make the authority of school boards, in matters of employment, subject to control by the Retirement Board.

Therefore, we conclude that whatever authority or duties are conferred or imposed by the provision just quoted, must be confined within the general function of the board,—the administration of the retirement funds. Within these bounds, the board has power to treat a member as retired, but it cannot discharge him from his job or prevent his employment on a new job. Nothing in the act would warrant the extension of the activities of the board into the field of hiring and dismissing school employes. That function has been given to the school boards alone.

It may be, as has been suggested, that the sponsors of the Act of 1917 intended to prevent school districts from employing in any capacity any person over the age of seventy years. But the Legislature has failed to embody that intention in the law. On the other hand, the Legislature may have intended to give school boards an easier way of eliminating employes who had outlived their usefulness, without making such action compulsory in every case. The language of the act is not inappropriate to express such a purpose.

We realize that the statutory language is not as clear as it might be. If a school employe should continue in the employ of a school district after the age of seventy, and should at the same time demand superannuation allowance from the retirement fund, a question might arise in respect to his right to such payments. But we are not called upon to consider such a situation here. All that we now decide is that the School Employes' Retirement Board is without authority to interfere in the relation of employer and employe existing between a school district and a school janitor, as long as no question of payment of moneys from the retirement fund is involved.

Therefore, we advise you that the School Employes' Retirement Board should not take any action whatever in the case stated to us.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 69

Public Service Companies—Securities—Sale of—Dealer—Salesmen—Registration. Securities Act of April 13, 1927, P. L. 273.

The Securities Act applies to and affects public service companies and the sale of their securities to the same extent that it applies to other entities and individuals in the sale of securities. The Securities Commission has no authority to regulate the issuance of securities. However, it may investigate

any such issue in the hands of dealers, to determine whether fraud has been or is being practiced in the offering and sale of the issue to the public. If such fraud is found, the Commission may forbid any further offerings or sales of the securities by the dealers.

Employes of public service companies, when selling securities of their employers, under certain conditions, need not register as salesmen under the act. Such salesmen are in all other respects subject to the same restrictions and penalties, and the same supervisory power of the Commission as registered salesmen.

Department of Justice,
Harrisburg, Pa., October 7, 1932.

Honorable James M. Magee, Chairman, Pennsylvania Securities Commission, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether the Securities Act of April 13, 1927, P. L. 273, is intended to apply to the registration of public service companies and securities issued by such companies.

The Securities Act is intended to regulate individuals and entities dealing in securities, rather than to regulate the issuance of securities or to control the financing of corporations. Such was the interpretation placed on the Act of June 14, 1923, P. L. 779, by the Supreme Court in *N. R. Bagley Co., Inc. v. Peter G. Cameron, Commissioner of Banking,* 282 Pa. 84 (1925). That statute was essentially re-enacted by the Act of 1927, now in effect. In that case the Supreme Court said, at page 91:

> "While the legislative enactments of some states * * * attempt to control the financing of corporations, our act is intended to regulate the registration of stock and bond dealers and salesmen rather than the issuance of securities. Section 15 is the only part of the statute which indicates a purpose to regulate in any manner the securities themselves. * * *"

And in *Insuranshares Corporation v. Pennsylvania Securities Commission,* 298 Pa. 263 (1929), the same interpretation was placed on the Act of 1927. The court said, at page 264:

> "* * * the act is intended to regulate the registration of stock and bond dealers and salesmen rather than the issuance of securities and 'does not contemplate the approval by the commission of the business expediency of the plan of financing a corporation whose securities are to be offered for sale by the dealer * * * [but] an investigation to determine whether the securities are being offered to the public "honestly and in good faith" without an intent to deceive or defraud.'"

See also *Crockston Safety Razor Company v. Pennsylvania Securities Commission,* 34 Dauphin County Reports 176 (1930); *Meteor Crater*

Exploration and Mining Company v. Cameron, 29 Dauphin County Reports 248 (1926).

I. DEALERS AND SECURITIES.

The term "dealer" is defined in Section 2 (c) as follows:

> "(c) The term 'dealer' shall include every person or entity, other than a salesman who engages in this State, either for all or part of his or its time, directly or through an agent, in selling, offering for sale or delivery, or soliciting subscriptions to, or orders for, or undertaking to dispose of, or to invite offers for, or inquiries about, or dealing in, any manner in any security or securities within this State, *including securities issued by such entity.*"

The section, however, enumerates fourteen transactions which are excepted from the above broad definition, and provides that "None of the * * * transactions [so enumerated] shall constitute the person or company engaging therein a dealer * * *." For example, subparagraph 5 of this section exempts from registration among others, any company which issues securities and sells the issue to a registered dealer. Subparagraph 8, as amended by the Act of May 8, 1929, P. L. 1659, exempts any company organized under the laws of this State, or of a foreign State, and having fifty per cent of its capital invested in this State, which in good faith disposes of its own securities for its own account without any commission, and at a total expense of not more than three per cent of the proceeds realized thereon, and where no part of the issue is used in payment for patents, services, good will, or for property located outside of this State. Subparagraph 9 exempts from registration any Pennsylvania corporation engaged in the sale of its own securities, where its capital stock, added to its other outstanding securities, does not exceed $25,000, and where the securities are issued and disposed of in good faith for the sole account of the corporation. Subparagraph 10 exempts Pennsylvania corporations in the original issuance and sale of their own securities, in cases where the total number of stockholders does not exceed twenty-five, and where there are no advertisements, agents or public solicitation. The other subparagraphs enumerate transactions which may be carried on without registration. For the purpose of this opinion it is not necessary to review each of the exceptions contained in these subparagraphs. It is sufficient to point out that there is no exception applicable to public service companies as distinguished from other companies, and that the above quoted definition of the term "dealer," and the fourteen exceptions thereto, apply to public service companies to the same extent that they apply to other individuals and entities.

It is important to bear in mind that under the express terms of the above quoted definition, an entity offering its own securities is a dealer. Hence, all such entities require registration unless their transactions are within one or more of the exceptions specified in the act.

The applicant for registration as a dealer must, under the provisions of Section 7, satisfy the Commission that the applicant is of good repute and that its plan of business is fair, just and equitable in that there is no fraud in connection with the proposed offering of securities to the public. In the sale of their securities, or to the extent that they are dealing in any manner in securities, public service companies are subject to the jurisdiction of the Securities Commission as are all other companies. Whenever they operate as dealers within the meaning of Section 2 (c) they are required to be registered, and must therefore satisfy the Commission as to their good repute and that their securities are being offered honestly.

It should be noted that the term "company" as used in the Securities Act is very broad in its meaning, and as defined in Section 2 (b), includes "a corporation, part-stock company, partnership, association, company, syndicate, trust, incorporated or unincorporated, heretofore or hereafter formed under the laws of this State, or any other State or Territory of the United States, or any foreign state or country."

Under the provisions of Section 15, the Commission has authority to regulate the securities themselves to the extent that they have been, or are being sold fraudulently by dealers. That section provides:

> "Section 15. The commission may at any time require a dealer to file with it a list of securities which, within this State, he has offered for sale or has advertised within the preceding six months, or which he is at the time offering for sale or advertising, or any portion thereof, and thereupon, if it shall appear that any of such offerings of the dealer have not been made honestly and in good faith, but have been made with intent to deceive or defraud, it may prohibit the dealer from selling or offering such securities as have been so sold or offered or from in any way advertising them within this State."

This section gives the Commission full authority to investigate the manner in which securities are being, or within the past six months have been, offered to the public by dealers. As we have pointed out, public service companies are subject to the same regulation as other dealers and if there is any fraud or lack of good faith in the offering of securities of such companies, the Commission may prohibit their sale within this State.

II. SALESMEN.

The term "salesmen" is defined by Section 2 (d) of the act. It is as follows:

> "(d) The term 'salesmen' shall, except as provided in section four, include every person or company employed or appointed or authorized by a dealer to sell, offer for sale or delivery, or solicit subscriptions to or orders for, or dispose of inquiries about, or deal in any manner in, securities within this State, whether by direct act or through subagents."

Salesmen are registered by the Commission in accordance with the provisions of Section 10 of the act upon application of registered dealers and upon satisfactory evidence being submitted to the Commission as to the good repute, fitness and qualifications of such salesmen.

Section 4 is the only part of the Securities Act which refers in any way to public service companies as distinguished from any other individuals or entities; it contains an exception relating specifically to salesmen who are employes of public service companies subject to the Public Service Company Law of Pennsylvania. This section provides:

> "Section 4. The employes of a company subject to the provisions of the Public Service Company Law of Pennsylvania shall not for the purpose of registration, be considered as salesmen or agents within the meaning of this act, and shall not be required, as to securities issued by such company, or as to securities issued by a company subject to regulation by the Interstate Commerce Commission, which latter company controls directly or otherwise such other company, to procure registry certificates to enable such employes, acting for either of such companies and no other, or for a securities company owned or controlled by either of them and engaged in promoting the distribution of such securities as incidental to their regular employment, to sell or solicit or negotiate for the sale or purchase of such securities in the territory served by the company by which they are employed. Such employes shall however be subject to the other provisions of this act to the same extent as though in fact registered as an agent or salesman thereunder.
>
> "If the commission has reason to believe that any such employe has in any way violated, or is violating, or is about to violate, any of the provisions of this act, or has reason to believe that such employe has been guilty of any fraud or fraudulent practice, it may order such employe to cease and desist from the further sale of such securities. Such order shall be made after notice and hearing, and shall be subject to appeal as is herein provided for in the case of a revocation of an agent's or salesman's registration."

In effect, the above section provides that the employes of a public service company operating in Pennsylvania shall not for the purpose of registration be considered as salesmen or agents when they are selling the securities of that company, when they are selling the securities of a holding company regulated by the Interstate Commerce Commission, which controls the first mentioned company, or when they are acting for a security company owned or controlled by either of the two previously named types of companies and engaged in the distribution of their securities. However, these exemptions apply only so long as the employes sell, solicit or negotiate for the sale of such securities in the territory served by the public service company by which they are employed and as part of their regular employment.

It is especially to be noted that the statutory provisions we have just discussed exempt employes of public service companies only from registration. In every other respect any such employe who is engaged in disposing of securities of his company is subject to the same restrictions and penalties, and the same supervisory power of the Securities Commission as a registered salesman.

To Summarize:

The Securities Act applies to and affects public service companies and the sale of their securities to the same extent that it applies to other entities and individuals in the sale of securities. The Securities Commission has no authority to regulate the issuance of securities. However, it may investigate any such issue in the hands of dealers, to determine whether fraud has been or is being practiced in the offering and sale of the issue to the public. If such fraud is found, the Commission may forbid any further offerings or sales of the securities by the dealers.

Employes of public service companies, when selling securities of their employers, under certain conditions, need not register as salesmen under the act. However, such salesmen are in all other respects subject to the same restrictions and penalties, and the same supervisory power of the Commission as registered salesmen.

Very truly yours,

DEPARTMENT OF JUSTICE,
WILLIAM H. NEELY,
Special Deputy Attorney General.

OPINION NO. 70

State institutions—Cooperative stores for benefit of pupils, patients and inmates.

Cooperative stores for the sale of small articles to pupils, patients and inmates may be operated in state institutions. Such stores must be operated under proper supervision and no public money may be used therein.

Department of Justice,
Harrisburg, Pa., October 31, 1932.

Honorable James N. Rule, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether trustees of State Teachers Colleges may lawfully permit the operation of cooperative stores on the premises of the respective colleges. The purpose of these stores would be to provide the students with books and supplies needed in their college courses and other school and athletic activities, and also with small articles of personal use of various kinds, including class jewelry and emblems. The proposed store would be operated by representatives of the student body, and the profits would be devoted to the benefit of the students generally in such manner as the students or their representatives might determine.

For this purpose your plan would make use of existing student-body organizations, or would provide for the formation of such organizations where none already exist. They would be voluntary associations, financed by small membership dues. Funds of these associations would be used to furnish the original capital necessary to set up the stores, although you say that very little initial capital would be needed, because book publishers and other merchants would give liberal credit to such stores.

In an opinion dated September 3, 1929, addressed to the Department of Property and Supplies, and a supplemental opinion dated October 11, 1929, addressed to the Superintendent of Public Instruction, Honorable Wm. A. Schnader, then Special Deputy Attorney General, stated the general nature of the articles which might be purchased by the Commonwealth for sale to students in State teachers colleges.

We understand that your present inquiry is not concerned with any of the questions involved in those opinions, and that the proposed cooperative stores are intended to eliminate the conduct of stores or supply rooms by the Commonwealth itself, acting through the college officers.

The Secretary of Health and the Secretary of Welfare inform us that in certain institutions under the care of their departments, similar cooperative stores serving the needs of the inmates and employes of

the institutions have been in operation for some years. These institutions are largely the State Hospitals and sanitoriums. These stores, in all cases, we are informed, were started with private funds, and have been conducted on a purely cooperative basis. They supply to the inmates, patients and employes small necessities and inexpensive luxuries which it would be practically impossible for them to obtain in any other way. The stores are not designed as money-making enterprises, but what small profits are realized are used for the common benefit of the patients and inmates.

Some question has been raised, informally, as to the propriety of the operation of these stores in institutions of the Departments of Health and of Welfare. Since they are so similar in principle to the proposed stores in State teachers colleges, we may consider them together.

These stores are not commercial enterprises, and their operation is not to be compared with grants of concessions to private individuals or corporations for the conduct of business on public property. They are, first and last, for the benefit of the people for whom the State maintains the institutions in question. Pupils in the teachers colleges must have books and other articles for their school work, and promptness and convenience in obtaining them are important factors. Cooperative stores of this kind will afford the most convenient and prompt method of supplying these needs. Outside the category of bare necessities are many items which are commonly regarded as essentials or near-essentials for even the most modest comfort. Others, perhaps less essential, are nevertheless in constant demand as incidental to the every-day life of great numbers of persons. In the hospitals the comfort and pleasure to be obtained by persons confined in these institutions from the articles which they can purchase in these stores cannot be measured.

In many cases, a store in the institution is the only practical source of supply for these small articles of every-day need. A number of the institutions are far removed from adequate stores. But even if outside stores were close at hand, few patients in mental, tuberculosis or other hospitals could go to them.

Of course there will have to be limitations on the scope of the activities of the stores to keep them within the purposes for which they were formed. These limitations can best be determined as the need arises, by the exercise of sound discretion by supervising officials. However, we believe that in order to insure the propriety of the maintenance of the proposed stores, the following conditions should be observed:

The organization operating the store of each institution should be a distinct unit, without connection or relation with similar stores at other institutions. No scheme of joint buying or other combined op-

erations or contacts made through the agency of public authorities should be employed.

No moneys of the Commonwealth may be used in the establishment or operation of the stores. In this respect, they must be purely private enterprises. The proposals that persons handling money of the stores be bonded and that there be annual audits are excellent ones for cases where the amounts involved warrant such regulations.

All business of the stores should be conducted by and in the names of the store organizations. No purchases or other transactions for the stores may be made or carried on by the institutions, in their names.

The activities of the stores should be confined to such as are for the real benefit, comfort and convenience of the persons in the institutions, and the margin of profit on sales should be kept low. The financing of extensive enterprises, even for the common benefit of all, from profits of the stores, is not to be encouraged. Obviously, no attempt may be made to compel any person or groups to purchase any article from or through the stores instead of from other tradesmen. On the other hand, no person in an institution may be denied the privilege of purchasing at its store.

Your letter suggests in respect to stores at teachers colleges, that the boards of trustees and the administrative officers of the colleges should be represented in the management of the stores. Of course the trustees of any institution should first determine whether any such store is to be operated in their particular institution. If the permission is granted, the trustees, whether of teachers colleges or of other institutions, either directly or through the president, should prescribe rules and regulations concerning the designation of student, or patient representatives, compensation of attendants, and general store policies and finances, and should exercise supervision and jurisdiction over the conduct of the business. But we do not believe that the trustees or other authorities, in their official capacities, should be expected to take any active part in the conduct of the store or the handling of its funds.

Therefore, we advise you that cooperative stores of the general nature described in this opinion may be operated in State teachers colleges and other institutions, for the benefit and convenience of pupils, patients and other persons therein. No public moneys may be employed in the founding or maintenance of such stores, nor may they be operated as enterprises of the State or any of its agencies.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 71

School directors—Employment by school district—School Code of 1911, P. L. 309, Sections 226 and 2804.

Section 226 of the School Code of May 18, 1911, P. L. 309, forbids a school district to employ one of its school directors in any capacity during the term for which he was elected. Section 2804 of the Code makes no exceptions to this prohibition.

Department of Justice,
Harrisburg, Pa., November 1, 1932.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether a board of school directors may employ one of their number to render certain "technical services" to the school district and compensate him for those services. You state that the case you have in mind involves a situation in which the director is capable of rendering the necessary services and in which it would be difficult to obtain another person to do the same work.

It has been suggested that the authority for such employment may be found in Section 2804 of the School Code of May 18, 1911, P. L. 309. That section is as follows:

> "Where by the provisions of this act, any services or additional services are imposed upon any public official for which no compensation is provided, the board of school directors of the proper district may, unless such service is required to be performed without compensation, pay out of the funds of the district such reasonable compensation for such services or additional services as it may determine, subject to the provisions of this act."

Section 2804 above quoted must be read in connection with Section 226 of the Code, which provides as follows:

> "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 Section 226 of the Code must govern the situation which you have submitted to us. That section expressly forbids employment of a director by the school board. The language is so stringent that it does not even permit a director to resign and then accept employment from the school district during the term for

which he was elected: *Employment of School Director by School District,* 14 Pa. D. & C. 360. In view of the provisions of this section, it is clear that Section 2804 does not apply to school directors.

Therefore, we advise you that a board of school directors may not employ one of their number under the circumstances outlined in your letter, and pay him for services rendered in such employment.

Very truly yours,

DEPARTMENT OF JUSTICE,
HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 72

Wage specifications—Violation or evasion of by contractor—Penalty—Department of Property and Supplies—The Administrative Code of 1929 as amended by Act of 1931, P. L. 350.

If a contractor deliberately violates or evades the wage specifications, and subsequently pays to the employes the difference between the minimum wage rate and the wages which they were originally paid, the contractor has violated Section 522 of The Administrative Code of 1929, and is liable for the penalty imposed.

If a contractor pays the minimum wages stipulated in the contract and through an arrangement with the employes later receives a refund of a part of the wages from the employes, either directly or indirectly, the contractor has violated Section 522 and is liable for the penalty provided.

Department of Justice,
Harrisburg, Pa., November 9, 1932.

Honorable John L. Hanna, Secretary of Property and Supplies, Harrisburg, Pennsylvania.

Sir: We have your request to be informed with regard to the following questions:

> "1. If the Contractor deliberately violates or evades the Wage Specifications, and subsequently pays to the employes the amount of wages which they were originally underpaid, is the Contractor thereby relieved from the penalty imposed under Section No. 522 of the Act of Assembly referred to above?
>
> "2. If the Contractor pays the wages specified in the contract and, through an arrangement with the employes, later receives a refund of a part of the wages from

the wage-earners, either directly or indirectly, does this method of evading the Wage Specifications subject the Contractor to the prescribed penalty?''

Your questions arise under Section 522 of The Administrative Code of 1929, as amended by the Act of June 1, 1931, P. L. 350, which authorizes the Commonwealth to provide minimum wage requirements in the specifications upon which contracts for the construction, alteration, or repair of public works are entered into by the Commonwealth, and which stipulate penalties for violations of these requirements.

This section provides as follows:

> ''The specifications upon which contracts are entered into by the Commonwealth for the construction, alteration, or repair of any public work shall, as far as possible, contain the minimum wage or wages which may be paid by the contractor or his subcontractors for the work performed by laborers and mechanics employed on such public work, and such laborers or mechanics shall be paid not less than such minimum wage or wages.
>
> ''Every contract entered into upon such specifications shall stipulate a penalty of an amount equal to twice the difference between the minimum wage contained in said specifications and the wage actually paid to each such laborer or mechanics for each day during which he has been employed at a wage less than that prescribed in said specifications. Every officer or person designated as inspector of the work to be performed under any such contract, or to aid in the enforcing of the fulfillment thereof, shall, upon observation or investigation, report to the department, board, or commission which made the contract award, all violations of minimum wage stipulations, together with the name of each laborer or mechanic who has been paid less than that prescribed by the specifications, and the day or days of such violation. All such penalties shall be withheld and deducted, for the use of the Commonwealth, from any moneys due the contractor, by the officer or person whose duty it shall be to authorize the payment of moneys due such contractor, whether the violation of the minimum wage stipulation of the specifications is by the contractor or by any of his subcontractors.''

We shall answer your inquiries seriatim.

I

Your first inquiry is with reference to the contractor who deliberately violates or evades the wage specifications and subsequently pays to the employes the difference between the minimum wage rate and

the wages which were paid. We are of the opinion that the language of Section 522 is clear on this point. The contractor may not by such supplementary payments evade the penalty provided in the act. To permit evasions in this manner would work a nullification of this section. The violation of the act occurs when an amount less than the minimum wage stipulation is paid to the employe in full payment for work and labor performed for the period. At that instant the contractor has made himself liable for the penalty provided in the act. He may not be relieved of the payment of this penalty by later tendering and paying to the employe an amount sufficient to comply with the wage specifications.

II

Your second inquiry is with reference to the contractor who pays the wages specified in the wage specifications of the contract, but has an arrangement with the employes whereby a part of the wages is refunded to the contractor, either directly or indirectly.

Section 522 is very explicit and specifically provides as follows:

> "The specifications * * * shall * * * contain the minimum wage or wages which may be paid by the contractor or his subcontractors for the work performed by laborers and mechanics employed on such public work, and such laborers or mechanics shall be paid not less than such minimum wage or wages."

Where the contractor pays to the employes the wages specified in the contract, part of which are later refunded by the employes by virtue of a mutual agreement, clearly such employes are ultimately being paid less than the wages specifically provided. It might be contended that the employes, when they agree to refund this money to the contractor, have a perfect right to do whatever they may wish with their property. But, is this arrangement or agreement between the employe and the contractor one of entire concord and harmony? Is it not rather one made out of necessity and desire to secure employment? We feel that it is of the latter type and not of the former.

We are of the opinion that the Legislature had in mind the prohibition and prevention of arrangements and agreements such as the one outlined in your second inquiry. Thus, it is clear that where the refund is made directly by the employe, it is in violation of Section 522 of The Administratve Code. Likewise, when refunds are made indirectly, but arising out of the arrangement or agreement between the employe and contractor, the contractor violates the act and incurs the penalty which it provides.

Therefore, we are of the opinion and you are advised:

1. That if the contractor deliberately violates or evades the wage specifications, and subsequently pays to the employes the difference between the minimum wage rate and the wages which they were originally paid, the contractor has violated Section 522 and is liable for the penalty imposed; and,

2. That if the contractor pays the minimum wages stipulated in the contract and through an arrangement with the employes later receives a refund of a part of the wages from the employes, either directly or indirectly, the contractor has violated Section 522 and is liable for the penalty provided under the act.

Very truly yours,

DEPARTMENT OF JUSTICE,
THOMAS W. BENDER,
Deputy Attorney General.

OPINION NO. 73

Notary Public—Fees—Affidavits—Adjusted Compensation Certificates—Act of May 18, 1924, Ch. 157, 43 Stat. at L. 121.

A notary public in cities of the first, second and third classes is not permitted to charge a fee for any affidavit taken to papers executed for the purpose of obtaining an adjusted compensation under the Act of May 18, 1924, c. 157, 43 State at L. 121.

Department of Justice,
Harrisburg, Pa., November 10, 1932.

Honorable Richard J. Beamish, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether in cities of the first, second, and third classes a notary public may claim a fee for taking an affidavit by an ex-soldier in connection with Adjusted Compensation Certificates.

The Congressional Act of May 19, 1924, c. 157, 43 Stat. 121, was passed to provide adjusted compensation for veterans of the World War, 38 U. S. C. A., Section 591.

Compensation under this act is allowed to any individual who was a member of the military or naval forces of the United States at any time after April 5, 1917, and before November 12, 1918, exclusive of (1) any individual who at any time during such period or thereafter

separated from such forces under other than honorable conditions; (2) any conscientious objector who performed no military duty whatever or refused to wear a uniform; or (3) any alien who at any time during such period or thereafter was discharged from the military or naval forces on account of his alienage.

The amount of the adjusted service credit is computed by allowing stated sums for each day of active service, in excess of sixty days, in the military or naval forces of the United States after April 5, 1917, and before July 1, 1919, as shown by the service or other record of the veteran.

The Pennsylvania Act of June 11, 1879, P. L. 148, provides:

> "That hereafter, it shall be the duty of any magistrate, alderman, justice of the peace, or any other person authorized to take acknowledgments and administer oaths, to perform such service for any soldier, widow or orphan of a soldier, or soldier's parents, who may apply to them for the purpose of making affidavit to papers for the purpose of obtaining pensions, free of charge therefor: Provided, That the provisions of this act shall only apply to magistrates, aldermen, justices of the peace or other persons authorized to take acknowledgments in cities of the first, second and third class."

Is adjusted compensation, payable under the provisions of the Act of May 18, 1924, c. 157, a pension within the meaning and intendment of the Act of June 11, 1879, P. L. 148?

In *Busser v. Snyder,* 282 Pa. 440, 128 Atl. 80, (1925), the court pointed out that pensions in their nature are compensation. In the opinion Mr. Justice Kephart said:

> "* * * Pensions or gratuities for military service are in the nature of compensation for a special and highly honored service to the State, implying the idea of a moral obligation on the part of the government; * * *"

While this pronouncement is dicta, it follows other and earlier authority for the same proposition. See *Donnelly v. U. S.,* 17 Ct. Cl. 105, 108 (1881). In that case the court said:

> "A pension is a periodical allowance of money to a person, in the nature partly of a gratuity and partly of payment for past benefits conferred; payment because it is supposed to be in consideration of previous services rendered to the government or the public, for which the compensation before made, if any, was inadequate in proportion to the benefits received and the ability of the nation in its prosperity to pay; * * *"

In *Singles v. U. S.,* 61 Ct. Cl. 433 (1926), the court in its opinion said:

> "* * * defendant insists (1) that the claim is one 'arising out of the pension laws,' and for that reason is not within the court's jurisdiction. * * *
>
> "If the claim be construed as a pension the court's jurisdiction is expressly excluded by the organic act. * * *
>
> "It is not necessary, however, to a proper decision of the case before us to decide that this court has no jurisdiction of any claim arising under the World War adjusted compensation act, because if it be conceded that plaintiff's claim is one that this court may consider, it would yet be true that the facts present an insurmountable obstacle to any recovery. When a case properly comes here under this phase of its jurisdiction, the court must apply the law to the established facts. * * *"

So far as our examination discloses, this is the only case in which the question whether adjusted compensation is a pension has been directly raised. We must, therefore, consider the term "adjusted compensation" in the light of the definitions stated in *Busser v. Snyder*, supra, and *Donnelly v. U. S.*, supra. As there viewed, a pension is an adjusted compensation, and vice versa, an adjusted compensation is a pension. As such, it is within the meaning and intendment of the term "pension" as used in the Act of June 11, 1879, P. L. 148.

Therefore, you are advised that a notary public in cities of the first, second and third classes is not permitted to charge a fee for any affidavit taken to papers executed for the purpose of obtaining an adjusted compensation under the Act of May 18, 1924, c. 157, 43 Stat. 121.

Yours very truly,

DEPARTMENT OF JUSTICE,
S. M. R. O'HARA,
Deputy Attorney General.

OPINION NO. 74

Legislature—Speaker of the House of Representatives—Eligibility for Membership in State Emergency Relief Board.

When the term of office of Speaker of the House of Representatives, (an ex officio member of the State Emergency Relief Board), expires, his membership in the Board will automatically cease.

Department of Justice,
Harrisburg, Pa., November 18, 1932.

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

Sir: We have your request to be advised whether Honorable C. J. Goodnough may continue to serve as a member of the State Emergency Relief Board after November 30, 1932, when he will cease to be a member of the Legislature, and automatically, therefore, will cease to be Speaker of the House of Representatives.

The State Emergency Relief Board was created by Act No. 51 of the 1932 special session of the Legislature, approved August 19, 1932. Section 1 provides that the board shall consist of the Governor, the Lieutenant Governor, the Auditor General, the State Treasurer, and the Speaker of the House of Representatives. In our opinion, this section of the act contemplates that the membership of the board shall consist of the persons who, for the time being, occupy the offices named.

After November 30 Mr. Goodnough will not be Speaker of the House of Representatives, and it will, therefore, not be possible for him to continue to hold offices which the Speaker is designated to hold ex officio.

Therefore, you are advised that after November 30, 1932, Mr. Goodnough will no longer be a member of the State Emergency Relief Board.

Very truly yours,

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

OPINION NO. 75

Taxation—Sales tax—Water, gas and electricity—Distribution of, by Municipalities and Public Service Companies—Act No. 53, Extraordinary Session of 1932.

Act No. 53 of the Extraordinary Session of 1932, providing a State tax upon sales of tangible personal property, does not apply to the distribution of water, gas and electricity by municipalities and public service companies.

Department of Justice,
Harrisburg, Pa., November 19, 1932.

Honorable Leon D. Metzger, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the distribution of water, gas, and electricity by municipalities and public service companies is a sale of tangible personal property within the meaning of Act No. 53, approved August 19, 1932, and therefore subject to the tax imposed by that act.

Section 3 of the act provides that:

> "A State tax is hereby imposed and assessed upon sales of tangible personal property, at the rate of one per centum upon each dollar of the gross income derived from the sales of such property, * * *"

Under this section the sales tax is imposed upon "sales of tangible personal property". We believe that in construing this expression, we are bound to regard the popular conception of its meaning rather than any technical construction.

This certainly seems necessary in the light of numerous decisions of the Supreme Court of Pennsylvania.

In *Commonwealth v. Light & Power Co.*, 145 Pa. 105 (1891), Mr. Justice Williams said at page 118:

> "* * * Laws are written ordinarily in the language of the people, and not in that of science * * *".

And in *Commonwealth v. Lowry-Rodgers Co.*, 279 Pa. 361 (1924), Mr. Justice Simpson, in passing upon the question whether roasting coffee is "manufacturing", stated that the process in question must be considered "in the popular, and therefore in the statutory, sense of the word". See also *Commonwealth v. Glendora Products Co.*, 297 Pa. 305 (1929).

In *Commonwealth v. Weiland Packing Co.*, 292 Pa. 447 (1928), Mr. Justice Frazer quoted with approval the definition of manufacturing given in 26 Cyc. as follows:

> "Manufacturing is: (1) the application of labor or skill to material whereby the original article is changed to a new, different and useful article, *provided the process is of a kind popularly regarded as manufacture* or the product of such process." (Italics ours.)

In *Commonwealth v. Sunbeam Water Co.*, 284 Pa. 180 (1925), the Supreme Court reversed the court below because it had not followed "the natural reaction of the mind" in determining whether the distillation of water was manufacturing.

With these decisions in mind, the question arises: Would the average person, in reading Act No. 53, believe that the distribution of water or gas through the mains to the consumer or of electricity through the wires constitutes sales of tangible personal property? We cannot reach this conclusion. On the contrary, we believe that it would be generally accepted that "sales of tangible property" means only the transfer of portable, merchantable articles.

This conclusion is unaffected by the broad definition of "sale" contained in Section 2 of the act.

Therefore, we advise you that Act No. 53 does not apply to the servicing of water, gas, or electricity to the consumer through pipes, mains, or wires.

Very truly yours,

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

OPINION NO. 76

Building and Loan Associations—Reconstruction Finance Corporation—Loans—Collateral—Act No. 4, Extraordinary Session of 1932.

Any building and loan association under the supervision of the Department of Banking, may, within the limits prescribed by the Act of July 28, 1932, Act No. 4, pledge with the Reconstruction Finance Corporation, or any other agency established under the authority of the United States Government, except national banks, any bonds and mortgages owned by it, or shares of its stock pledged to it, whether the contracts with the member-borrowers giving it title to such assets were entered into prior or after July 28, 1932, without the necessity of consent by the member-borrowers concerned.

Department of Justice,
Harrisburg, Pa., November 25, 1932.

Honorable William D. Gordon, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether, under the provisions of Act No. 4 of the Extraordinary Session of 1932, approved July 28, 1932, a building and loan association under your supervision may pledge as collateral for loans made to it by the Reconstruction Finance Corporation, or other Federal agency, bonds, mortgages, and shares of stock delivered to it by member-borrowers.

Section 2 of the Act of 1932 provides that any building and loan association of the Commonwealth

> "* * * shall have power and authority to borrow money from the Federal Home Loan Bank, the Reconstruction Finance Corporation, or any other corporation or agency established under the authority of the United States Government, except National banks, upon such terms and rates of interest, not exceeding the legal rate of interest in this Commonwealth, as may be agreed upon, and to assign its bonds and mortgages or other property, including the right to repledge the shares of stock pledged as collateral security without securing the consent of the

> owner thereto, as security for the repayment of its indebtedness as evidenced by its bond, obligation, or note given for such borrowed money, and such bond, obligation, note or notes may be in such form as is prescribed by the corporation or agency established under the authority of the United States Government, as aforesaid: Provided, however, That no building and loan association shall at any time borrow money from any such corporation or agency or in any manner now authorized by law in an amount exceeding thirty-five per centum of the withdrawal value of the stock issued by such association."

Nothing could be clearer than the provisions recited. Without question, this act, in terms complete in themselves, and independently of other legislative authority, gives to a building and loan association the right to pledge its assets, consisting of bonds and mortgages given to it, and stock assigned to it, as collateral for loans made to it by any governmental agency of the United States other than a national bank.

However, the question arises whether that right may be exercised with respect to assets which came into possession of an association prior to the approval of the act. Where a member-borrower has contracted with the association before it was given the power to pledge can he prevent the exercise of such power because of constitutional provisions protecting the obligations of contracts? Is the Act of 1932 unconstitutional as far as bonds and mortgages given and stock assigned prior to July 28, 1932, are concerned?

If a building and loan association enjoyed, previous to July 28, 1932, the right to pledge its assets, the 1932 act did not increase its rights. It merely stated them in connection with the grant of power to borrow money from certain governmental agencies. However, an examination of prior shares, now enjoys such right without restriction. Would the exercise of that right impair the obligation of the contract entered into when the association took a member's bond and mortgage and accepted an assignment of his stock in the association?

Admittedly there is a contractual relationship existing between the member-borrower and the association. No statute can impair the obligations of such a contract. This is elementary.

Article I, Section 10, of the Federal Constitution provides, inter alia:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

Section 1 of the Fourteenth Amendment to the Constitution provides in part:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

> the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *''

Furthermore, the Pennsylvania Constitution of 1874 safeguards property rights in the same general manner. Article I, Section 17, provides as follows:

> ''No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.''

Has the Legislature, in authorizing a building and loan association to do something more than it could do before it passed the 1932 act, attempted to do what the State and legislation indicates that heretofore no such right existed.

Prior to the 1932 enactment, a building and loan association was closely restricted in power to borrow money. The Act of June 2, 1891, P. L. 174, as amended by the Act of June 25, 1895, P. L. 303, permitted it to make, under certain conditions, temporary loans not exceeding in the aggregate ''at any one time twenty-five per centum of the withdrawal value of the stock issued'' by the association and to ''secure the payment of the same by interest bearing order, note or bond as collateral.''

The Act of July 9, 1919, P. L. 808, gave associations the additional right, under the same conditions to borrow up to the same limit and to secure the payment of such loans ''by pledge of bonds of the United States Government issued for war purposes as collateral.''

Neither of these acts affirmatively gave an association the power to pledge any other assets as collateral for loans made to it. In the opinion of November 29, 1905 (Official Opinions of the Attorney General 1905-06, p. 155), the then Commissioner of Banking was advised that under the Act of 1891 associations could not pledge mortgages. The grant of power made by the General Assembly in 1919 indicates that it was the legislative understanding and intention that an association could not pledge bonds and mortgages given to it by borrowers and the stock assigned by them, as collateral for loans.

We are then faced with the question whether a building and loan association which did not have, before July 28, 1932, the right to pledge a member's bond, mortgage, and Federal Constitutions prohibit? Does a building and loan association in parting with the possession and control of a bond and mortgage given and shares of stock pledged by a borrower, deny to him any of his contract rights?

There is no reason to believe that it does. The terms of the bond and mortgage usually given by the borrower evidence his intention that others than the association named therein may secure title to

them. The words "obligee, its successors and assigns," and "mortgagee, its successors and assigns," appear repeatedly in them as in all such documents where the party secured thereby is an individual or corporate entity other than a building and loan association. The commonly used forms of application for loan and stock loan note and assignment refer to the "association, its successors and assigns," and give to all of them right, title and interest in and to the shares of stock as collateral for the obligation evidenced by the note.

In none of these documents is there any phraseology imposing upon the association the duty to retain title and possession thereto. No such restriction is imposed on any other obligee or mortgagee. The inference is clear that the member-borrower has agreed to permit the association to assign his obligation and stock, provided, of course, such action does not impose upon him a liability that would otherwise not exist. The mere lack of power in the association legally to make such assignment, even though permitted by the borrower, does not affect the nature of the contract in such manner that the later grant of the power alters the terms of the contract. The borrower has left open to the association a course of action which it, as far as he is concerned, is free to take when, as, and if the Legislature gives it authority. Such course of action is ordinarily open to any other obligee, mortgagee, or assignee which enjoys the right to reassign or repledge. Whether or not the association secures such right, or acts upon it when secured, is of no consequence to the borrower and has no effect on his rights or obligations.

Consequently, the Act of 1932 does not effect any change in the contractual relationship between borrower and association by granting power to the association. The exercise of the power does not impair any contract entered into before the grant. There is merely a change in the statutory rights of one of the parties to the contract. Only where rights created by a law are themselves contractual and not merely permissive does a change in the law alter the terms of a contract existing before the change: *Coombes v. Getz*, 285 U. S. 434, 76 L. Ed. 866 (1932).

Furthermore, it can not be said that the mere legal disability of a contracting party to deal with a contract can not be removed by subsequent enabling legislation. If the disability is not recognized in the contract and does not enter into the nature of the rights of either party, and if no provision is made respecting such right if the disability be removed, such removal by statute does not impair the obligation of the contract. See *Gray v. Monongahela Navigation Company*, 2 W. & S. 156 (1841), where, at page 159, Chief Justice Gibson said:

> "* * * A grant of additional privileges to a corporation has certainly not been thought an invasion of the contract which exists between it and subscribers to its stock. * * *"

See also *Cross v. The Peach Bottom Railway Co.*, 90 Pa. 392 (1879), where the giving of additional privileges to a corporation was held not to be an invasion of the contract of subscription for its stock.

The Act of May 25, 1878, P. L. 155, as amended by the Act of June 10, 1881, P. L. 107, No. 118, makes it a misdemeanor for any person, bank, savings fund, building association or any corporation to repledge any securities received for money lent or borrowed during the continuance of the contract of hypothecation of such securities. Its terms are repealed by the self-sustaining and unambiguous provisions of the Act of 1932, as far as the repledging of stock of a building and loan association to a Federal agency is concerned. The Act of 1878 is penal in its nature. No contractual rights under it could have been created; none survive its repeal.

Of course the repledge in any case can have, with respect to collateral assigned to it, no higher rights than the building and loan association enjoys. No repledge can adversely affect the rights of the member-borrower. He is entitled to a return of his assigned stock when he has paid the obligation it secures. His right to repay his loan before maturity given him by the Act of April 10, 1879, P. L. 16, as amended by the Act of April 30, 1929, P. L. 901, can not be denied him.

An association should not repledge any shares of stock assigned to it unless accompanied by the obligation of the member-borrower, nor for an amount in excess of the amount remaining due on such obligation at the time of the assignment. Were it to do otherwise, the right of the member-borrower to a return of his property might be destroyed and the officers of the association might be charged with conversion.

The association should repay promptly to the repledgee any amounts paid by the member-borrower, and when final payment has been made by him, it should secure the return of his collateral. It may seem elementary to state the foregoing and to say that agencies of the United States Government may be expected to be properly advised as to the right of an association to borrow and to pledge. However, it is well to make it clear that an association can not avail itself of the provisions of the Act of 1932, if by so doing it takes away the rights of a member-borrower.

We believe that the Act of 1932 is a valid and constitutional enactment and that, subject to the limitations it imposes, it gives to build-

ing and loan associations the powers it prescribes without adversely affecting the rights of member-borrowers.

Therefore, you are advised that any building and loan association under your supervision may within the limits prescribed by the Act of July 28, 1932, pledge with the Reconstruction Finance Corporation, or any other agency established under the authority of the United States Government, except national banks, any bonds and mortgages owned by it, or shares of its stock pledged to it, whether the contracts with the member-borrowers giving it title to such assets were entered into prior to or after July 28, 1932, without the necessity of consent by the member-borrowers concerned.

Very truly yours,

DEPARTMENT OF JUSTICE,
HAROLD D. SAYLOR,
Deputy Attorney General.

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