Commonwealth of Pennsylvania

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

PENNSYLVANIA

FOR THE YEARS

1933 and 1934

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DEPARTMENT OF JUSTICE

1933-1934

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OFFICIAL OPINIONS
1933-1934

OPINION NO. 77

Teachers' salaries—Proper method of calculating proportion to be paid by the State—Act of May 18, 1911, P. L. 309, Sec. 1210.

Example: The fact that a teacher is receiving a salary less than the amount fixed by the School Code cannot change the basis upon which the Commonwealth must contribute to such teacher's salary. If she is receiving an amount equal to or greater than the annual or basic minimum prescribed for elementary teachers in her district, the State's contributions toward her salary will be sixty per centum of that minimum. If she is receiving less than that minimum, the State's contribution will be sixty per centum of the actual salary.

Department of Justice,

Harrisburg, Pa., January 9, 1933.

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

Sir: You have asked us to advise you as to the proper method of calculating the proportion of the salary of a school teacher which is to paid by the State where the teacher is receiving less than the basic minimum and earned increments prescribed by the School Code.

In answering your inquiry we shall consider only the question of what payments the State must make under the circumstances outlined. We are not here concerned with the propriety of the arrangement existing between the teacher and the school district under which the teacher's salary is so fixed.

For purposes of illustration and discussion, we shall consider the question in terms of the law applicable to an elementary school teacher in a school district of the third class which has a true valuation of between $50,000 and $100,000 per teacher. The principles involved in our determination will be equally applicable to other classes of teachers and districts.

The relevant statutory provisions are all contained in Section 1210 of the School Code of May 18, 1911, P. L. 309, as amended.

Paragraph 6 of the section (24 PS Sec. 1169) prescribes the minimum salaries of teachers in districts of the third class as follows:

> "Elementary teachers, and elementary principals who devote less than one-half of their time to supervision and administration, minimum annual salary one thousand dollars ($1,000), minimum annual increment one hundred dollars ($100), minimum number of increments four (4); * * *."

Paragraph 19 of the same section (24 PS Sec. 1180) requires the Commonwealth to contribute to school districts of the third class having a true valuation of between $50,000 and $100,000 per teacher "sixty per centum (60%) of the annual minimum salary prescribed herein for elementary teachers in such district:"

The same paragraph contains the following proviso:

> "* * * Provided, That where any member of the teaching or supervising staff receives less salary than the minimum salary prescribed by the foregoing salary schedule for the class of district in which he is teaching, there shall be paid to the district a corresponding per centum of the salary paid to such person: * * *."

Your question would arise, for example, in a case where an elementary school teacher, in her fifth year of service in a school district of the third class is receiving a salary of $1100 instead of the $1400 which she would receive if the schedule above quoted were adhered to. In order to cover all possible situations, we shall also consider the effect of such a teacher's receiving only $900, that is, less than the basic minimum for elementary teachers in the district.

We fail to find any ground for using any different basis for the State's contributions in such cases than in any other. In our Informal Opinion No. 81, dated February 8, 1932 addressed to the State Treasurer, we ruled that the clear directions of the proviso above quoted from Section 1210 of the School Code must be observed, and that the Commonwealth is required to contribute to the salaries of teachers who are paid less than the minimums fixed by the act, as well as to others. In school districts such as we have been discussing, the Legislature has directed that the Commonwealth shall contribute toward the salary of each teacher an amount equal to sixty per centum (60%) of the basic or annual minimum salary prescribed for elementary teachers. If a teacher receives less than this basic minimum the Commonwealth is to contribute sixty per centum (60%) of the actual salary. Nothing in the law would warrant any administrative officer in varying this percentage because the teacher is receiving less than the prescribed salary. The Legislature has, by the proviso referred to, expressly directed contributions at the same rate in such cases.

Therefore, we conclude, and advise you that the fact that a teacher is receiving a salary less than the amount fixed by the School Code cannot change the basis upon which the Commonwealth must contribute to such teacher's salary. If she is receiving an amount equal to or greater than the annual or basic minimum prescribed for elementary teachers in her district, the State's contributions toward her salary will be sixty per centum (60%) of that minimum. If she is receiving less than that minimum, the State's contribution will be sixty per centum (60%) of the actual salary.

As noted earlier in this opinion, the figures and percentages we have used, have been based on the situation which we chose as an illustration. For the figures and percentages applicable to other classes of teachers and districts reference must be made to the provisions of Section 1210 of the School Code covering those classes.

Very truly yours,

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

OPINION NO. 78

Banking Institutions—Institutions under supervision of Secretary of Banking—Extent of control—Deferred payment plan—Time and demand deposits—Act of March 8, 1933, P. L. 9.

All funds deposited in an institution under supervision of the Secretary of Banking, after it has availed itself of the provisions of legislation permitting postponement of payments to depositors shall be returned to those who have deposited them, even though the institution close its doors and its affairs be liquidated.

Institutions may operate on the deferred payment plan only on such terms as the Secretary of Banking shall impose, and as shall be proper and necessary in carrying out the provisions of the legislation and in protecting the depositors of such institution.

Department of Justice,
Harrisburg, Pa., April 7, 1933.

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

Sir: You have asked to be advised regarding various matters arising under the provisions of Act No. 6 of the present session of the General Assembly, approved March 8, 1933, permitting institutions under your supervision under certain conditions to defer payments to depositors.

1. You first inquire whether, if an institution has availed itself of the privileges of the act and at a later date is taken into possession by you, deposits made during the time it was operating under the act may be mingled with its general assets and liquidated on the same basis as deposits received prior to the time it took advantage of the act.

Act No. 6 has two specific purposes. It is intended, first, to enable State banks and trust companies to refuse to honor depositors' demands for withdrawal without suffering the penalty of being closed and liquidated, and, second, to assure persons and corporations making deposits in such institutions that their money will be segregated and made available for payment at any and all times on demand.

Section 1 of the act gives the Secretary of Banking the power to authorize institutions under his supervision to postpone the payment of time and demand deposits and

> "To receive new deposits, which shall be segregated from deposits previously made and invested in liquid assets as defined by the Secretary. All such new deposits shall be available exclusively for the benefit of new depositors until such depositors have been paid in full and shall always be withdrawable on demand without restriction."

While not actually stating that "new deposits" are more than special funds, the language of the act clearly indicates that they are to be treated in a different manner and surrounded by different safeguards than ordinary deposits. They are more than ordinary deposits which could be used by the depository for its own purposes. They are to be kept separate and apart from other deposits of the institution. They are to be invested in liquid assets, so that the depositors may receive them back at any time on demand. No restrictions on withdrawal are to be imposed by the depository. It cannot treat the funds in any manner that might interfere with their prompt return to their owners. It may make no claim on them for itself or for any other than the owners thereof or their assignees. It may not treat such deposits as part of its assets. It may not use them for its own purposes or mingle them with its own funds,

In the event that the business and property of the institution pass into your possession, the situation is not altered. There is merely a change in the person of the fiduciary holding such funds.

If as Secretary of Banking you take possession of an institution operating on the deferred payment plan, you could not mingle the "new deposits" with the assets of the institution. It would be your duty promptly to sell securities in which such funds might be invested and to deliver the proceeds thereof, together with uninvested cash, to the parties entitled thereto.

2. Your second inquiry concerns the degree and extent of your control over an institution operating on the deferred payment plan following your approval of its action in availing itself of the privileges of the legislation.

Section 2 of the Act of March 8, 1933, provides as follows:

> "In order that any institution may avail itself of the privileges herein granted, it shall accept such terms as the Secretary of Banking shall from time to time impose upon it."

If an institution under your supervision desires to adopt the plan, it should do so by proper action of its directors, if a corporation, and by authority of its owners, if a private bank. Upon receipt of evidence thereof, you may authorize the institution to defer payments on existing deposit accounts, subject to such terms as you may impose.

All such terms, which you may designate as rules and regulations, should be proper and necessary in effecting the purposes of the legislation and in protecting the interests of depositors. They should be drafted with a view to carrying out the terms of the act and should be made effective in a manner conducive to the best interests of the depositors of the institution concerned.

You inquire whether as part of your rules and regulations, you may prohibit the granting of new loans. It is clearly within your prerogative to do so. Obviously, when an institution is not paying its depositors it should not lend its assets to others.

Furthermore, under the act such rules and regulations may be altered, amended and supplemented by you from time to time.

Therefore, in summary, you are advised as follows:

1. All funds deposited in an institution under your supervision after it has availed itself of the privileges of legislation permitting postponement of payments to depositors shall be returned to those who have deposited them, even though the institution close its doors and its affairs be liquidated.

2. Institutions may operate on the deferred payment plan only on such terms as you shall impose, and as shall be proper and necessary in carrying out the provisions of the legislation and in protecting the depositors of such institution.

Very truly yours,

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

OPINION NO. 79

Farm Products—Municipalities—Ordinances—Licenses. Acts of April 18, 1878, P. L. 26, Sec. 5; May 2, 1899, P. L. 184; April 22, 1903, P. L. 258; May 4, 1927, P. L. 519; May 8, 1929, P. L. 1636; June 23, 1931, P. L. 932; June 24, 1931, P. L. 1206.

Farmers who sell their own products may make such sales in municipalities within the Commonwealth without payment of license fee. There may be regulation in the manner of delivery, which ordinances would require observance.

Department of Justice,
Harrisburg, Pa., April 13, 1933.

Honorable John A. McSparran, Secretary of Agriculture, Harrisburg, Pennsylvania.

Sir: You have informed this department that numerous complaints have been made by farmers throughout the Commonwealth that they are being deprived of the right to sell their products in many of the cities and boroughs, because of ordinances which have been passed by such municipalities precluding them from making sales therein. You inquire whether farmers who sell their own products are required to procure a license in order to make such sales.

You have not furnished us with copies of the ordinances against which complaints have been made, or where illegally enforced, to the prejudice of the privileges accorded under the law to the farmer who sells the products which have been raised on his farm.

Sales by the farmer are often confused with those by hawkers, peddlers, and traveling merchants, who peddle, from house to house, goods, wares and merchandise. The ordinances against this class of salesmen, who are required to procure licenses, run into the hundred throughout the Commonwealth. These regulations are sometimes improperly used to deter the unwary farmer from exercising his right to sell the products which were raised by his own toil upon his own soil.

An ordinance made by a municipal corporation under authority of the State to levy and collect taxes upon hawkers and peddlers has been held to be a valid exercise of the police power: *J. W. Brennan* v. *City of Titusville,* 153 U. S. 289, 38 L. Ed. 719 (1894).

But a different condition is presented where a mercantile license tax on vendors of or dealers in goods, wares and merchandise is required. This is regulated by the Act of May 2, 1899, P. L. 184, which relates to raising revenue by imposing a mercantile license tax on such vendors or dealers, and which provides that:

> "Section 1. * * * each retail vender of or retail dealer in goods, wares and merchandise shall pay an annual mercantile license tax * * *.

"Section 2. And it is provided that all persons who shall sell to dealers in or venders of goods, wares and merchandise * * * shall be * * * wholesalers; and all other venders of or dealers in goods, wares and merchandise shall be retailers, and shall pay an annual license tax as provided in this act for retailers."

The act was construed by Honorable John P. Elkin, Attorney General, in an opinion reported in 9 Pa. Dist. 117 (1900), under the title "New Mercantile Tax Law." The opinion has been cited with approval in our Superior and Supreme Courts. The Attorney General there defined "vendors of" and "dealers in goods, wares and merchandise." He said:

"Mr. Justice Black, in the case of *Norris Bros. v. Com.*, 27 Pa. 494, * * * said: 'A dealer, in the popular, and therefore in the statutory sense, is not one who buys to keep or makes to sell, but one who buys to sell again.' * * *

* * * * * *

"* * * Under these decisions, a farmer who sells his own hay or other farm products * * * is not subject to the payment of the tax. He is not a dealer within the meaning of the Act, and has no fixed and permanent place of business where he buys and sells his goods."

In *Commonwealth v. Gardner,* 133 Pa. 284 (1890), it was held that the carriage of the surplus products of the farm or garden to a market town or from house to house was not peddling.

In *Reading City v. Bitting,* 167 Pa. 21 (1895), the defendant was a milkman who regularly used a wagon on the streets of the city for retailing milk to customers from house to house. A fine was imposed for violation of an ordinance. The Supreme Court said:

"* * * We do not think the delivery wagon of the baker, the butcher, the drygoods dealer, or the milk-man is within the purview of this statute."

The general trend of legislation and adjudications seems to place a ban upon the licensing of persons making sales of their own farm products.

The Act of April 16, 1878, P. L. 26, Section 5, provides:

"* * * That farmers selling their own produce, or occupying a stall or stalls or side-walk, or part thereof, in any of the markets of a city of the first class, shall not be subject to classification or taxation for mercantile purposes."

The Act of April 22, 1903, P. L. 258, provides:

"Section 1. * * * after the passage of this act, it shall be unlawful for any borough or city of this Commonwealth to levy or collect any money or tax, as a license-fee, from any

> farmer who sells his own products in or about the streets of any borough or city of this Commonwealth."

The Borough Act of May 4, 1927, P. L. 519, as amended by the Act of May 8, 1929, P. L. 1636, provides:

> "Section 2920. Farmers.—It shall be unlawful for any borough to levy or collect any license fee from any person who sells, in or about the streets of any borough, vegetables or animal products raised on his or her own land."

The Act approved June 23, 1931, P. L. 932, relating to cities of the third class, placing restriction on the general powers to license and imposes license fees upon farmers, provides:

> "Section 2610. Farmers.—No city shall levy or collect any license fee from any farmer who sells his own produce in or about the streets of the city."

At the same session of the Legislature the Act of June 24, 1931, P. L. 1206, was passed concerning townships of the first class, regulating licenses and license fees of transient retail merchants, Section 2901 of which reads:

> "Nothing contained in this section shall be construed to apply to farmers selling their own produce * * *."

Therefore, you are advised that farmers who sell their own products may make such sales in municipalities within the Commonwealth without payment of license fees. There may be regulation in the manner of delivery, which ordinance would require observance.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAS. W. SHULL,

Deputy Attorney General.

OPINION NO. 80

Edinboro State Teachers College—Fire loss—Responsibility of painting contractor—Basis of liability.

Where a contractor has completed his entire contract in every respect, the balance due on his contract may be paid to him without deduction for the cost of repairs made to a building as the result of fire.

Department of Justice,
Harrisburg, Pa., May 3, 1933.

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

Sir: You have asked us to advise you whether you may authorize payment to J. A. Lanston of Corry, Pennsylvania of an unpaid balance on a contract made between the Commonwealth and Mr. Lanston for certain painting at Edinboro State Teachers College, under the following circumstances:

Mr. Lanston's contract required him to do certain painting and the necessary burning off of the old paint before application of new coats. The contract contains the following clause:

> "*CONTRACTOR'S LIABILITY*
>
> "12. The work in every respect, from the execution of the contract bond and during its progress until final acceptance shall be under the charge and in care of the Contractor and at his risk. He shall properly safeguard against any or all injury or damage to the public, to any property, material, or thing, except where stipulated otherwise in the specifications and shall alone be responsible for any such damage or injury from his undertaking of this work to any person or persons or thing connected therewith. He shall indemnify and save harmless the Commonwealth and all its officers, agents and employes, from all suits or actions at law of any kind whatsoever in connection with this work, and shall if required, show evidence of settlement of any such action before final payment is made by the Commonwealth."

Reports furnished to us by Mr. Lanston and by the president of the teachers college agree upon the following facts:

The contractor was engaged in burning old paint from a cornice on the outside of one of the buildings at the college when fire started inside the cornice. The woodwork of the cornice was old and cracked, and presumably the flame from the painter's torch entered one of these cracks and ignited inflammable particles inside. The fire gained some headway before it was discovered. This occurred on a Saturday afternoon and the doors of the building were locked. The workmen were therefore unable to get into the building promptly and the delay gave the fire opportunity to gain further headway.

The contractor, realizing the inflammable condition of the woodwork on which he was working, had his men working in pairs. Each pair had a pail of water at hand to extinguish any flame that might spread to the woodwork from their torch.

The fire did considerable damage, which has been repaired by the Commonwealth. The contractor completed his contract in every respect. The present question is whether the cost of these repairs should be charged against the contractor and as a result of such charging, whether the final payment due to the contractor under his contract should be withheld from him.

In our opinion there is no evidence of negligence on the part of the contractor which led to the fire. In fact it would seem that he was taking every possible precaution to avoid damage by fire in the situation which he realized to be dangerous.

The question, therefore, is whether the clause of the contract which we have quoted above imposed on the contractor liability for this damage merely because the damage arose from the prosecution of the work under the contract, and without regard to any question of negligence. In our opinion, such liability is not imposed. We believe that the intention of that clause is to impose on the contractor a duty in cases of this kind, to exercise all proper precautions to avoid damage to property but that it does not impose any absolute liability. The provision which declares that the contractor shall alone be responsible for *such* damage or injury from his undertaking of the work, follows immediately after the requirement that he shall properly safeguard against injury to property. The two provisions must be read together. And in our opinion, such a reading makes it clear that negligence is made the only basis of liability with respect to damage to property not involved in the completion of the contract.

The provisions which we have quoted from the contract in this case are practically the same as were involved in *Commonwealth v. Nelson-Pedley Construction Co.*, 303 Pa. 174 (1931), and *Commonwealth v. J. T. Evans*, 304 Pa. 445 (1931), but the nature of the liability here involved is different from that involved in the cases just mentioned.

The *Nelson-Pedley* and *J. T. Evans* Cases concerned the obligation of contractors to complete the work called for by their particular contracts, and in doing so, to restore work already done by them, where that work had been damaged by fire. The Supreme Court, in both cases held that the contractors were liable to make the restoration and to complete their contracts even though it was conceded that the fire did not arise from any negligence on the part of the contractors.

In the present case, however, the contractor did complete his entire contract. He is not here claiming extra compensation for any repainting made necessary by the fire, which was included within his original contract. The present case is closely analogous to *Newport News Shipbuilding & Drydock Company v. United States*, 34 Fed. (2d) 100 (1929). There the question arose as to the liability of a contractor who was making certain repairs on a ship, for damage to the entire ship, caused by fire which started from the contractor's operations. Our own Supreme Court in the *Nelson-Pedley* Case at page 185, distinguished the *Newport News* Case as follows: "The question which arose was as to liability for the loss to the ship itself, entirely aside from the work contracted for, and the former was ten times the amount of the contractor's bid for the repair work."

We are not in accord with all of the reasoning of the *Newport News* Case, but in our opinion, the result there reached was a proper one with respect to the liability of the contractor under circumstances involving no negligence on his part.

Therefore, we advise you that the balance due to Mr. Lanston on his present contract may be paid to him without deduction for the cost of repairs made to the building as a result of the fire in question.

Very truly yours,

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

OPINION NO. 81

Appropriations—Riders in the General Appropriation Act of 1933—Veto power of Governor—Constitutional Law, Art. III, Secs. 3 and 15; Art. IV, Sec. 16.

Article IV, Section 16 of the Constitution empowers the Governor to disapprove any item or items of any bill making appropriations of money embracing distinct items, and provides that the part or parts approved shall be the law and the items disapproved shall be void.

Department of Justice,

Harrisburg, Pa., June 2, 1933.

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

Sir: You have asked to be advised what effect is to be given to the so-called riders in the General Appropriation Act passed at the 1933 session of the Legislature and now before you for approval.

A typical example of these riders is that which follows the appropriation for the State-owned medical and surgical hospitals. It is as follows:

> "Provided That from the amount hereby appropriated the annual salary of any Superintendent of a State Medical and Surgical Hospital shall not exceed four thousand five hundred dollars ($4,500) including maintenance the annual sal-

> ary rate of any Roentgenologist Pathologist and Interne shall not exceed five thousand dollars ($5,000) including maintenance and no other employe shall receive a salary wage or other compensation exceeding an annual rate of four thousand dollars ($4,000) including maintenance * * *"

This proviso is not an appropriation, but an attempt to limit salaries and thus to deprive the Executive Board of the power now conferred upon it by Section 709 of The Administrative Code of 1929 to classify State employes and fix their compensation.

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."

Article III, Section 3 of the Constitution exempts the General Appropriation Bill from the requirement that:

> "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title."

In our opinion the rider we have quoted is unconstitutional as are all other attempts in the General Appropriation Bill to fix salaries by similar riders.

Persons affected by salary legislation are certainly entitled under Article III, Section 3 of the Constitution to notice that legislation on this subject is pending.

In addition, whether or not notice had been given in the title, Article III, Section 15 of the Constitution expressly prohibits the inclusion in this bill of anything other than appropriations; and salary regulations and limitations are not appropriations.

Accordingly, we advise you that the salary limitations contained in House Bill No. 260 will not be effective, notwithstanding your approval of the bill.

Article IV, Section 16 of the Constitution empowers the Governor to disapprove any item or items of any bill making appropriations of money embracing distinct items, and provides that the part or parts approved shall be the law, and the items disapproved shall be void. In *Commonwealth v. Barnett,* 199 Pa. 161 (1901), Mr. Justice Mitchell construed "part" and "item" as used in this section to be synonymous (page 173). Therefore, if any court should hold the riders in question to be "appropriations," they are necessarily "items" of the bill and as such may be vetoed.

For this reason we advise you that in acting upon the General Appropriation Bill you should veto these provisos, if they do not meet with your approval.

Very truly yours,

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

OPINION NO. 82

Escheats—Informant's fee—Where payable when informant is State employe—Public policy. Acts of May 2, 1889, P. L. 66; May 11, 1911, P. L. 281; 1929, P. L. 343, Sec. 1304.

If an informant is an employe of the Commonwealth at the time the information in escheat is filed, and if his duties have anything whatsoever to do with the collection or securing of escheats due the Commonwealth, or with the keeping of any records pertaining thereto, payment of the statutory fee would be contrary to sound public policy. If, however, the duties of the informant deal entirely with other functions of the State government, the mere fact that he is an employe cannot deprive him of the statutory fee.

Department of Justice,

Harrisburg, Pa., June 23, 1933.

Honorable Leon D. Metzger, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether an informant's fee is payable to an employe of the Commonwealth, who files information leading to the escheat of the estate of a decedent. You specifically refer to the Estate of Eugene Dumontier in which matter, on January 31, 1907, James C. Deininger, then an employe in the Department of State, filed an information in escheat as provided by law. From this estate a net balance of one thousand eight hundred ninety dollars ($1,890) was paid into the State Treasury. Of this amount one quarter, or four hundred seventy-two dollars and fifty cents ($472.50) would be due to Mr. Deininger if, under the circumstances, he is entitled to an informant's fee.

An informant is defined by Section 1304 of The Fiscal Code of 1929, P. L. 343, which restated Section 24 of the Act of May 2, 1889, P. L. 66, as amended by the Act of May 11, 1911, P. L. 281. This section provides, in part, as follows:

> "Except as hereinafter otherwise provided, any person, who shall first inform the Department of Revenue, by writing signed by such person in the presence of two subscribing

witnesses, that any escheat has occurred by reason of the fact that any person has died intestate, without heirs or known kindred, a widow, or surviving husband, or by reason of any other fact, and who shall procure necessary evidence to substantiate the fact of said escheat, and shall prosecute the right of the Commonwealth to the property escheated with effect, shall be entitled to one-fourth part of the proceeds of all property, real, personal or mixed, that has been declared escheated to the Commonwealth in pursuance of such information, after deducting therefrom all debts and expenses with the payment of which said property is charged, and all proper costs and charges incident to the establishing of such escheat, and the converting of the escheated property into money. * * *''

Therefore, unless some statutory prohibition specifically prevents the paying of informants' fees to employes of the Commonwealth, or unless such practice is contrary to public policy, there would seem to be no reason why the mere fact that the person making the information is employed by the Commonwealth should deprive him of the fee. There is no specific enactment on the subject. The question of whether or not the practice is contrary to public policy requires some discussion.

The compensation provided for an informer is similar in nature to a reward offered for the detection of crime according to the opinion of Honorable John C. Bell, Attorney General, to Honorable A. E. Sisson, Auditor General, dated June 27, 1911, Attorney General's Reports 1911-1912, p. 44. The Attorney General, in that opinion, said:

> ''The compensation due an informer is analogous to a reward offered for the detection of crime or for the recovery of property, *Commonwealth ex rel. Henry v. Gregg,* 1 Dauphin County Reporter 203.
>
> ''The offer as set forth in this Act of Assembly, is an invitation to the public, or proposal to enter into a contract. The second element of the contract is the acceptance by the Auditor General of the information given. The performance by the informer is 'the last element of the contract and makes the theretofore conditional and revocable proposal a part of a completed contract, with an executed consideration on the one side and a binding promise to pay on the other,' 24 Am. & Eng. Ency of Law, 2d Ed., 943, 952, 955.''

In cases where rewards are offered for the detection of a criminal it has been held, as a general principle of law, that it is the duty of a peace officer to pursue and arrest offenders and that it is against public policy to permit such officers to accept rewards for the performance of such services. *Smith v. Whildin,* 10 Pa. 39; *Commonwealth v. Lane,* 28 Pa. Superior Ct. 149, and *Smith v. Lancaster County,* 29 Dist. R. 902.

An exception, however, is recognized where the claimant of the reward, although a peace officer, was not charged by warrant or other process to make the arrest, or where the offender is a fugitive having committed the offense in another jurisdiction. In the case of *Barry, Trustee, v. Gvoic,* 8 D. & C. 544, this exception was recognized. In that case Reader, P. J. said (p. 546):

> "A fuller examination of the authorities, however, shows that exceptions to the rule are recognized where the circumstances are such that it cannot be said that it is the duty of the officer in question to pursue, search for and arrest the alleged criminal. Such an exception has been held to arise where the officer was not charged by warrant or other judicial process to make the arrest, or where the arrest was made by an officer in one state of a fugitive from another jurisdiction. In these cases it has been held that the officer, if he makes the arrest and otherwise complies with the conditions attending the offer of the reward, may claim the reward. A distinction also seems to be recognized between the right to take a reward from a private individual and the right to take one authorized by statute. Among the cases illustrating these exceptions are the following: *Marsh v. Wells-Fargo & Co. Express* 43 L. R. A. (N. S.) 133; *Smith v. Vernon County,* 87 S. W. Repr. 949; 70 L. R. A. 596; *U. S. v. Matthews,* 173 U. S. 381.
>
> "The cases above cited also cite numerous other cases to the same effect. In the Pennsylvania case of *Creamer et al. v. Hall,* 2 Del. Co. Reps. 378, it was held that the case was not ruled by the decision in *Smith v. Whildin,* 10 Pa. 39, because the officers in question were under no obligation to make the arrest, no warrant having been placed in their hands. * * *"

Since an informant's fee is analogous to a reward for the detection of crime, the same general rule and the same exception should prevail.

Therefore, we advise you that if an informant is an employe of the Commonwealth at the time the information in escheat is filed, and if his duties have anything whatsoever to do with the collection or securing of escheats due the Commonwealth, or with the keeping of any records pertaining thereto, payment of the statutory fee would be contrary to sound public policy. If, however, the duties of the informant deal entirely with other functions of the State Government, the mere fact that he is an employe cannot deprive him of the statutory fee.

In the case you specifically mention no great difficulty is presented. At the time the information in the Dumontier Estate was filed, the Department of State, in which Mr. Deininger was an employe, had no duty, statutory or otherwise, in connection with the collection of escheats. The Escheat Act of 1889, P. L. 66 imposed duties only upon the Auditor General. At that time the only other agencies of the State

Government which conceivably could have anything to do with escheat matters, were the Attorney General's Department and the State Treasurer.

Therefore, you are advised that an informant's fee of one quarter of the net amount paid into the State Treasury in the Eugene Dumontier Estate may be paid to James C. Deininger in spite of his state employment, if he has otherwise entitled himself to receive it.

Very truly yours,

DEPARTMENT OF JUSTICE,
JOHN Y. SCOTT,
Deputy Attorney General.

OPINION NO. 83

Appropriations—Allocations to the various school districts where the amount appropriated is less than the estimate required.

Authority of Superintendent of Public Instruction to distribute the full allotments for the year 1933-1934, and then to make a pro rata distribution of the balance for the following years. The manner of spreading the appropriation over the biennium is provided in the General Appropriation Act of 1933.

Department of Justice,

Harrisburg, Pa., July 1, 1933.

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

Sir: You have asked us to advise you concerning the manner in which you may allocate to the various school districts of the State the moneys appropriated for that purpose by the General Appropriation Act of 1933. The question arises from the fact that the amount appropriated is approximately $5,200,000 less than the estimate of the amount which would be required to meet in full, during the coming biennium, all payments prescribed by the portion of the School Code known as the Edmonds Act.

The appropriation is made to your department in the following language:

> "For reimbursing school districts upon the salaries of school teachers and for closed schools and for nonresident high school tuition as required by law the sum of fifty-three million dollars ($53,000,000)
>
> "Provided That this appropriation shall be so pro rated by the Department of Public Instruction that it will be spread over the biennium and the amounts due to school districts under existing law shall be paid in the discretion of the Department to accomplish this result

> "Provided That the Superintendent of Public Instruction with the approval of the Governor may make payments from this appropriation in advance of the due dates prescribed by law to school districts which are financially handicapped whenever he shall deem it necessary to make such advance payments to enable such school districts to keep their public schools open"

You ask whether under these provisions it would be proper to make the full payments required by the Edmonds Act during the first year of the biennium, and then prorate the remaining balance among the districts for the second year.

You call our attention to the fact that the payments to school districts are actually reimbursements for expenditures already made, and that consequently the districts have expended funds and have incurred obligations to operate their schools during the year 1932-1933 in anticipation of the grants for 1933-1934 authorized by the Edmonds Act. Thus to reduce the payments during the year 1933-1934 would impose additional hardship on hard pressed districts, because they did not have an opportunity to prepare themselves for the reductions.

In addition, you remind us that you now have no special fund with which to assist school districts which could not otherwise keep their schools open. Therefore, it is desirable that during the coming year, the districts should receive as much as is legally possible. The following year may see improved tax collections to compensate for reduced grants.

In our opinion, you have authority to distribute the full allotments for the year 1933-1934, and then to make a pro rata distribution of the balance for the following year. The statutory proviso above quoted expressly gives you discretion as to the manner of spreading the appropriations over the biennium. In view of the circumstances to which we have referred, we believe that the method proposed will constitute a proper exercise of that discretion. In the meantime, the districts must prepare themselves for materially reduced appropriations during the school year 1934-1935.

Yours very truly,

DEPARTMENT OF JUSTICE,

HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 84

Agents and brokers—Rebates—Rewriting in other companies without expense to insured, risks previously carried by companies which have gone into receivership —Act of May 17, 1921, P. L. 789, Secs. 635, 636.

Where an insurance agent or broker, following the failure of an insurance company, rewrites a risk insured thereby with another company without charging and collecting from the insured the premium for such new policy, he is violating the laws of the Commonwealth against giving rebates.

Department of Justice,

Harrisburg, Pa., July 7, 1933.

Honorable Charles F. Armstrong, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether the practice of insurance agents and brokers in rewriting in other companies, without expense to the insured, risks previously carried by companies which have gone into receivership is in violation of law.

We understand that in order to keep the good will of a client certain agents and brokers licensed by you have taken the position that upon the failure of a company with which they have placed their client's insurance they should, without cost to him, replace the insurance with another company for the balance of the unexpired term of his policy.

You suggest that in so doing these agents and brokers are violating the anti-rebate laws of the Commonwealth, in that they are advancing out of their own funds the amount of premium, less commission, necessary to secure the new insurance. While they may do this on the assumption that they will recover back from the company in receivership the unearned premium paid for the original policy, and to which the client is entitled, there is reason to suppose that such will not be the result, because experience shows that once a company is in receivership, it is not likely to pay claims in full.

Section 635 of the Insurance Department Act of 1921, approved May 17, 1921, P. L. 789, provides in part as follows:

> "No insurance agent, solicitor, or broker, personally or by any other party, shall offer, promise, allow, give, set off, or pay, directly or indirectly, any rebate of, or part of, the premium payable on the policy or on any policy or agent's commission thereon, or earnings, profit, dividends, or other benefit founded, arising, accruing or to accrue thereon or therefrom, * * * nor shall any such agent, solicitor, or broker, personally or otherwise, offer, promise, give, option, sell, or purchase any * * * property * * * or other thing of value whatsoever, as inducement to insurance or in connection therewith. * * *"

It might be contended in behalf of the brokers and agents to whom you refer that they are not offering inducements to secure insurance because they have already obtained orders from their clients to write insurance policies. They are, however, offering inducements in connection with insurance in that they are advancing their own funds to retain their clientele by reinsuring their risks in going concerns. They are allowing a rebate of the premium or of a part thereof when they secure and pay for a new policy of insurance and fail to charge or collect a premium therefor.

Furthermore, the act of the insured in accepting an insurance policy for which he has not paid is in violation of law.

Section 636 of the Insurance Department Act of 1921 provides as follows:

> "No insured person or party or applicant for insurance shall, directly or indirectly, receive or accept, or agree to receive or accept, any rebate of premium, or of any part thereof, or all or any part of any agent's, solicitor's, or broker's commission thereon, or any favor or advantage, or share in any benefit to accrue under any policy of insurance, or any valuable consideration or inducement, other than such as are specified in the policy."

Where an insured accepts from a broker or agent a policy of insurance in substitution for that to which the defunct company was a party and does not pay his broker or agent a premium for such new policy, he is in effect receiving a rebate of the premium or a part thereof. Furthermore, the insured in accepting the new policy from his broker or agent is receiving a valuable consideration or inducement other than such as are specified in the policy.

Despite the fact that they secure no direct and immediate financial advantage from actions which are morally commendable, those brokers and agents who in such manner reinsure their clients' risks in going concerns are, nevertheless, violating the law.

Therefore, you are advised that where an insurance agent or broker, following the failure of an insurance company, rewrites a risk insured thereby with another company without charging and collecting from the insured the premium for such new policy, he is violating the laws of the Commonwealth against giving rebates.

Very truly yours,

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

OPINION NO. 85

County Officers—Sheriff—Power of sheriff when the Governor has sent the militia into a county to preserve law and order. Art IV, Secs. 2 and 7 of the Constitution.

In any and every part of the Commonwealth, the Governor has the highest civil as well as military authority to safeguard life and property and preserve law and order. All other civil police officers, including the sheriffs of the several counties and their deputies, wherever located, are subordinate to him.

When the militia has been called out to quell riotous conditions in any part of the State, it acts solely under the orders of the Governor as commander-in-chief, and his military aides. The sheriffs of the several counties are without authority to give any directions whatever to the military forces.

Department of Justice,

Harrisburg, Pa., August 1, 1933.

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

Sir: You have asked to be advised regarding the extent of a sheriff's power when you have sent the militia into a county of the State to preserve law and order.

Article IV, Section 2 of the Constitution provides that:

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

Under Article IV, Section 7, the Governor is constitued the "commander-in-chief of the army and navy of the Commonwealth, and of the militia, except when they shall be called into the actual service of the United States."

The sheriffs of the State have no connection with or jurisdiction over the militia. Subordinate military officers are required to recognize only their superior officers; when on active duty it is obvious that they function under the civil and military authority of the Governor and independently of the civil police officers of the county or counties where they are located.

In addition, the Governor's constitutional authority as the Commonwealth's supreme executive power to take care that the laws be faithfully executed is State-wide and unlimited. He is not subordinate to the sheriff or any other police officer. His directions, in times of emergency, supersede those of any other State or local officer.

At common law the sheriff was under the crown. Under our Constitution, the sheriff is under the Governor.

Both the Governor and the sheriff are charged with the duty of preserving life and property; but when they differ as to methods or means to accomplish this result, clearly the sheriff must give way to the "supreme executive power."

As Mr. Justice Mitchell said, in *Commonwealth v. Shortall,* 206 Pa. 165 (1903), at page 171:

> "* * * if the situation goes beyond county control, and requires the full power of the state, the governor intervenes as the supreme executive and he or his military representative becomes the superior and commanding officer. * * *
>
> "The resort to the military arm of the government therefore means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. * * *"

Under these circumstances, a civil officer, including a sheriff, who interferes with or obstructs the military forces in the performance of their duties, is subject to the same measures which may be taken against an ordinary private citizen who interferes with or obstructs the military forces in the performance of their duties.

Therefore, we advise you:

1. That in any and every part of the Commonwealth, the Governor has the highest civil as well as military authority, to safeguard life and property and preserve law and order. All other civil police officers, including the sheriffs of the several counties and their deputies, wherever located, are subordinate to him.

2. That when the militia has been called out to quell riotous conditions in any part of the State, it acts solely under the orders of the Governor as commander-in-chief, and his military aides. The sheriffs of the several counties are without authority to give any directions whatever to the military forces.

Very truly yours,

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

OPINION NO. 86

Banks and Banking—Home Owners' Loan Corporation Bonds—Investment in, and exchange for mortgages.

Banks when operating without restrictions, may purchase bonds of the Home Owners' Loan Corporation as investments and may accept them in exchange for mortgages on real estate. When operating under restrictions, these institutions may not purchase such bonds as investments with old funds, and can purchase them with segregated funds only if the Secretary of Banking classifies them as "liquid assets"; but the banks may accept such bonds in exchange for mortgages, in any cases in which they are satisfied that to do so will avoid loss.

Bank and trust companies, for their own account have the same powers as banks. They may not purchase these bonds for trust estates in the absence of clear and unequivocal authority in the instrument creating the fiduciary relationship; but they may accept them in exchange for mortgages held by them for such estates, in any case in which, after a careful and independent examination of all the facts, it appears that to do so will save the estate from loss upon the mortgage thus given in exchange.

Savings banks are authorized to purchase such bonds as investments or accept them in exchange for mortgages, only if authorized to do so by their articles of incorporation or any amendment thereto; if not authorized by their articles of incorporation to invest in such bonds, they may nevertheless accept them in exchange for mortgages held by them whenever it appears that to do so will save them from loss upon such mortgages.

Trust companies, for their own account, have the same powers and are subject to the same limitations with respect to such bonds, as savings banks. For trust estates, they have the same power as bank and trust companies.

Private banks under supervision of Department of Banking have the same powers as banks.

Building and loan associations are not authorized to purchase such bonds as investments, but may accept them in exchange for mortgages held by them, in any cases in which it appears that to do so will save them from loss upon such mortgages. The powers of these associations are not affected by the fact that they are operating under order of segregation.

The Secretary of Banking as receiver of banks, bank and trust companies and trust companies for their own account, savings banks, private banks under supervision of Department of Banking, building and loan associations, is not authorized to purchase such bonds as investments, but may, with the approval of the court, accept them in exchange for mortgages of the institution of which he is in possession in any cases in which he deems such action to the best interests of the estate.

The Secretary of Banking as receiver of bank and bank and trust companies and trust companies for estates of which they are serving in a fiduciary capacity is not authorized to purchase such bonds as investments for estates, but may accept them in exchange for mortgages of estates under the same circumstances and subject to the same conditions as governed the action of the institution in this regard prior to his taking of possession.

Liquidating trustees of building and loan associations, subject to the terms of the particular plan of voluntary dissolution, have the same powers as the Secretary of Banking as receiver of a building and loan association.

Department of Justice,
Harrisburg, Pa., August 17, 1933.

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

Sir: We have your request to be advised whether banks, bank and trust companies, trust companies, savings banks, and building and loan associations, operating either normally or upon a restricted basis, the Secretary of Banking as receiver in possession of any such institution, or liquidating trustees of building and loan associations, elected pursuant to plans of voluntary dissolution, may invest in, or accept in exchange for mortgages held by them, bonds issued by the Home Owners' Loan Corporation.

The Home Owners' Loan Corporation is a corporation organized under the Federal "Home Owners' Loan Act of 1933," approved June 13, 1933. Its entire capital, not exceeding $200,000,000 is subscribed by the government of the United States. The Corporation is authorized to issue bonds in an amount not exceeding $2,000,000,000.

The act provides that the bonds shall mature within a period of not more than eighteen years, shall bear interest at the rate of four per centum per annum, and shall be guaranteed by the United States as to interest only. There is no guarantee as to the payment of principal.

The bonds may be sold by the Corporation to provide additional funds for carrying out the purposes of the act, or they may be exchanged for mortgages or other liens upon real property occupied by the owner as a home. The face value of bonds exchanged, plus accrued interest thereon, and any cash advanced in accordance with the provisions of the act, shall not exceed $14,000, or eighty per cent of the value of the real property, as determined by an appraisal made by the Corporation, whichever is the smaller amount. The value of the property, as so appraised, must not exceed $20,000. The mortgage or lien taken by the Corporation in exchange for the bonds must be a first lien upon the real property taken as security.

I

Institutions Operating Without Restrictions

1. *Banks and Bank and Trust Companies.* Section 1001 of the Banking Code, Act No. 112, approved May 15, 1933, provides that a bank or bank and trust company shall have the power:

> "(5) To discount, buy, sell, negotiate, or assign * * * bonds, or other evidences of debt; * * *"

There are no limitations or restrictions in any other section of the Banking Code which modify this power, as far as concerns the purchase by an institution for its own account of the bonds of the Home Owners' Loan Corporation.

Accordingly, banks and bank and trust companies may purchase as investments the bonds issued by the Home Owners' Loan Corporation.

It follows necessarily that these institutions have the power to exchange assets, other than cash, for such bonds. If a given security is a legal investment for banks and bank and trust companies, it is immaterial, in our opinion, whether it is procured by means of an outright purchase or whether it is by means of an exchange of securities.

Therefore, banks and bank and trust companies are authorized for their own account to invest their funds in bonds of the Home Owners' Loan Corporation and to accept such bonds in exchange for mortgages held by them for their own account.

2. *Private Banks.* Section 1310 of the Banking Code, applicable only to private banks under your supervision, provides, in part, as follows:

> "* * * A private bank shall have the power to make the same types of loans, discounts, and investments as are permitted to banks by this act, subject to the same limitations, * * *."

Accordingly, private banks which are subject to the supervision of the Department of Banking are authorized to purchase such bonds as investments, or to accept them in exchange for mortgages on real property.

3. *Savings Banks.* Two classes of savings banks must be considered: those organized under general acts and those organized under special acts.

Section 1208 of the Banking Code provides that a savings bank, other than a savings bank organized under a special act of General Assembly, shall not make any investment other than those specifically therein enumerated. This applies equally to savings banks organized under the Act of May 20, 1889, P. L. 246, and to those organized under the Banking Code. In our opinion, the bonds of the Home Owners' Loan Corporation do not fall within any of the classes enumerated in Section 1208.

However, Section 1208 of the Banking Code also provides that:

> "B. A savings bank, other than a savings bank organized under a special act of the General Assembly, may make such additional investments as are authorized by its articles * * *."

In the case of savings banks incorporated under special acts, the Banking Code does not specify any particular securities as legal investments. Section 1209 of the Code provides that:

> "A savings bank organized under a special act of the General Assembly may make such investments as may be authorized by its articles of incorporation, * * *."

Section 2 of the Banking Code contains the following definition:

> " 'Articles' includes the original articles of incorporation, any or all amendments thereto, articles of merger, consolidation, or conversion, and also what have heretofore been designated by law as certificates of incorporation or charters."

Therefore, savings banks, organized either under the Act of May 20, 1889, P. L. 246, or under the Banking Code, or under special acts, are authorized to purchase as investments, the bonds of the Home Owners' Loan Corporation, if the power to do so is contained in their articles of incorporation, or in any amendment thereto. And for the reasons stated in discussing the power of banks, we advise you that this includes the power to acquire such bonds in exchange for mortgages on real estate, if the articles so provide.

The question now arises whether a savings bank, which is not authorized by its articles of incorporation, or any amendment thereto, to invest its funds in bonds of the Home Owners' Loan Corporation, may acquire such bonds by giving in exchange for them mortgages held by such savings bank.

Section 1214 of the Banking Code provides as follows:

> "The restrictions imposed by this act shall not be construed to prevent a savings bank, in order to protect itself from loss upon a loan or investment previously made lawfully and in good faith, from acquiring ownership of, or otherwise taking and holding, any kind of property or security, whether real or personal. Except as otherwise provided by this act, any property so acquired, unless of the character and nature by this act authorized to be purchased or held by such savings bank, shall be sold by it within five years, but the Department may, upon application of a savings bank, grant to it in writing the power to hold such property for a longer period."

Under this section a savings bank may take bonds of the Home Owners' Loan Corporation in exchange for a mortgage held by it, if in its opinion, arrived at after an independent study of the entire situation, the acceptance of such bonds will protect it from loss on the mortgage which it is giving in exchange. Such bonds can be held by the savings bank for a period of five years, or as much longer as the Department of Banking authorizes. However, should the articles of incorporation of the savings bank be amended in the meantime to include such bonds as legal investments, the savings bank will not be limited in the period during which it could hold them.

4. *Trust Companies.* Section 1001 B of the Banking Code provides that trust companies shall have the power:

> "(5) To make any investments, subject to the same limitations as in the case of savings banks incorporated hereunder, including such investments as are specifically authorized by its articles."

Therefore, trust companies are not authorized to purchase as investments for their own account the bonds of the Home Owners' Loan

Corporation, unless the power to do so is contained in their articles of incorporation or in any amendments thereto, or, lacking such power, if they will avoid loss by accepting such bonds in exchange for mortgages held by them.

5. *Bank and Trust Companies and Trust Companies—Funds Held in Fiduciary Capacity.* Under Section 1103 of the Banking Code, legal investments for funds held in a fiduciary capacity by bank and trust companies or trust companies are, in general, in the absence of contrary authority in the instrument creating the fiduciary relationship, limited to those prescribed by Section 41 (a)1 of the Fiduciaries Act of June 7, 1917, P. L. 447, as last amended by the Act of April 26, 1929, P. L. 817, which is applicable to individual, as well as to corporate fiduciaries. This section designates various types of securities as those in which fiduciaries may invest funds of their trust estates. The bonds of the Home Owners' Loan Corporation do not fall within the specified classes of securities. Consequently, fiduciaries investing in them would be subject to liability in the event of loss. See *Hemphill's Appeal,* 18 Pa. 303 (1852); *Appeal of Baer,* 127 Pa. 360 (1889); *Darlington's Estate,* 245 Pa. 212 (1914). Section 41 (a) 3 of the Act of June 7, 1917, P. L. 447, exempts fiduciaries from such liability only in the event that the investments are listed as legal investments in Section 41 (a)1 of that act, as amended.

Of course, if the instrument creating the fiduciary relationship authorizes the bank and trust company or the trust company to deviate from the list of legal investments specified in Section 41 (a)1 of the Act of June 7, 1917, P. L. 447, as amended, it may do so. Such authority must, however, be clear and unequivocal. See *Barker's Estate,* 159 Pa. 518 (1894); *Taylor's Estate,* 277 Pa. 518 (1923).

Therefore, bank and trust companies and trust companies, in the absence of unequivocal authority in the instrument creating the fiduciary relationship to depart from the list of legal investments, are not authorized to invest trust funds in bonds of the Home Owners' Loan Corporation. To do so will subject them to a surcharge for any loss which may be suffered by the estate by reason of such investment.

Whether such bonds may be accepted in exchange for real estate mortgages held by bank and trust companies or trust companies as fiduciary is a different question. This question involves the implied power of a trustee or other fiduciary to use reasonable business judgment to protect an investment legally made.

As early as 1831, the Supreme Court of Pennsylvania, in *Billington's Appeal,* 3 Rawle 48 (1831), said at page 57:

> "* * * We agree entirely with the general position, that an executor, administrator, or guardian, cannot change the prop-

> erty from real to personal, or the contrary, or accept the security of one person, and give up that of another, or release a debt, without receiving the amount, unless at his own risk. This is the law in all ordinary cases, and where the interest of the estate, or of the ward, was safe by adhering to this rule. But cases may occur, and do often occur, where a debt will be totally lost to the estate by an executor, who adheres to this rule as the only safe one, and yet the debt or the greatest part of it could be secured by accepting an assignment of securities on other persons, or by executing a release in full where part only is paid. Now, as the general rule was introduced for the benefit of the cestuy que trusts, it would seem strange if it could not be dispensed with, when their interest requires that a different principle should be adopted. The executor, or administrator, or guardian, must show, that the circumstances required the exercise of a sound discretion; that from all the information and advice he could obtain, the estate would sustain a total or partial loss, unless he exercised a discretionary power, and that what he did was what he really thought best, in the case as presented, what he or any prudent man would do in his own case; that his motives were pure, and his conduct prudent, and if he can do this, it is not easy to see on what principle he can be charged personally.''

Several examples in which such action by fiduciaries was upheld are cited in the opinion.

On the subject of the right of a trustee to make further advances of money to render secure an investment previously made in a mortgage, the following is said in 1 *Perry, Trusts and Trustees* (6th ed., 1911) Section 458, page 740:

> ''* * * No general rule can be stated; but the trustee in such case must make a careful investigation and exercise a sound discretion * * *.''

We believe that the language quoted from *Billington's Appeal* and from *Perry* is applicable to the present situation.

Therefore, bank and trust companies and trust companies are authorized to accept, on behalf of estates of which they are fiduciaries, bonds of the Home Owners' Loan Corporation in exchange for mortgages held by them on behalf of such estates, in any case in which, after a careful and independent study of the entire situation, they reach the conclusion that to do so will in all probability protect the estate from loss upon such mortgages.

6. *Building and Loan Associations.* Section 803 of the Building and Loan Code, Act No. 108, approved May 5, 1933, provides that a building and loan association shall not make any investments except those specifically enumerated in that act. In our opinion, the bonds of the Federal Home Owners' Loan Corporation do not fall within any of the categories therein specified.

It has been suggested that the bonds of the Federal Home Owners' Loan Corporation come within the following class mentioned in Section 803:

> "(2) Bonds or debentures *issued by a Federal Home Loan Bank* under the provisions of the Federal Home Loan Bank Act, approved the twenty-second day of July, one thousand nine hundred thirty-two, *its amendments* and supplements." (Italics ours.)

It is true that the Home Owners' Loan Act of 1933 is, in part, an amendment to the Federal Home Loan Bank Act. However, the bonds under discussion in this opinion are those issued by the Home Owners' Loan Corporation, not the Federal Home Loan Bank. The Home Owners' Loan Corporation is not a substitute for the Federal Home Loan Bank. The latter continues to exist. Its purpose and operation are entirely different from those of the Home Owners' Loan Corporation. The power to invest in the bonds and debentures of the Federal Home Loan Bank cannot be construed to include the power to invest in the bonds of the Home Owners' Loan Corporation.

It has been suggested also that these bonds fall within the group specified in Section 803 (1) of the Building and Loan Code, that is, in general, obligations of the United States. The bonds of the Home Owners' Loan Corporation are debts of the Corporation; they are not part of the public debt of the United States.

Accordingly, building and loan associations are not authorized to purchase as investments bonds of the Home Owners' Loan Corporation.

However, under Section 806 of the Building and Loan Code, (which corresponds to Section 1214 of the Banking Code) building and loan associations are authorized to accept such bonds in exchange for mortgages upon real property held by the association, provided that it appears that the transaction will probably protect the association from loss upon the mortgages. The association, before accepting the bonds, must arrive at an independent judgment after a study of all the facts. Such bonds, when accepted by the association in exchange for mortgages, must be sold by it within five years, unless the Department, in the manner provided by the above section, authorizes the association to hold them for a longer period.

II

Institutions Operating under Restrictions

1. *Banks, Bank and Trust Companies, Savings Banks and Private Banks under Supervision of Department of Banking.* Under Act No. 6, approved March 8, 1933, the Secretary of Banking has the power to authorize any bank, bank and trust company, savings bank, or

private bank under his supervision to suspend payment of all or part of its deposit liabilities, subject to such rules and regulations as the Secretary of Banking may prescribe.

Pursuant to this act, the Secretary of Banking has imposed the following limitation, applicable to all funds on hand in the institution, except those received as new deposits after the date on which the Secretary of Banking authorized the institution to suspend payment of its deposit liabilities:

> "(c) Cash on hand and accumulated from the collection of loans, etc., shall not be invested but shall be available for payments to depositors in such amounts and at such times as may be approved by the Secretary of Banking."

Such funds therefore may not be invested in bonds of the Home Owners' Loan Corporation.

Section 1 (c) of Act No. 6 authorizes institutions which are operating under that act:

> "(c) To receive new deposits which shall be segregated from deposits previously made and invested in liquid assets as defined by the Secretary. * * *"

Therefore, "new deposits" may not be invested in bonds of the Home Owners' Loan Corporation unless you are able and willing to classify them as "liquid assets".

However, institutions operating under the restrictions imposed by Act No. 6, are nowhere, either in the act itself or in the regulations of the Department of Banking, limited in the carrying out of their regular powers to protect themselves from loss. Each of the types of institution enumerated is authorized, when operating without restrictions, to acquire any property or security whatsoever to protect itself from loss on a previous investment. See Sections 1001, 1017, 1214, and 1310 of the Banking Code.

Therefore, banks, bank and trust companies, savings banks, and private banks under supervision of the Department of Banking, operating under the restrictions imposed by Act No. 6 and the regulations of the Department of Banking issued pursuant thereto, are authorized to accept bonds of the Home Owners' Loan Corporation in exchange for mortgages held by them, in any case in which it appears to them that such action will protect the institution from loss on such mortgages.

2. *Bank and Trust Companies, and Trust Companies—Funds Held in a Fiduciary Capacity.* Neither Act No. 6 nor the regulations issued by the Department of Banking pursuant thereto affect in any way the powers which a bank and trust company or a trust company

has as fiduciary. Their power to accept bonds of the Home Owners' Loan Corporation in exchange for mortgages held by them is, therefore, in our opinion, the same as that which we have outlined above for bank and trust companies and trust companies not operating on a restricted basis.

3. *Building and Loan Associations.* Under Section 808 of the Building and Loan Code, the Department of Banking is authorized, under certain conditions, to issue an "order of segregation". The order of segregation does not in any manner add to the investments which may be made by an association. Consequently a building and loan association, operating under the restrictions imposed by the order of segregation has no power to purchase bonds of the Home Owners' Loan Corporation, but it has the same power to accept them in exchange for a mortgage held by the association as it had prior to the issuance of the order of segregation.

III

Institutions in Possession of the Secretary of Banking as Receiver

1. *Banks, Bank and Trust Companies, Trust Companies, Savings Banks, and Private Banks Subject to Supervision of Department of Banking—Funds Other than Trust Funds.* Article VII of the Department of Banking Code, Act No. 111, approved May 15, 1933, prescribes the rights, powers, and duties of the Secretary of Banking in possession, as receiver, of the business and property of any bank, bank and trust company, trust company, savings bank, or private bank under his supervision.

A careful study of Article VII indicates that the Secretary of Banking, in possession of an institution as receiver, is nowhere given power to make investments, except such as are necessary to protect an equity which such institution has in real or personal property. In general it is the duty of the Secretary of Banking as receiver to liquidate the affairs of the institution and to make funds available for the payment of dividends to creditors, depositors, or shareholders, as the case may be. The making of investments is inconsistent with the purposes for which he takes possession as receiver. Consequently, no such powers are granted to him by the Department of Banking Code.

However, Section 716 of the Department of Banking Code provides, in part, as follows:

> "The Secretary may, with leave of court, compound or compromise any debt, claim, or judgment due to the institution of which he is in possession as receiver, and discontinue any action or other proceeding pending therefor."

Under this section, the Secretary of Banking as receiver may, with leave of court, settle any claim, whether secured by a mortgage or by any other form of security. If the compromise of a mortgage contemplates the acceptance by him of the bonds of the Home Owners' Loan Corporation in exchange for the mortgage, we are of the opinion he may do so, if the court approves.

2. *Bank and Trust Companies and Trust Companies—Funds Held in Fiduciary Capacity.* Section 802 of the Department of Banking Code deals with the powers and duties of the Secretary of Banking in handling the trust department of bank and trust companies or trust companies of which he is receiver. It provides, in part, as follows:

> "The Secretary shall not, however, have the power to invest funds or property of any such estate, except where it shall appear necessary to purchase any real or personal property, or any interest therein, in order to protect an equity which such estate has in such property. * * *"

This clause is self-explanatory.

Section 802 B of the Department of Banking Code provides, in part, as follows:

> "The Secretary, when in possession of an institution as receiver, shall have all the rights, powers, and duties which such institution had in its fiduciary capacity. * * *"

Under the express terms of this provision, the Secretary of Banking as receiver of a bank and trust company or a trust company has same power as was enjoyed by the bank and trust company or trust company before it was taken into possession to protect an estate from loss on mortgages held by it by accepting bonds of the Home Owners' Loan Corporation in exchange for such mortgages.

IV

Building and Loan Associations in Possession of Liquidating Trustees

Article XI of the Building and Loan Code contains the procedure for the voluntary dissolution of building and loan associations. Under a plan of dissolution by liquidating trustees, as under a liquidation conducted by the Secretary of Banking as receiver, the purpose is to liquidate the business and property of the association with the greatest possible dispatch. It would clearly be beyond the power of liquidating trustees to make any new investments, except such as are necessary to protect a prior equity of the association.

However, most plans of voluntary dissolution specifically authorize the liquidating trustees to compromise and settle claims. Even in cases where this power is not specifically stated, it must be implied as a necessary corollary of the power to liquidate.

Therefore, liquidating trustees under a plan of voluntary dissolution are authorized to accept bonds of the Home Owners' Loan Corporation in exchange for mortgages, pursuant to a compromise or settlement which they deem to the best interests of creditors and shareholders of the association.

V

To summarize we advise you that:

1. *Banks,* when operating without restrictions, may purchase bonds of the Home Owners' Loan Corporation as investments and may accept them in exchange for mortgages on real estate. When operating under restrictions, these institutions may not purchase such bonds as investments with old funds, and can purchase them with segregated funds only if you classify them as "liquid assets"; but the banks may accept such bonds in exchange for mortgages, in any cases in which they are satisfied that to do so will avoid loss.

2. *Bank and trust companies,* for their own account, have the same powers as banks. They may not purchase these bonds for trust estates in the absence of clear and unequivocal authority in the instrument creating the fiduciary relationship; but they may accept them in exchange for mortgages held by them for such estates, in any case in which, after a careful and independent examination of all the facts, it appears that to do so will save the estate from loss upon the mortgage thus given in exchange.

3. *Savings banks* are authorized to purchase such bonds as investments or accept them in exchange for mortgages, only if authorized to do so by their articles of incorporation or any amendment thereto; if not authorized by their articles of incorporation to invest in such bonds, they may nevertheless accept them in exchange for mortgages held by them whenever it appears that to do so will save them from loss upon such mortgages.

4. *Trust companies,* for their own account, have the same powers and are subject to the same limitations, with respect to such bonds, as savings banks. For trust estates, they have the same powers as bank and trust companies.

5. *Private banks under supervision of Department of Banking* have the same powers as banks.

6. *Building and loan associations* are not authorized to purchase such bonds as investments, but may accept them in exchange for mortgages held by them, in any cases in which it appears that to do so will save them from loss upon such mortgages. The powers of these associations are not affected by the fact that they are operating under order of segregation.

7. *The Secretary of Banking as receiver of banks, bank and trust companies and trust companies for their own account, savings banks, private banks under supervision of Department of Banking, building and loan associations,* is not authorized to purchase such bonds as investments, but may, with the approval of the court, accept them in exchange for mortgages of the institution of which he is in possession in any cases in which he deems such action to the best interests of the estate.

8. *The Secretary of Banking as receiver of bank and trust companies and trust companies for estates of which they are serving in a fiduciary capacity* is not authorized to purchase such bonds as investments for estates, but may accept them in exchange for mortgages of estates under the same circumstances and subject to the same conditions as governed the action of the institution in this regard prior to his taking of possession.

9. *Liquidating trustees of building and loan associations,* subject to the terms of the particular plan of voluntary dissolution, have the same powers as the Secretary of Banking as receiver of a building and loan association.

Very truly yours,

DEPARTMENT OF JUSTICE,
BERNARD G. SEGAL,
Assistant Deputy Attorney General

WM. A. SCHNADER,
Attorney General

OPINION NO. 87

Taxation—Corporate Loans—Bank deposits.

Deposits in incorporated banks, upon which interest is paid, are subject to corporate loans tax under the provisions of Section 17 of the Act of June 17, 1913, P. L. 507 as amended.

Department of Justice,

Harrisburg, Pa., August 19, 1933.

Honorable Leon D. Metzger, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether deposits in incorporated banks, upon which interest is paid, are subject to corporate loans tax under the provisions of Section 17 of the Act of June 17, 1913, P. L. 507, as amended.

The Act of July 15, 1919, P. L. 955 amended Section 17 of said Act of 1913 as indicated by the words in italics in the following passage therefrom:

> "Section 17. That all scrip, bonds, certificates *and evidences* of indebtedness issued, *and all scrip, bonds, certificates and evidences of indebtedness assumed, or on which interest shall be paid,* by any and every private corporation, incorporated or created under the laws of this Commonwealth or the laws of any other State or of the United States, and doing business in this Commonwealth, and all scrip, bonds, certificates, *and evidences* of indebtedness issued, *and all scrip, bonds, certificates, and evidences of indebtedness assumed, or on which interest shall be paid,* by any county, city, borough, township, school district, or incorporated district of this Commonwealth are hereby made taxable in the year one thousand nine hundred and *nineteen,* and annually thereafter, for State purposes, at the rate of four mills on each dollar of the nominal value thereof: * * *"

and by adding at the end thereof, the following paragraph:

> *"It is the intent of this act that all scrip, bonds, certificates, and evidences of indebtedness made taxable under section one (1) of the act to which this is an amendment, and that only such scrip, bonds, certificates, and evidences of indebtedness which cannot be made taxable under this section are to be taxed under section one (1) of said act."*

In *Commonwealth v. Jacob Reed's Sons, Inc.,* 25 Dauphin, 117 (1922), affirmed 275 Pa. 20, (1922) Judge Hargest reviewed at some length the history of our legislation taxing personal property, showing exactly how the distinction between the "personal property tax" and the "tax on loans" came to be made. As it gradually evolved up to the time of the passage of the Act of 1913, the "tax on loans" clearly embraced all of the debts of private corporations upon which interest was paid. Judge Hargest said at page 123:

> "So it is apparent that the Legislature by these various Acts, as indicated by the cases above cited, and many other cases to which reference is unnecessary, intended to separate personal property for taxation *into two classes,* although the subjects were enumerated in the same section of the Act of Assembly. The one class came to be known as the "tax on loans" and, as indicated by the two cases above referred to, *embraced the debts of private corporations.* It was intended to embrace *all of such debts,* and from the passage of the Act of 1885, wherein the taxable was directed not to return to the local assessor for taxation the obligations of corporations, down to the passage of the Act of 1913, such obligations, if taxed at all, were taxed as loans, and the tax paid by the corporation, as the collector thereof. The other class, as the Supreme Court have said in the case of Commonwealth *v.* Lehigh Valley R. R. Co., supra, was 'the residue of the general class, except the bonds of municipal corporations.' * * *" (Italics ours)

As explained by Judge Hargest in his opinion, great confusion arose between Sections 1 and 17 of the Act of 1913 because the language of both sections overlapped and taxed the same kind of property. The obvious intention of the Legislature in passing the Act of 1919 was not only to return to the system of taxing indebtedness in force prior to the Act of 1913, but also to enlarge the subjects of taxation for State purposes by including all corporate indebtedness, however evidenced, provided interest was paid thereon.

This is supported by the opinion of the Supreme Court in *Commonwealth v. Imperial Woolen Company,* 290 Pa. 526 (1927). In that case, the question arose whether Section 17 of the Act of 1913 as amended by the Act of 1919 imposed a tax for State purposes upon accounts recorded on the books of a corporation and on which it paid interest but which were not evidenced by any paper, document, credit memorandum, written acknowledgment, or any substitute therefor, given or issued, by a debtor corporation to its creditor. Referring to the Act of 1919, the Supreme Court said (page 529):

> "* * * it classifies evidences of indebtedness of three kinds upon which tax is to be paid; those that are issued by a corporation, those which are assumed by

> it and those on which it pays interest. * * * We think the manifest purpose of the legislature was *to tax all indebtedness of corporations, however evidenced,* and thus to place them all on an equality so far as loan taxes are concerned, otherwise a corporation which had borrowed money and given an obligation for it would be taxed, whereas one which had borrowed a like sum and made an entry thereof upon its books would escape the tax." (Italics ours)

In *Commonwealth v. People's Natural Gas Company,* 301 Pa. 120 (1930), the Supreme Court affirmed the principle laid down in the Imperial Woolen Company Case, that the purpose of the Legislature as indicated in the Act of 1919 was to tax "* * * all indebtedness of corporations, however evidenced, * * *" upon which interest was paid. In this case, cash deposits made by customers with a gas company in order to establish credit, under an agreement to refund the amount of the deposit with interest upon the fulfilment of the customer's obligations to the company, were subject to loans tax under Section 17 of said Act of 1913 as amended by the Act of 1919.

Foley's Estate, 80 P. L. J., 469 (1932) holding that a bank account which bore interest at two per cent was liable for personal property tax under Section 1 of the Act of 1913, gave no consideration to any of the decided cases on Section 17, and, therefore, can have no application to your question.

The Act of April 21, 1933, Act No. 40, amends Section 1 of said Act of 1913 as indicated by the words in italics in the first proviso of the section as follows:

> "* * * Provided, That this section shall not apply to bank notes, or notes discounted or negotiated by any bank or banking institution, savings institution, or trust company, nor to loans, shares of stock, or other securities, held by bankers or brokers solely for trading purposes, nor to accounts or debit balances owing by customers of bankers or brokers in the usual courses of business, *nor to interest bearing accounts in any bank or banking institution, savings institution, or trust company:* * * *"

In view of the fact that this amendment of 1933 expressly removes "interest bearing accounts in any bank or banking institution, savings institution or trust company" from taxation under Section 1, it definitely eliminates any doubt as to whether these interest bearing deposits are taxable under Section 1.

It is unnecessary to cite authorities in support of the principle that the relationship of creditor and debtor exists between a bank and its depositors. As stated by the Supreme Court in *Commonwealth v. People's Natural Gas Company,* supra, "if the placing of the deposit with defendant did not create the relationship of creditor and debtor, it is difficult to say what other relation was established.''

Therefore, we are of the opinion and you are advised that deposits in incorporated banks, upon which interest is paid, are subject to corporate loans tax under the provisions of Section 17 of the Act of June 17, 1913, P. L. 507 as amended.

Very truly yours,

DEPARTMENT OF JUSTICE,
PHILIP S. MOYER,
Deputy Attorney General.

OPINION NO. 88

Audits—State Workmen's Insurance Fund—State Workmen's Insurance Board.

The Legislature, by Acts Nos. 68 and 322, which became effective June 1, 1933, transferred from the Department of the Auditor General to the Insurance Department the full responsibility of auditing the State Workmen's Insurance Fund and the affairs of the State Workmen's Insurance Board.

Department of Justice,

Harrisburg, Pa., August 22, 1933.

Honorable Otto F. Messner, Deputy Auditor General, Harrisburg, Pennsylvania.

Sir: You inquire whether the Department of the Auditor General has any responsibility in connection with the audit of the State Workmen's Insurance Fund and the affairs of the State Workmen's Insurance Board.

Your inquiry arises under Acts No. 68 and 322, which were enacted at the recent session of the Legislature and which became effective June 1, 1933.

Act No. 68 provides, inter alia:

> ''That the Insurance Department, at least once each year, shall make a complete examination and audit of the affairs of the State Workmen's Insurance Fund, including all receipts and expenditures, cash on hand, and securities, investments, or property held representing cash or cash disbursements, to ascertain its financial condition and its ability to fulfill its obligations, whether the State Workmen's Insurance Board in managing the fund has complied with the provisions of law relating to the fund, and the equity of the board's plans and dealings with its policyholders.''

Act No. 322 amended Section 402 of The Fiscal Code to read, in part, as follows:

> "Audits of Affairs of Departments, Boards and Commissions.—It shall be the duty of the Department of the Auditor General to make all audits, which may be necessary, in connection with the administration of the financial affairs of the government of this Commonwealth.
>
> "At least one audit shall be made each year of the affairs of every department, board, *except the State Workmen's Insurance Board,* and commission of the executive branch of the government, and all collections made by departments, boards, or commissions, and the accounts of every State institution, shall be audited quarterly.
>
> "Special audits of the affairs of all departments, boards, *except the State Workmen's Insurance Board,* commissions, or officers, may be made whenever they may, in the judgment of the Auditor General, appear necessary, and shall be made whenever the Governor shall call upon the Auditor General to make them." (Italics reflect changes made by the amendatory act)

Prior to the enactment of the above cited legislation, the only authority for the Department of the Auditor General to audit the affairs of the State Workmen's Insurance Board or the State Workmen's Insurance Fund was contained in Section 402 of The Fiscal Code and the Act of June 13, 1923, P. L. 698. (See Formal Opinion of this Department to the Secretary of Labor and Industry, under date of May 26, 1930, Official Opinions of the Attorney General, 1929-1930, page 164)

In the above cited opinion it was stated, among other things:

> "The suggestion has been advanced that the audit of the affairs of the Board is not essentially or necessarily an audit of the Fund. * * *
>
> "* * * the audits provided for in Section 402 mean the audits of the *fiscal* or *financial* 'affairs' of the departments, boards, and commissions of the Commonwealth. The only financial affairs of the State Workmen's Insurance Board are its control and administration of the State Workmen's Insurance Fund—even though said Fund is not strictly State-owned money. * * *"

Accordingly, the power to audit the State Workmen's Insurance Fund necessarily includes the power to audit the affairs of the State Workmen's Insurance Board.

Reading Acts 68 and 322 together, it becomes clear that it was the obvious intent of the Legislature, by those acts, to transfer from the

Department of the Auditor General to the Insurance Department the power and duty to audit the State Workmen's Insurance Fund, and, consequently, the affairs of the State Workmen's Insurance Board.

Accordingly, you are advised that the Legislature, by Acts Nos. 68 and 322, which became effective June 1, 1933, transferred from the Department of the Auditor General to the Insurance Department the full responsibility of auditing the State Workmen's Insurance Fund and the affairs of the State Workmen's Insurance Board.

Very truly yours,

DEPARTMENT OF JUSTICE,
E. RUSSELL SHOCKLEY,
Deputy Attorney General.

OPINION NO. 89

Taxation—Exoneration by school directors of person owning real estate from paying school taxes assessed against him.

Property owners may not be exonerated from payment of taxes on the ground of indigency. Such exonerations would constitute exemptions forbidden by Article IX, Sections 1 and 2 of the Constitution of 1874. But these provisions do not prevent exonerations on the grounds of mistake or for unseated lands; nor do these provisions prohibit exoneration of tax collectors as distinguishing from taxpayers.

Department of Justice,
Harrisburg, Pa., August 22, 1933.

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 exonerate a person owning real estate from paying school taxes assessed against him.

The term "exoneration" as most commonly used in tax matters means an action of taxing authorities by which a tax collector is relieved of the responsibility of collecting taxes assessed against particular persons or property. In many cases the practical result of such an exoneration is to relieve the taxpayer himself, because no efforts are made thereafter to collect the tax. In other instances, however, the exoneration of the collector is followed by the filing of liens or other methods of enforcing the taxpayer's liability. A situation in which the Legislature has expressly provided for the latter procedure is found in the Act of May 29, 1931, P. L. 280, under which collectors become entitled to exoneration upon returning delinquent taxes to the county commissioners for establishing liens.

That school boards have authority to exonerate tax collectors is settled: *Stone v. School District of Carbondale,* 102 Pa. Super. Ct. 60, 64 (1931); *Chester City School Directors* (No. 3), 19 Del. Co. 200, 202 (1928); *Scranton School Directors,* 6 Pa. D. & C. 105 (1924) and *In Re Auditors of School District, Pittston Township,* 20 Luzerne L. R. 51 (1918).

However, you have supplemented your inquiry by saying that you are not concerned as to the authority of school boards to exonerate tax collectors, but only as to the power of the boards affirmatively to relieve the taxpayer himself and his property from tax liability. We shall address ourselves to that problem.

Exonerations may be made by school districts on one of three grounds,—mistake, unseated lands, or indigency: Act of June 13, 1836, P. L. 525, Sec. 6; Act of May 8, 1854, P. L. 617, Sec. 31.

Exonerations to correct mistakes are not in reality exonerations at all. Exonerations of unseated lands is clearly in relief of the tax collector only; the lands themselves are returned to be sold at tax sales, under a long established system: See *Long v. Phillips,* 241 Pa. 246 (1913). We have no hestitation in saying that these two forms of exoneration are entirely proper. Therefore, we shall eliminate them from further consideration, and our discussion will concern only exonerations made on the ground, or under the pretext of indigency.

Two principal questions confront us. (1) Is there existing legislation conferring on boards of school directors authority to exonerate taxpayers and taxable property from tax liability? And, (2), if there is such legislation, is it constitutional?

The answer to the first question is not entirely free from doubt. No Act of Assembly expressly confers the power, and the cases provide no explicit authority. However, we believe that the power may be implied from such legislative provisions as do exist. But since the answer which we shall give to the second question will dispose of the matter, it would serve no useful purpose to enter into a detailed discussion of the first. Suffice it to say that, in our opinion, legislative authority to make such exonerations, may be found in the Act of June 13, 1836, P. L. 525, Section 6 and the Act of May 8, 1854, P. L. 617, Section 31, and was recognized or assumed by the Supreme Court in *School Directors of Bedford Borough v. Anderson,* 45 Pa. 388 (1863), and *Clinton School District's Appeal,* 56 Pa. 315 (1868). The Legislature attempted to carry the power forward in boroughs and townships by the Act of June 25, 1885, P. L. 187, Section 10, and it included it by implication in Sections 559, 530 and 545 of the School Code of May 18, 1911, P. L. 309. Incidentally, the School Code repealed the Acts of 1836 and 1854, supra. The Act of May 27, 1841,

P. L. 400, Section 8 also confirms the existence of authority to make such exonerations at that time.

Therefore, we shall proceed on the premise that there is legislative authority to exonerate taxpayers and their property from payment of school taxes on grounds of indigency. Is it constitutional?

Prior to 1874 the power of the Legislature to exempt from taxation was practically unlimited. Abuses of this power led to the adoption of the provisions of Section 1 and 2 of Article IX of the Constitution of 1873. As adopted, they were as follows:

> "Section 1. All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity. * * *
>
> "Section 2. All laws exempting property from taxation, other than the property above enumerated, shall be void."

Subsequent amendments have added other permissible subjects of exemption not important here.

We are convinced that exoneration of taxpayers, on the ground of indigency, as distinguished from exoneration of the collector, is the granting of an exemption. Exonerations on the ground of mistake and exonerations of unseated lands, however, are not exemptions.

In *Sinnemahoning Iron and Coal Company v. Shaffer*, 14 Pa. Dist. 368 (1905), a well reasoned case, it was directly ruled that the constitutional provisions above quoted prevented exoneration of taxpayers after the effective date of the Constitution. The court in that case said:

> "* * * All the Acts of Assembly allowing exonerations from taxation have been abrogated by the Constitution, and no exemptions can be allowed except those enumerated in art. IX, sec. 1, of the Constitution."

In *Mercantile Hall Library Co. v. Pittsburgh*, 9 Sadler 59 (1887), the Supreme Court adopted the opinion of the court below, which held that the Constitution annulled an act which had exempted from taxation the property of the plaintiff. To the argument there advanced that the constitutional provisions were prospective only the court said:

> "To say that this section is merely prospective is to say that it is utterly without meaning or good. Any statute thereafter passed in violation of any of the provisions of sec. 1 would necessarily be void. The intention was to save the existing laws in relation to the manner of assess-

> ing and collecting taxes, for the discretion of the legislature as to the time of their repeal; but to wipe out at once all exemptions of property from taxation other than that enumerated in sec. 1. All such laws 'shall be void'—not when the legislature may see fit to repeal them, but immediately on the adoption of the Constitution."

The effect of this seemingly clear language of the Constitution and of the cases just cited has been confused, however, by other cases which have, in one connection or another, said that the constitutional provisions in question did not repeal any prior laws, but were prospective only. *Coatesville Gas Co. v. County of Chester,* 97 Pa. 476 (1881), and other cases of this kind are distinguished in the Mercantile Library Co. Case.

But in *Walker's Appeal,* 44 Pa. Supra. 145 (1910), it was directly stated that the Constitution had not repealed any laws permitting exonerations, and that the power vested in taxing officials by prior Acts of Assembly was undisturbed. That case, however, involved exoneration of a tax collector, not of a taxpayer, and the Superior Court directly avoided our present question when it used the following argument to sustain its conclusion that the power to exonerate collectors remained:

> "* * * It may well be doubted in any view of the case whether the exonerations to the collector authorized by the act of 1834 are exemptions from taxation within the meaning of the constitutional provision. The exoneration of the treasurer was not necessarily a release of the property assessed from liability. The assessments were duly made and the taxables regularly charged. The release of the treasurer from liability for the collection of the taxes from which he was exonerated was in relief of the treasurer in order that he might make settlement as provided in sec. 48 of the act of 1834."

The Walker Case may well be differentiated from the other cases cited on the ground suggested in the foregoing quotation. Exoneration of tax collectors not being an exemption, was not affected by the Constitution.

Subsequent cases, dealing with the propriety of the exonerations of collectors, have at times made general statements as to the existence of a power in taxing bodies to exempt property and persons, but we have not found one in which the question was actually decided, or even made the subject of direct consideration. The most recent is *Robbins v. Baldwin Township School District,* 80 Pitts., L. J. 30 (1930). The plaintiff there was a taxpayer seeking exoneration, but the case was dismissed on procedural grounds, and the opinion affords us no assistance.

Except for *Sinnemahoning Iron and Coal Company v. Shaffer*, supra, the only case that has squarely passed upon our present question is *Carver v. Hanover Township School District*, 17 Pa. D. & C. 116 (1932). In that case, Judge Valentine of the Court of Common Pleas of Luzerne County, in considering the propriety of certain acts of a board of school directors said (p. 119):

> "1. The so-called abatement constituted an attempt on the part of the majority of the members of the school board to relieve the owners of real estate from liability for the payment of taxes assessed thereon. They lack legal authority to take such action."

Judge Valentine's opinion does not contain any discussion of the question, but we believe that his conclusion is fully justified. If we regard the exoneration provisions of Sections 530, 545 and 559 of the School Code as new legislation, (the Code having expressly repealed the Acts of 1836 and 1854 under which prior exonerations had been made), both the legislative provisions and the actual exonerations by local authorities would fall under the constitutional ban on future grants of exemption.

If, on the other hand, following the rather tenuous reasoning of *In Re Auditors School District, Pittston Township*, 20 Luzerne L. R. 51 (1918), we should consider the Code provisions on exonerations not as new legislation adopted since the Constitution, but as continuations of powers granted by the Acts of 1836 and 1854, carried forward through the medium of the Act of June 25, 1885, P. L. 187, Section 10, the result is the same. The Sinnemahoning Iron and Coal Company and Mercantile Hall Library Co. Cases, supra, amply sustain the conclusion that the Constitution abrogated the authority given to school boards by the Acts of 1836 and 1854 to exonerate taxpayers on the ground of indigency, as well as prohibiting future legislation of the same kind.

It may be noted that the theory of the Pittston Township Case, that the statutory authority granted by the Acts of 1836 and 1854 has been continued without interruption in any event could be applied only in boroughs and townships, since the Act of 1885, on which the theory depends, applied only to those municipal subdivisions.

It seems that our conclusion coincides with the view of at least one of the present Justices of our Supreme Court. In a dissenting opinion in *Fitzpatrick v. Thomas*, 311 Pa. 191, 196 (1933), Mr. Justice Kephart, speaking of items which may be deducted from a tax levy in cities of the third class, said that the item "exoneration of poor persons," "never includes persons owning real estate."

To summarize:

We conclude that exoneration of taxpayers on the ground of indigency, as distinguished from exoneration of collectors, is the granting of exemptions from the payment of taxes. Prior to the adoption of the Constitution of 1873, such exonerations were permissible, and the School Code of 1911, by implication, purported to permit similar action by boards of school directors. But the provisions of Article IX, Section 1 and 2 of the Constitution abrogated then existing powers to make such exonerations and forbade future legislation conferring the power.

Therefore, following the decisions in *Sinnemahoning Iron and Coal Company v. Shaffer* and *Carver v. Hanover Township School District*, supra, we advise you that boards of school directors may not exonerate property owners or their property from payment of school taxes on the ground of indigency, although tax collectors may be exonerated from liability to collect such taxes. However, this does not prevent exonerations of unseated lands or on account of mistakes.

Very truly yours,

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

OPINION NO. 90

Business corporation—Public service company—Certificates of authority and articles of incorporation.

Existing corporation laws of this Commonwealth do not permit the formation of a domestic business corporation or the admission of a foreign business corporation with authority to transact the business of a public service company, and, conversely, a domestic public service company may not be formed, or a foreign public service company may not be registered for any purpose applicable only to business corporations. Therefore, the Department of State should not accept any papers which do not reflect this distinction.

Department of Justice.

Harrisburg, Pa., August 23, 1933.

S. L. Winegrad, Chief, Corporation Bureau, Department of State, Harrisburg, Pennsylvania.

Sir: You state that applications for certificates of authority and articles of incorporation have been presented to your department, containing purpose clauses which would authorize a corporation to engage in a business permissible by the laws of this Commonwealth for both public service companies and business corporations.

You inquire whether your department should treat such corporations as public service companies or as business corporations.

Your inquiry is undoubtedly prompted by the enactment of the Business Corporation Law, which became effective July 3, 1933, and which completely revised and codified the laws of the Commonwealth relating to the formation, regulation and dissolution of all corporations for profit, except cooperative associations, public service companies, banks, trust companies, building and loan associations and insurance companies (see Section 4). Among other things, a new method was prescribed for the incorporation of domestic business corporations (Article II), and for the registration of foreign business corporations desiring to do business in the Commonwealth (Article X). No change whatsoever was made in existing laws relating to the incorporation, regulation and dissolution of domestic public service companies or the registration of foreign public service companies. All prior laws relating to corporations for profit were repealed in so far as they related to business corporations (Section 1202).

Accordingly, the existing legislative pattern of our corporation laws makes a clear distinction between business corporations and public service companies. To form a domestic business corporation the incorporators are required by the Business Corporation Law to submit articles of incorporation to the Department of State, which, in turn, is required to issue a certificate of incorporation; whereas to form a public service company the incorporators are required, by the Corporation Act of 1874, or other applicable laws, to present a certificate of incorporation to the Governor, who, in turn, is required to issue letters patent with the approval of The Public Service Commission. A foreign business corporation, before it may do business in the Commonwealth, is required by the Business Corporation Law to procure a certificate of authority from the Department of State, and to advertise its intention to do so; whereas a foreign public service company is required by the Act of June 8, 1911, P. L. 710, to file with the Secretary of the Commonwealth a written power of attorney designating the secretary as its agent for service of process, and, by The Public Service Company Law, to obtain a certificate of public convenience.

As the Business Corporation Law, by Section 4, does not apply or relate to public service companies, it is clear that a business corporation may not be formed for any purpose which would put it within the category of a public service company, as defined in The Public Service Company Law. Conversely, a public service company may not be formed for any purpose for which a business corporation may be formed, as the Business Corporation Law is the only incorporation statute providing for the formation of corporations for that purpose, and public service companies are not within its purview. In the latter case, however, we point out that the Legislature has not curtailed the powers of public service companies one iota, so that such companies still have the implied power to deal in merchandise that will promote the utilization of their service rendered to the public, as was decided by the Supreme Court in *Malone v. Lancaster Gas Light, Etc. Co.,* 182 Pa. 309 (1897). See also, *Commonwealth, ex rel., Appellant, v. Philadelphia Electric Co.,* 300 Pa. 577 (1930).

What we have said applies equally as well to foreign corporations seeking admission to do business in this Commonwealth, for Section 1002 of the Business Corporation Law expressly provides that the Department of State shall not issue a certificate of authority to any foreign business corporation to do "any kind of business for the transaction of which a domestic business corporation could not be formed under the laws of the Commonwealth." Therefore, the Department of State has no power to issue a certificate of authority to a foreign public service company under the Business Corporation Law, and, conversely, the Department of State may not issue a certificate of authority to a foreign business corporation which sets forth any purpose which would constitute it a public service company.

Accordingly, you are advised that the existing corporation laws of this Commonwealth do not permit the formation of a domestic business corporation or the admission of a foreign business corporation with authority to transact the business of a public service company, and, conversely, a domestic public service company may not be formed, or a foreign public service company may not be registered, for any purpose applicable only to business corporations. Therefore, the Department of State should not accept any papers which do not reflect this distinction.

Very truly yours,

DEPARTMENT OF JUSTICE,

E. RUSSELL SHOCKLEY,
Deputy Attorney General,

OPINION NO. 91

Banks and Banking—Banks and trust companies—Commercial department—Assets.

Section 1111 of the Banking Code of 1933, P. L. 624, applies to assets acquired by the commercial department of a bank and trust company prior to July 3, 1933, with the same force as in the case of assets acquired after that date.

Department of Justice,

Harrisburg, Pa., September 9, 1933.

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

Sir: You have asked to be advised on the application of Section 1111 of the Banking Code, Act No. 112, approved May 15, 1933, to assets which were purchased by the commercial department of a bank and trust company prior to July 3, 1933, the effective date of the Banking Code.

Section 1111 of the Banking Code provides, as follows:

> "Limitation upon Purchase or Exchange of Assets of Commercial Department.—A bank and trust company shall not, directly or indirectly, purchase with funds held by it as fiduciary, or exchange for any real or personal property held by it as fiduciary, any asset of its commercial department, but this prohibition shall not apply in the case of bonds or other interest-bearing obligations of the United States, of this Commonwealth, or of any county, city, borough, township, school district, or poor district of this Commonwealth, nor in the case of assets of its commercial department earmarked for future trust investment at the time of acquisition by the commercial department, and purchased or exchanged, within one year after acquisition, with funds or for property held by it as fiduciary. A report shall be made monthly to the board of directors and to the Department of all transactions, including earmarked acquisitions, within the exception to the foregoing prohibition."

It is clear under the terms of this section that no transfers of assets, other than those expressly specified therein, may be made from the commercial department to the trust department of a bank and trust company. No exception, express or implied, is made with respect to assets acquired prior to July 3, 1933. Except for the types of government obligations listed in the portion of Section 1111 quoted above, no asset of the commercial department of a bank and trust company, regardless of when acquired, may be purchased with, or exchanged for, funds or property held by the bank and trust company as fiduciary, unless such asset was earmarked for trust investment at the time of its acquisition by the commercial department and unless the transfer to the trust department is made within one year after the acquisition of such asset by the commercial department.

You have suggested the possibility that assets acquired by the commercial department of a bank and trust company prior to July 3, 1933 may be earmarked after that date for future trust investment. Such a procedure would be in conflict with the express terms of Section 1111 of the Banking Code. That section specifically prohibits the transfer from a bank and trust company's commercial to its trust department of any assets not earmarked for future trust investment "at the time of acquisition by the commercial department".

Therefore, we advise you that Section 1111 of the Banking Code applies to assets acquired by the commercial department of a bank and trust company prior to July 3, 1933, with the same force as in the case of assets acquired after that date.

Very truly yours,

DEPARTMENT OF JUSTICE,
BERNARD G. SEGAL,
Assistant Deputy Attorney General.

OPINION NO. 92

Home Owners' Loan Corporation Bonds—Right of insurance companies to invest in.

Life insurance companies, fire insurance companies, marine insurance companies, fire and marine insurance companies, and casualty insurance companies, whether stock or mutual, as well as fraternal benefit societies, are not authorized to purchase bonds of the Home Owners' Loan Corporation as investments, but they may accept them in exchange for mortgages upon real property in any case in which, after an independent study of the particular facts involved, they deem such action to the best interests of the companies or associations.

Department of Justice,

Harrisburg, Pa., September 14, 1933.

Honorable Charles F. Armstrong, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether life insurance companies, fire insurance companies, marine insurance companies, fire and marine insurance companies, and fraternal benefit societies may invest in, or accept in exchange for mortgages held by them, bonds of the Home Owners' Loan Corporation.

The Home Owners' Loan Corporation is a corporation organized by the Federal Home Loan Bank Board under the provisions of the "Home Owners' Loan Act of 1933", approved June 13, 1933. Its entire capital, not exceeding $200,000,000.00, is subscribed by the government of the United States. The corporation is authorized to issue bonds in an amount not exceeding $2,000,000,000.00.

The act provides that the bonds shall mature within a period of not more than eighteen years, shall bear interest at the rate of four per centum per annum, and shall be guaranteed by the United States as to interest only. There is no guarantee as to the payment of principal.

The bonds may be sold by the Corporation to provide additional funds for carrying out the purposes of the act, or they may be exchanged for mortgages or other liens upon real property occupied by the owner as a home. The face value of bonds exchanged, plus accrued interest thereon, and any cash advanced in accordance with the provisions of the act, shall not exceed $14,000, or eighty per cent of the value of the real property, as determined by an appraisal made by the Corporation, whichever is the smaller amount. The value of the property, as so appraised, must not exceed $20,000. The mortgage or lien taken by the Corporation in exchange for the bonds must be a first lien upon the real property taken as security.

We shall consider separately the questions involved with respect to each of the institutions mentioned in your inquiry.

Stock or Mutual Life Insurance Companies

Section 404 of the Act of May 17, 1921, P. L. 682, The Insurance Company Law of 1921, prescribes the classes of securities in which a stock or a mutual life insurance company may invest its capital and reserves. In our opinion, the bonds of the Home Owners' Loan Corporation do not fall within any of the categories therein specified.

It has been suggested that these bonds come within the group specified in Section 404 (b), that is, bonds of the United States. In our Formal Opinion No. 86, issued August 17, 1933, we advised the Secretary of Banking that bonds of the Home Owners' Loan Corporation are not bonds of the United States.

Section 405 of The Insurance Company Law of 1921 lists the classes of securities in which a stock or a mutual life insurance company may invest its surplus. These classes likewise do not, in our opinion, include bonds of the Home Owners' Loan Corporation.

The question next arises whether such companies may accept such bonds in exchange for mortgages held by them.

Section 404 of The Insurance Company Law of 1921, which deals with investments of the capital and reserves of life insurance companies, provides as follows:

> "Nothing herein contained shall be construed as to prevent any such company from acquiring or holding property * * * which may be obtained in satisfaction of any debt previously contracted."

Section 405, which deals with the investments and surplus of such companies, provides, in part, as follows:

> "Any money over and above the capital and reserves of any stock or mutual life insurance company may be invested in the securities enumerated in the preceding section * * *."

Under these provisions, it is clear that such companies have the power to exchange mortgages held by them for such bonds, whenever in their opinion such action is for the best interests of the companies.

Therefore, we advise you that stock or mutual life insurance companies are not authorized to purchase bonds of the Home Owners' Loan Corporation as investments, but they may accept them in exchange for mortgages whenever such action seems to be to their best interests.

Stock or Mutual Fire Insurance, Marine Insurance, or Fire and Marine Insurance Companies

Section 517 of The Insurance Company Law of 1921, as amended by the Act of June 23, 1931, P. L. 904, specifies the classes of securities in which stock or mutual fire insurance, marine insurance, or fire and marine insurance companies may invest their capital, and Section 518 of that act, as amended by the Act of May 12, 1925, P. L. 601, establishes the legal investments for the surplus of such companies. In our opinion, none of the classifications in either section includes bonds of the Home Owners' Loan Corporation.

It has been suggested that such bonds fall within the following category in Section 518:

> "* * * the stock or other evidence of indebtedness of any solvent corporation created under the laws of this Commonwealth or of any other state of the United States or the District of Columbia * * *."

The Home Owners' Loan Corporation was organized by the Federal Home Loan Bank Board under the laws of the United States,—not under the laws of any state or of the District of Columbia. Clearly, therefore, it is not included in any of the classes enumerated in the portion of Section 518 which we have quoted above.

Whether such bonds may be accepted in exchange for real estate mortgages of such companies is a different question. Such action is neither expressly authorized nor expressly prohibited by any provision of law. It involves the power of any institution or any fiduciary with limited investment powers to protect itself or the estate, respectively, from loss on a previous investment by acquiring property which it could not purchase as an original investment. Such power must be implied, unless it is expressly prohibited. Its existence is essential to the successful operation of the companies under discussion in this opinion.

Therefore, we advise you that stock or mutual fire insurance companies, marine insurance companies, or fire and marine insurance companies are not authorized to purchase bonds of the Home Owners' Loan Corporation as investments, but they may accept them in exchange for mortgages in any cases in which, after an independent study of all the surrounding circumstances, they deem such action to be to their best interests.

Stock or Mutual Casualty Insurance Companies

Section 602 of The Insurance Company Law of 1921 specifies the authorized investments for the capital of stock casualty insurance companies, and Section 603 of that act, as last amended by the Act of March 10, 1925, P. L. 30, lists the authorized investments for their surplus. In our opinion, bonds of the Home Owners' Loan Corporation are not within the terms of either list.

Section 802 of The Insurance Company Law of 1921 provides as follows:

> "No domestic mutual company other than a mutual life company shall invest any of its assets except in accordance with the laws of this Commonwealth relating to the investment of the assets of domestic stock insurance companies transacting the same kinds of insurance."

Although there are no relevant statutory provisions on the question of the power of casualty companies to accept such bonds in exchange for mortgages, we are of the opinion, for the reasons stated above in connection with fire insurance, marine insurance, or fire and marine insurance companies, that they may do so under the same circumstances as apply in the case of such companies.

Therefore, we advise you that stock or mutual casualty insurance companies are not authorized to purchase bonds of the Home Owners' Loan Corporation as investments, but they may accept them in exchange for mortgages in any cases in which, under the particular circumstances involved, they deem such action to their best interests.

Fraternal Benefit Societies

Section 10 of the Act of May 20, 1921, P. L. 916, as amended by the Act of April 26, 1929, provides, in part, as follows:

> "* * * Except as herein otherwise allowed, every domestic society [that is fraternal benefit societies] shall invest its funds only in securities permitted by the laws of this Commonwealth for the investment of the reserves of life insurance companies. * * *" (Bracket ours.)

Therefore, we advise you that fraternal benefit societies may not purchase bonds of the Home Owners' Loan Corporation as investments, but they may accept them in exchange for mortgages, in any cases in which, after an independent study of the facts involved in each case, they deem such action to their best interests.

Summary

To summarize, we advise you that life insurance companies, fire insurance companies, marine insurance companies, fire and marine insurance companies, and casualty insurance companies, whether stock or mutual, as well as fraternal benefit societies, are not authorized to purchase bonds of the Home Owners' Loan Corporation as investments, but they may accept them in exchange for mortgages upon real property in any case in which, after an independent study of the particular facts involved, they deem such action to the best interests of the companies or societies.

Very truly yours,

DEPARTMENT OF JUSTICE,

BERNARD G. SEGAL,
Assistant Deputy Attorney General.

OPINION NO. 93

Taxation—Delinquent taxes—Abatement of penalties on local taxes—Act of August 26, 1932, P. L. 100 as amended by Act of May 1, 1933, P. L. 214.

The abatement that may be granted under the Act of August 26, 1932, P. L. 100, as amended by the Act of May 1, 1933, P. L. 214, is limited to a period of three months from the date of the ordinance or resolution providing for it. Taxes which are not paid within that time are subject to all the penalties imposed by law and no further abatement period may be established with respect to taxes covered by the first ordinance or resolution.

Department of Justice,

Harrisburg, Pa., September 20, 1933.

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

Sir: You have asked us to advise you as to the powers of a school board in connection with the abatement of tax penalties under the Act of August 26, 1932, P. L. 100, as amended by the Act of May 1, 1933, P. L. 214.

The original act authorized certain political subdivisions of the Commonwealth, including school districts, to abate penalties on delinquent taxes provided that the taxes were paid before December 1, 1932. The 1933 amendment removed that definite time limitation and substituted the following:

> "* * * Any ordinance or resolution abating penalties on taxes, as herein provided, shall contain a provision that such taxes must be paid within three months from the date the ordinance or resolution takes effect, and that, in default of such payment, the penalties shall continue to be imposed in the same manner as if such ordinance or resolution had not been adopted. Such ordinance or resolution may provide for a different amount of abatement of penalties in proportion to the promptness of payment of the delinquent taxes, but no abatement shall be authorized which would result in the amount of the penalty unabated being less than interest at the rate of six per centum on the delinquent taxes from the date when such taxes became delinquent."

Your immediate question, in short, is this: Where a school district has taken advantage of the Act of August 2, 1932, P. L. 100 or of the amendment of 1933, and has provided for the abatement of penalties during the periods allowed, may it after the expiration of such a period, by appropriate action, extend the time for three months more, with respect to the same taxes as were covered by the original resolution?

The purpose of the Act of 1933 was to encourage prompt payment of taxes. It was not intended to provide a means whereby local authorities could set at naught the tax penalty provisions of the Acts of Assembly. If a school district could renew the abatement period for three months, it could continue to renew it indefinitely.

In our opinion the batement that may be granted under the act in question is limited to a period of three months from the date of the ordinance or resolution providing for it. Taxes which are not paid within that time are subject to all the penalties imposed by law and no further abatement period may be established with respect to taxes covered by the first ordinance or resolution.

Very truly yours,

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

OPINION NO. 94

Fees—County officers—Deduction of fees from fines payable to the State under the Motor Vehicle Code. Act of May 1, 1929, P. L. 905 as amended by Act of June 22, 1931, P. L. 751.

Except where a writ is issued to the sheriff to levy and collect a fine, the clerks of court or, where directed by the court, the parole or probation officers, are the only officers properly authorized to receive payment of fines imposed by the court of quarter sessions for violation of the Motor Vehicle Code. None of these officers is entitled to deduct any fee when transmitting fines collected for the use of the State.

When a writ is issued to the sheriff and he collects such fines in pursuance of such writ, he is entitled to deduct a poundage fee of three cents on the dollar.

The clerks of court, and the sheriffs in those cases where they collect in pursuance of a writ, should account for and pay over the fines so received by them directly to the State under the provisions of The Fiscal Code. They have no right to transmit those fines first to any other county officer.

Court costs are first deductible out of any forfeited bail payable to the Commonwealth under the Motor Vehicle Code.

Department of Justice,

Harrisburg, Pa., September 21, 1933.

Honorable Leon D. Metzger, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have submitted to this office several questions involving the right of different county officials to deduct fees from fines payable to the State under the Motor Vehicle Code of May 1, 1929, P. L. 905, as amended by the Act of June 22, 1931, P. L. 751, before transmitting them to the Department of Revenue.

You state that in some instances the clerk of court collects the fines and deducts a poundage fee. In other cases, he transmits the fines to the sheriff who deducts a poundage fee before transmitting the money to the State. In some counties the sheriff collects the fines, deducts his poundage, and transmits the balance to the county treasurer, who in turn deducts a further commission before transmitting to the State. We have learned that in some counties the probation officers are appointed by the sheriff as deputies and that, in this capacity, they collect these fines and deduct the sheriff's fees; and that in other counties the county commissioners collect the fines and pay them to the county treasurer.

All of these many different methods of collecting and handling fines imposed by the courts of quarter sessions demonstrate that no uniformity exists throughout the State. The questions you have submitted relate primarily to the fees chargeable by the various officers in transmitting the fines to the State. The fees chargeable by the various county officers are fixed by statute and no officer is authorized to make a charge without specific statutory authority.

However, a more fundamental question is involved in your inquiry. Obviously, a county officer who is not authorized to receive payment of a fine imposed under the Motor Vehicle Code by the court of quarter sessions and payable to the State, would not have the right to claim any fee for collecting such fine. Therefore, your questions resolve themselves into one primary question—what officer is authorized to receive the payment of a fine imposed by the court of quarter sessions? The determination of this question first is necessary in order to decide which act relating to fees is applicable.

The question is not free from doubt and our most diligent search has failed to uncover any authoritative and definite statement by any of the lower or appellate courts of this State.

Jurisdiction to impose fines under the Motor Vehicle Code is vested in the court of quarter sessions of the peace. The Act of March 31, 1860, P. L. 427, Section 32, V, states that:

> "The courts of quarter sessions shall also have jurisdiction in cases of fines, penalties or punishments, imposed by any act of assembly, for offenses, misdemeanors or delinquencies, except where it shall be otherwise expressly provided and enacted."

And the further power is granted to those courts by the same section:

> "* * * to award process to levy and recover such fines, forfeitures and amercements, as shall be imposed, taxed or adjudged by them respectively; * * *."

From the above sections of the act it is clear that the court not only has the power to impose the sentence but to control the enforcement of it. Until compliance by the defendant the case is completely under the court's control.

When the court is compelled to issue its process to collect the fine, such process is directed to the sheriff and is in the form of a fi. fa. to collect it by levy on the defendant's goods: *Commonwealth v. Gabriel*, 14 D. R. 863 (1904); *In re Tony Tuttendario*, 21 D. R. 561 (1912).

Until some process has issued out of the court to the sheriff to collect the fine, that officer has nothing to do with the receipt or the collection of the money.

Even where the court directs the commitment of the defendant until the fine is paid, the sheriff's duty is only to hold the body of the defendant in custody and convey him to prison. That is the extent of the sheriff's power under his writ even though that writ is a method of compelling the payment of the fine.

Therefore, until a writ of execution is issued to the sheriff to collect the fine, its collection is still in the control of the court. Compliance with the sentence can be properly made only by payment to the duly constituted officer of the court.

The Act of April 14, 1834, P. L. 333, Section 45, provides as follows:

> "A clerk shall be commissioned for each of the said courts; he shall have the custody of the records and of the seal of the respective court, and keep the same at the place of holding such court, and in the apartments provided by authority of law for that purpose. He shall faithfully perform under the direction of the court all the duties appertaining to his office."

As the clerk of the court is the duly constituted officer of the court, (*Commonwealth v. Bonding Company,* 96 Pa. Super. Ct. 31 [1929]) and performs the ministerial duties relating to the procedure of the court and the keeping of its records, he is the proper and only officer authorized, in the absence of any order of the court directing otherwise, to receive money paid to the court in compliance with sentence imposing the fine.

We have no doubt, however, that the court can direct that fines be received by probation officers. Probation officers are appointed under the authority of the Act of June 19, 1911, P. L. 1055, as amended June 21, 1919, P. L. 569. These officers are appointed by the court to perform such duties as the court may direct. Likewise, desertion probation officers, appointed under the authority of the Act of June 12, 1913, P. L. 502, are authorized under the direction of the court to collect and pay over to the person entitled thereto, money ordered to be paid by the defendant.

In many instances it is highly desirable to have the cases handled by probation officers kept entirely separate from the other business and officers of the courts. That the legislature recognized the right of probation officers to receive money is evidenced by the Act of June 9, 1931, P. L. 401, Section 12, adding a new section to the county code and directing that the county comptroller or auditor should audit the books of parole and probation officers.

Whether the fine is paid to the clerk of court or to the parole or probation officer it is nevertheless a payment to the court through its officer duly designated to receive it in compliance with the sentence of the court. While it might be highly desirable for the parole officer at least to certify his collections to the clerk of court in order that the record of each case would be complete, that is a matter within the discretion of the court.

There is no statute which fixes any fees to be received by parole or probation officers for collecting or supervising the collection of fines. Even though a sheriff may have the right to appoint a parole officer as a deputy sheriff, such officer in collecting fines does so under the direction of the court in the capacity of parole officer and cannot purport to act as sheriff and collect the sheriff's fees for doing so.

When process has been issued to the sheriff in the form of a fi. fa. to levy on property of the defendant, the sheriff is entitled to a fee of 3 cents on the dollar out of the fine collected. The fees of the sheriffs of the various counties are regulated by the following acts applicable according to varying populations: Act of June 20, 1911, P. L. 1072; Act of July 11, 1901, P. L. 663; Act of April 9, 1915, P. L. 54, as amended by the Act of May 2, 1919, P. L. 110. All of these acts contain the following fee:

> "For levying or paying out fines, three cents per dollar; to be paid by the party receiving the fine."

The fees of clerks of quarter sessions in counties of over 1,500,000 are regulated by the Act of 1879, P. L. 40, and in counties of more than 800,000, but less than 1,500,000, by the Act of June 11, 1915, P. L. 938, as amended by the Act of March 18, 1925, P. L. 42. Neither of these acts provides for anything like a poundage fee.

The fees of clerks of courts in all other counties i. e., all counties except the counties of the first or second class, are regulated by the Act of May 11, 1925, P. L. 570. That act allows the following fees:

> "* * * receiving and distributing money paid into court, one per cent.* * *"

Whether clerks of court in counties governed by the above Act of 1925 are entitled to a fee of one per cent on fines received by them depends on whether such payment would be classed as "money paid into court".

In the fee bills relating to sheriffs quoted above, the fee for collecting fines was clearly and unmistakably covered. We cannot believe that the Legislature by the phrase "money paid into court" intended it to mean the same thing as the fee bill of sheriffs were fines were specifically provided for in addition to a fee for other types of moneys going through their hands.

The term "money paid into court" has a well recognized meaning. It applies to situations where money is delivered to the court to await the outcome of litigation involving the right to that money. Such was the situation in *Free's Appeal,* 301 Pa. 82 (1930), where the clerk of quarter sessions paid into the court of common pleas the money received by him from fines imposed under the Motor Vehicle Acts of 1913 and 1919, pending the outcome of the contest between the Commonwealth and the County Treasurer of York County as to which was entitled to such funds. Where money is paid into court in such cases the court is merely custodian. Fines, when paid, are paid as a final determination of the case and a compliance with the sentence.

Therefore, we are of the opinion that the clerk of court is not entitled to deduct a fee of one per cent from fines imposed under the Motor Vehicle Code before transmitting them to the State for the reason that paying the fine is not paying money into court within the meaning of the Act of 1925, P. L. 570.

In some cases to which you have called our attention, the clerks of court and sheriffs are transmitting these fines first to other county officers. This is clearly improper. Section 901 of Article IX of The Fiscal Code of April 9, 1929, P. L. 343, as amended by the Act of June 1, 1931, P. L. 318, Section 1, provides as follows:

> "On the first Monday of each month, it shall be the duty of each city and county officer to render to the Department of Revenue, under oath or affirmation, returns of all moneys received during the preceding month for the use of the Commonwealth, designating, under proper headings, the source from which such moneys were received, and to pay the same into the State Treasury, through the Department of Revenue, less any compensation and reimbursement for expenses allowable by law for having made the collections."

Under this section of The Fiscal Code, it is clearly the duty of each county officer to account directly to the Commonwealth for moneys received by him which belong to the State, and to pay such moneys over to the State directly. Where the money has already been paid to some other officer, it can undoubtedly be traced and recovered, but the proper officer to account is the officer authorized to receive the money.

There remain to be considered the other situations presented by your inquiry. Clearly the county treasurer is not the proper officer to receive the fines imposed under the Motor Vehicle Code for the use of the Commonwealth. Under Section 347 of Article IV of the County Code of May 21, 1929, P. L. 1278, the duty of the county treasurer is to receive and account for all money "due or accruing to the county." Fines imposed under the Vehicle Code for the use of the State are not moneys "due or accruing to the county," and consequently, the county treasurer has nothing to do with them.

The county commissioners have no more right to receive these fines than the county treasurer. Section 384 of Article IV of the County Code of May 2, 1929, P. L. 1278, provides that:

> "All fines * * * imposed * * * in any court, except such as are directed to be paid into the State Treasury under the provisions of existing law * * * shall, by the clerk of such court, be certified and estreated into the office of the commissioners of the county * * *. All sums of moneys collected in pursuance thereof shall be paid to the county treasurer for the use of the county. It shall be the duty of the commissioners to superintend the collections of said sums of money. * * *"

The term "estreat" means to certify or make an exact copy of. The language above quoted was used also in the Act of March 24, 1818, P. L. 273, 7 Sm. L. 120, Section 1, which was interpreted by the court in *Commonwealth v. Burkholder*, 3 Pa. Dist. 563, (1893). In an opinion by Judge Doty, the court said, in that case, at page 563:

> "The evident purpose of the first section of the Act of March 24, 1818, requiring the clerk to certify and estreat fines and forfeited recognizances into the office of the county commissioners, is to make sure that the collection of such fines and recognizances will not be overlooked. * * *"

At all events the fines directed to be paid into the State Treasury are specifically excepted and the clerk should not even estreat those fines to the county commissioners.

In conclusion you have asked whether court costs are deductible from bail forfeited before transmission to the State in those cases where under the Motor Vehicle Code such forfeited bail is payable to the State.

In a well considered auditor's report adopted as the opinion of the court in *Commonwelth for use of J. Monroe Miller v. John Winter*, 13 Berks 48 (1920), it was held that under the Act of July 30, 1842, P. L. 449, Section 26, court costs were first payable out of any forfeited recognizance. We need add nothing to what was there said other than to advise you that the Vehicle Code has not in any way changed the Act of 1842 with respect to forfeited bail payable to the Commonwealth.

To summarize, you are advised as follows:

1. Except where a writ is issued to the sheriff to levy and collect a fine, the clerks of court or, where directed by the court, the parole or probation officers, are the only officers properly authorized to receive payment of fines imposed by the court of quarter sesions for violation of the Motor Vehicle Code. None of these officers is entitled

to deduct any fee when transmitting fines collected for the use of the State.

2. When a writ is issued to the sheriff and he collects such fines in pursuance of such writ, he is entitled to deduct a poundage fee of three cents on the dollar.

3. The clerks of court, and the sheriffs in those cases where they collect in pursuance of a writ, should account for and pay over the fines so received by them directly to the State under the provisions of The Fiscal Code. They have no right to transmit those fines first to any other county officer.

4. Court costs are first deductible out of any forfeited bail payable to the Commonwealth under the Motor Vehicle Code.

Very truly yours,

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

OPINION NO. 95

Business Corporation—Status of foreign business corporation registered to do business in Pennsylvania—Bonus.

Since the enactment of the Business Corporation Law, a foreign business corporation which is registered to do business in Pennsylvania may not be domesticated under the provisions of the Act of June 9, 1881, P. L. 89, but the officers or other persons interested in the foreign corporation may achieve the same result by organizing a domestic business corporation under the Business Corporation Law. In the latter case, no credit could be allowed for bonus paid by the foreign corporation.

Department of Justice,

Harrisburg, Pa., September 22, 1933.

S. L. Winegrad, Chief, Bureau of Corporations, Department of State, Harrisburg, Pennsylvania.

Sir: You inquire whether, since the enactment of the Business Corporation Law, a foreign business corporation which is registered to do business in Pennsylvania may be domesticated under the provisions of the Act of June 9, 1881, P. L. 89.

The Act of June 9, 1881, P. L. 89, is entitled "An act to authorize foreign corporations to become corporations of Pennsylvania and to prescribe the mode for their so doing." The first section distinctly states that corporations created by or under the laws of any other state, which are doing business in this Commonwealth and which are embraced within corporations of the second class, as defined in the Corporation Act of 1874, may become corporations of this Commonwealth under the provisions of the above mentioned Corporation Act of 1874. Section 2 requires a prescribed certificate to be submitted to the Governor. If he finds the certificate to be in proper form and within the purposes named in the Corporation Act of 1874 for corporations of the second class, he is directed to endorse his approval thereon and cause letters patent to issue in the usual form, incorporating the stockholders and their successors into a body politic and corporate in deed and in law. Section 4, which was added by the Act of June 10, 1931, P. L. 490, provides that a domesticated corporation shall receive credit for the bonus it paid as a foreign corporation.

Former Attorney General Carson, in a formal opinion rendered under date of December 1, 1904, and reported in 30 Pa. C. C. 273, said of the domestication procedure outlined above:

> "This, in my judgment, is the creation of a Pennsylvania corporation and not the adoption or naturalization of a foreign corporation. The act itself requires a distinct renunciation of the foreign charter and of all privileges not enjoyed by corporations of its class under the laws of this Commonwealth. * * *"

Accordingly, the Act of 1881, in effect, merely provides that the persons interested in a foreign corporation might form a corporation of the second class by following the procedure outlined in the Corporation Act of 1874. Inasmuch as that would have been possible without enabling legislation, the act had no particular significance until the 1931 amendment granted a credit to a domesticated corporation for the bonus it had paid as a foreign corporation. Prior thereto the credit was not allowed (see Formal Opinion of Attorney General Carson, supra).

The Business Corporation Law, which became effective July 3, 1933, completely revised and codified the laws of this Commonwealth relating to the formation, merger, consolidation, reorganization, winding up and dissolution of corporations for profit, except cooperative associations, public service companies, building and loan associations, banks, banks and trust companies, trust companies, and insurance companies (Section 4). Such corporations were designated as "business corporations", and foreign corporations organized for any purpose or purposes for which a business corporation may be organized were designated as "foreign business corporations" (Section 2). The Business Corporation Law changed the procedure for the incorporation of this type of corporation and, among other things, requires the Secretary of the Commonwealth, instead of the Governor, to issue the papers evidencing incorporation. It also specifically repealed one hundred and thirty-three acts, including the Corporation Act of 1874, in so far as they related to business corporations, and repealed generally "All other acts or parts of acts inconsistent [therewith] * * * in so far as they relate to business corporations."

The Business Corporation Law did not specifically repeal the Act of 1881, supra, and does not contain any express provision for the domestication of foreign corporations. However, the Business Corporation Law expressly repealed the Corporation Act of 1874, in so far as it related to business corporations. In so doing, it necessarily restricted the scope of the Act of 1881, as that act clearly provides for the domestication of a foreign corporation organized for a purpose for which a domestic corporation may be organized under the Corporation Act of 1874, and requires the incorporation procedure outlined in the Corporation Act of 1874 to be followed to effect domestication. A business corporation can no longer be organized under the Corporation Act of 1874 or by the incorporation procedure outlined in that act. Accordingly, the Act of 1881, by its own terms, cannot apply to a foreign business corporation desiring to become a domestic business corporation.

The above conclusion is further substantiated by the rule of statutory interpretation stated in 59 C. J., Section 520, page 919, as follows:

> "Where a later act covers the whole subject of earlier acts, embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject matter. The rule applies not only where the former acts are inconsistent or in conflict with the new act, but also even where the former acts are not necessarily repugnant in express terms, or in all respects, to the new act. In order to effect a repeal by implication on this ground it must appear that the subsequent statute covered the whole subject matter of the former one, and was intended as a substitute for it. * * *"

As we have indicated above, it is possible for a foreign business corporation to be organized as a domestic corporation by the officers or other persons interested in the foreign corporation, following the procedure outlined in the Business Corporation Law for the organization of a domestic business corporation. However, the newly created corporation would not be entitled, as Section 4 of the Act of 1881 allows such a credit only to foreign corporations domesticated under its provisions.

Accordingly, you are advised that, since the enactment of the Business Corporation Law, a foreign business corporation which is registered to do business in Pennsylvania may not be domesticated under the provisions of the Act of June 9, 1881, P. L. 89, but the officers or other persons interested in the foreign corporation may achieve the same result by organizing a domestic business corporation under the Business Corporation Law. In the latter case, no credit could be allowed for bonus paid by the foreign corporation.

Very truly yours,

DEPARTMENT OF JUSTICE,
E. RUSSELL SHOCKLEY,
Deputy Attorney General.

OPINION NO. 96

Soldiers' Orphan School—Applicants for admission—Eligibility. Act of May 27, 1893, P. L. 171 as amended by Act of May 8, 1929, P. L. 1674.

Only orphans of soldiers, sailors or marines who were in the armed service of the United States during one of the wars mentioned in the Acts of Assembly are eligible to admission in the School.

Department of Justice,

Harrisburg, Pa., September 22, 1933.

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

Sir: You have asked us to advise you whether a boy named James Tucker is eligible for admission to the Pennsylvania Soldiers' Orphan School at Scotland, Pennsylvania. The Federal Veterans Administration advises us that this boy's father served in the United States Navy for about six years following the World War, and died in the service in 1924. The mother was remarried to a World War veteran who is also now deceased.

You do not state whether the residence qualifications of this boy are sufficient to permit him to be admitted to the school. However, since the inquiry raises a more important question, we shall assume for the moment that no obstacle arises because of lack of residence in Pennsylvania of the boy or his parents.

The fact that the mother was remarried to a World War veteran is of no significance. The boy is not the child of that veteran. Even if the child had been legally adopted by the stepfather, the war service of the stepfather would not entitle the child to enter the school:

See Formal Opinion of Deputy Attorney General Fleitz, dated November 29, 1905, 31 Pa. C. C. 641, 15 Pa. Dist. 377.

That leaves as our sole question whether it is necessary that the deceased father of a boy must have served in the armed forces of the United States during a war in order to entitle the boy to admission to the Soldiers' Orphan School. If war service is necessary, James Tucker is not eligible, since his father served in the Navy only after the close of the World War.

Section 6 of the Act of May 27, 1893, P. L. 171, as last amended by the Act of May 8, 1929, P. L. 1674, provides that the authorities in charge of the Pennsylvania Soldiers' Orphan School are authorized to admit thereto:

> "* * * soldiers' orphans, of parents residents of this State for a continuous period of not less than five years prior to their application, who shall be under fourteen years of age, * * *"

Section 7 of the Act of 1893, provided as follows:

> "Preference in admission shall be as follows:
>
> "First. Full orphans, the children of honorably discharged soldiers, sailors or marines, who served in the war for the suppression of the rebellion and were members of Pennsylvania commands, or having served in the commands of other States, or of the United States, were residents of Pennsylvania at the time of enlistment.
>
> "Second. Children of such honorably discharged soldiers, sailors or marines, as above, whose father may be deceased and mother living.
>
> "Third. Children of such honorably discharged soldiers, sailors or marines, as above, whose parents may either, or both, be permanently disabled."

The Act of April 13, 1899, No. 45, directed the commission which then had charge of the school:

> " * * * to admit to the Pennsylvania Soldiers' Industrial School, or to the Soldiers' Orphan Schools, orphans of honorably discharged soldiers, sailors and marines of the Spanish-American War, subject to present laws governing the control of said schools."

The Act of April 17, 1905, P. L. 195, made exactly the same provision as to orphans of men who saw service in the Philippine War, and the Act of February 26, 1919, P. L. 3, did the same for orphans of World War veterans.

Standing alone, Section 6 of the Act of 1893, would not seem to restrict admissions to orphans of soldiers who served during wars. However, when we read Section 7 of that act, we cannot escape the conclusion that the act was designed to provide only for orphans of men who had been in the army during the Civil War. If that had not been so, there would have been no need for the separate acts to which we have referred, which extended the privilege of the school to orphans of veterans of the Spanish, Philippine and World Wars.

Therefore, we conclude that only orphans of soldiers, sailors or marines who were in the armed service of the United States during one of the wars mentioned by the Acts of Assembly are eligible to admission to the Pennsylvania Soldiers' Orphan School. This is in accord with letter addressed to Doctor Keith, the former Superintendent of Public Instruction, by Deputy Attorney General O'Hara in another case on November 26, 1928.

Therefore, we advise you that James Tucker is not eligibile for admission to the Pennsylvania Soldiers' Orphan School.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRIS C. ARNOLD,

Deputy Attorney General.

OPINION NO. 97

Foreign corporations—Insurance—Agents and brokers—Business Corporation Law.

Foreign corporations licensed by the Insurance Department as agents, or brokers, or public adjusters are not so subject to the supervision of that Department as to be excluded from the scope of the Business Corporation Law.

Department of Justice,

Harrisburg, Pa., September 29, 1933.

Honorable C. F. Armstrong, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether foreign corporations licensed by your department as agents, brokers, or public adjusters, are subject to the supervision of the Insurance Department so as to be excluded from the scope of the Business Corporation Law, Act No. 106, approved May 5, 1933.

Section 4 of that act provides that:

> "This act does not relate to, does not affect, and does not apply to:
>
> * * * * * * * *
>
> (3) Any corporation which, by the laws of this Commonwealth, is subject to the supervision of the Depart-

> ment of Banking, the Insurance Department, The Public Service Commission, or the Water and Power Resources Board."

Insurance companies, incorporated under and regulated by the provisions of the Insurance Company Law of May 17, 1921, P. L. 682, are clearly subject to the supervision of the Insurance Department. The Department is required by law to make periodic examinations of the capital, surplus, and reserve funds of such companies, and in general to regulate and investigate their affairs. On the other hand, the control which the Insurance Department exercises over corporations engaged in the insurance business as agents, brokers, or public adjusters is not supervision within the intent and meaning of Section 4 of the Business Corporation Law.

We realize that every agent and every broker transacting business within this Commonwealth is required by the Insurance Department Act of May 17, 1921, P. L. 789, to obtain a license from the Insurance Department. Similarly, the Act of April 25, 1921, P. L. 276, requires that every public adjuster be licensed by the Insurance Department. Moreover, the Insurance Commissioner may revoke for cause the license of any corporation licensed as agent, broker, or public adjuster, and he may conduct hearings and make investigations for that purpose.

Nevertheless, in our opinion, the corporate affairs of such corporations are not supervised by the Insurance Department. There is no provision for the formation or the direct supervision of such corporations in the Insurance Company Law of 1921. They are essentially business corporations, not insurance companies, and they may be incorporated only under the Business Corporation Law.

Section 206 B of the Business Corporation Law provides as follows:

> "If the articles of incorporation delivered to the Department of State are for the incorporation of a business corporation for the transaction of any business in which a corporation may not engage without the approval of or a license from any department, board, or commission of the Commonwealth, the Department of State shall refer the articles to such department, board, or commission, and shall not file the articles or issue a certificate of incorporation until the approval or consent of such department, board, or commission shall have been endorsed on the articles."

This section sets up the procedure for the formation of corporations which are not under the supervision of any department, board, or commission of the Commonwealth but which may not engage in business without a license from a department, board, or commission. The section makes it clear that the Legislature did not intend to exclude from the scope of the Business Corporation Law corporations which are required by law merely to obtain a license from the Insurance Department.

Therefore, we advise you that foreign corporations licensed by your Department as agents, or brokers, or public adjusters, are not so subject to the supervision of the Insurance Department as to be excluded from the scope of the Business Corporation Law.

Very truly yours,

DEPARTMENT OF JUSTICE,
GEORGE W. KEITEL,
Assistant Deputy Attorney General.

OPINION NO. 98

Appropriations—School districts—Pupil transportation and special vocational education. General Appropriation Act of 1933.

The distribution of the appropriations made by the General Appropriation Act of 1933 to school districts for pupil transportation and vocational education, should be in accordance with the provisions of Section 1406 of the School Code as last amended by the Act of May 29, 1931, P. L. 243; and Section 9 of the Act of May 1, 1913, P. L. 138 as amended by Act of May 21, 1931, P. L. 176.

Department of Justice,

Harrisburg, Pa., October 3, 1933.

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

Sir: You have asked us to advise you concerning the distribution of the appropriations made by the General Appropriation Act of 1933 for the reimbursement of school districts on account of pupil transportation and special vocational work. You state that the amounts appropriated are materially less than the amounts which you estimate will be needed for these purposes during the biennium. Your specific question is whether the moneys may be apportioned so as to spread them over a whole biennium or whether you are required to distribute them in full, as long as they last, with the result that there may be no funds available in the latter part of the biennium.

The appropriation for vocational training is $700,000 and for transportation $2,500,000. In the case of the appropriation of $53,000,000 for the reimbursement of school districts for teachers' salaries, the Legislature expressly provided that the Department of Public Instruction should spread the appropriation over the biennium. Under that clause, we advised you by Formal Opinion No. 83, that you might apportion payments for teachers' salaries in the manner therein stated. But no such provision was appended to the appropriations here in question.

Payments to school districts for pupil transportation are made under Section 1406 of the School Code, as last amended by the Act of May 29, 1931, P. L. 243. Payments for the support of vocational education are made under Section 9 of the Act of May 1, 1913, P. L. 138, as amended by the Act of May 21, 1931, P. L. 176. Both of these acts fix definite amounts which the Commonwealth is required to contribute to the school districts, based on the amounts expended by the districts themselves. For example, the Commonwealth is required to contribute to school districts having certain qualifications, seventy-five per cent of the amount expended by the districts for pupil transportation.

In our opinion the provisions of the substantive acts must be adhered to as long as possible. They require certain definite payments to the school districts. No authority is anywhere given to your department to pay less. Therefore, you should make payments as usual to the school districts in accordance with the requirements of the Acts of Assembly above referred to as long as you have funds with which to do so. When your funds are exhausted, the districts will have to do without.

Very truly yours,

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

OPINION NO. 99

Banks and banking—Federal Land Banks—Farm loan bonds.

Farm loan bonds issued by federal land banks are not legal investments for trust funds in this Commonwealth.

Department of Justice.

Harrisburg, Pa., October 5, 1933.

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

Sir: You have asked to be advised whether farm loan bonds issued by federal land banks are legal investments for trust funds in this Commonwealth.

The Act of April 5, 1917, P. L. 46, as amended by the Act of July 11, 1923, P. L. 1059, provides as follows:

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

Article 3, Section 22 of the Constitution of the Commonwealth provides:

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

A federal land bank, like a joint stock land bank, is a corporation organized under the provisions of the Act of Congress, approved July 17, 1916, 39 Stat. at Large 360, known as the Federal Farm Loan Act. Bonds issued by such banks are the bonds of a corporation.

By opinion dated August 29, 1923 (Official Opinions of the Attorney General, 1923-1924, page 81), 4 D. & C. 55, former Deputy Attorney General Brown advised Honorable Peter G. Cameron, then Secretary of Banking, that joint stock land bank bonds were not legal investments for trust funds in the Commonwealth.

This opinion is cited in the opinion of Honorable William A. Schnader, then Special Deputy Attorney General, dated July 13, 1927 (Official Opinions of the Attorney General, 1927-1928, page 93), 9 D. & C. 745, 749, wherein he advised the then Budget Secretary that bonds issued either by federal land banks or by joint stock land banks were not legal investments for funds of the Public School Employes' Retirement Board because the members thereof were designated as "trustees" by Section 6 of the Act of July 18, 1917, P. L. 1043.

The reasoning and the conclusions of the opinion of Deputy Attorney General Brown apply with equal force to farm loan bonds issued by federal land banks.

There are distinctions between federal land banks and joint stock land banks, although both are chartered by the Federal Farm Loan Board. Shares of joint stock land banks may not be purchased by the government of the United States and are subject to double liability.

The bonds of such banks may not be purchased by the Secretary of the Treasury, and their debts are not the obligations of any other joint stock land banks.

On the other hand, shares of federal land banks are nonassesable and may be subscribed for by the government of the United States. Bonds of such banks may be purchased by the Secretary of the Treasury. Federal land banks are responsible for the debts and obligations of other such banks. Furthermore, the capital of a federal land bank may be subscribed for by any individual, firm or corporation or government of any state. Such being the case, it could not be successfully maintained that a federal land bank is anything in nature like a public or quasi-governmental corporation. Like a joint stock land bank, it is a private corporation.

As stated in *Commonwealth v. McConnell,* 226 Pa. 244 (1910), wherein the court interpreted the section of the Constitution above quoted, it is firmly established in this Commonwealth that trust funds may not be invested in the bonds or stocks of a private corporation. There is a clear constitutional prohibition on such investment. Accordingly, the Act of April 5, 1917, P. L. 46, as amended by the Act of July 11, 1923, P. L. 1059, is unconstitutional.

Therefore, you are advised that farm loan bonds issued by federal land banks are not legal investments for trust funds in this Commonwealth.

Very truly yours,

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

OPINION NO. 100

Bureau of Animal Industry—Indemnity claims for cattle which have been tested and have reacted to the tuberculosis test.

No indemnity may be paid for reactors which die before being appraised. No indemnity may be paid for tubercular reactors which die a natural death through no act of the Commonwealth. No indemnity may be paid for tubercular reactors which die a natural death through no act of the Commonwealth, after appraisal on the premises of the owner and after the carcass has been destroyed and disposed of. No indemnity may be paid for tubercular reactors which die after appraisal and after leaving the premises of the owner, enroute for slaughter on a permit issued by an agent of the Bureau of Animal Industry.

Department of Justice,

Harrisburg, Pa., October 5, 1933.

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

Sir: You have made request to be advised on the answers to five questions which you have propounded relative to the payment of indemnity claims for cattle which have been tested and have reacted to the tuberculin test. These will be answered seriatim as presented.

1. Can indemnity be paid for tubercular reactors which die before being appraised? (You direct our attention to Section 3 of the Act of June 22, 1931, P. L. 682.)

The Act of June 22, 1931, P. L. 682, relates to the appraisement of animals when about to be slaughtered to prevent the spread of disease, and regulates payments by the Commonwealth in such cases, and the payment of salvage by butchers.

The keynote in the construction of this act is found in its title, and in the body of the act in six words, viz., "to prevent the spread of disease."

The Commonwealth, through its agents and officers, may assume the burden of payment only when acting to prevent the spread of disease destructive to herds. Section 2 of the act provides:

> "The Commonwealth hereby agrees to compensate owners of domestic animals slaughtered to prevent the spread of disease. * * *"

The same language is used in the Act of July 22, 1913, P. L. 928, which was construed by Deputy Attorney General George Ross Hull, in "Opinions of the Attorney General," 1921-1922, page 218, wherein it is said:

> "It is clear from this provision that indemnities are to be paid only where the Bureau has caused the animals to be killed. * * *"

It is not within the contemplation of the act that the Commonwealth shall pay indemnity to the unfortunate individual who possesses cattle that have become affected with any disease. It comes to the rescue only when a disease which is transmissible is likely to become a menace to other herds of cattle within the Commonwealth. Then it devolves on the Commonwealth to compensate the owners for the animals which have been directed to be destroyed to prevent the spread of disease. Should the animal be so located that disease from it could not spread, the State officers have nothing to do with it.

Again, it appears at Section 3 of the Act of 1931, supra:

> "Whenever, to prevent the spread of disease, an authorized officer or agent of the Department of Agriculture may deem it necessary to order any domestic animal to be slaughtered, the animal shall be appraised before being slaughtered. * * *"

Section 4 provides:

> "An animal that has been appraised under this act shall be disposed of by the owner in accordance with the laws of this Commonwealth and the rules and regulations adopted by the Department of Agriculture."

The rules and regulations which are here authorized are necessarily to be made in conformity with that which is expressed in the act, and the purpose of the act is to prevent the spread of disease. If an animal dies from having been gored by another animal ar crushed by a fallen barn, the fact that it is tubercular or affected with a transmissible disease would not justify payment for it by the Department of Agriculture. Each and every requirement of the act must be fully met. Disease must be made to appear by examination, which is followed by condemnation, appraisement, slaughter directed, and the slaughter of the animal performed. These are all for the purpose of preventing the spread of disease.

Therefore, we advise that no indemnity may be paid for reactors which die before being appraised.

2. Can indemnity be paid for tubercular reactors which die a natural death through no act of the Commonwealth of Pennsylvania, after appraisal on the premises of the owner, where the carcass has *not* been destroyed or disposed of *under supervision* of a Bureau of Animal Industry agent, in accordance with Section 20, Act of July 22, 1913, P. L. 928?

The Act of 1913, supra, was enacted, inter alia, for the purpose of preventing, controlling, and eradicating transmissible diseases. Section 20 provides:

> "Whenever it shall be required to destroy or dispose of the carcass of any animal to prevent the spread of disease, such destruction or disposal shall be made by one of the following methods:
>
> "First. Complete cremation of the entire carcass * * *.
>
> "Second. Boiling the carcass * * *.
>
> "Third. Burial of the carcass * * * in such place that shall not be subjected to overflow from ponds or streams * * *"

This has nothing to do with payment of indemnity to persons and destruction of the carcasses in a manner that will prevent the spread of disease. When the animal is dead, the statute speaks of it as a carcass. There is no appraisal to be made of a carcass. Dead animals are not directed to be slaughtered, and, therefore, do not come within the scope of this section of the statute. Necessarily, we must conclude and advise that there can be no indemnity paid.

3. Can indemnity be paid for tubercular reactors which die a natural death through no act of the Commonwealth of Pennsylvania, after appraisal on the premises of the owner and after the carcass has been destroyed and disposed of in accordance with Section 20, Act of July 22, 1913, P. L. 928, according to affidavits submitted, but not under supervision of a Bureau of Animal Industry agent?

The answer to this inquiry is included in the answer to the preceding question. Section 20 relates to the carcasses and not to animals directed to be killed to prevent the spread of disease.

Therefore, you are advised that no payment can be made of any indemnity for the carcass of such animal.

4. Can indemnity be paid for tubercular reactors which die a natural death through no act of the Commonwealth of Pennsylvania, after appraisal on the premises of the owner and after the carcass has been destroyed and disposed of in accordance with Section 20 of the Act of July 22, 1913, P. L. 928, under supervision of a Bureau of Animal Industry agent?

Again, we make answer that Section 20 relates to the destruction or disposition of the carcasses of animals to prevent the spread of disease, and even if supervision of the carcass is attended by the Bureau of Animal Industry, it would not render the Commonwealth liable to payment of the indemnity.

5. Can indemnity be paid for tubercular reactors which die after appraisal and after leaving the premises of the owner, enroute for slaughter, on a permit issued by an agent of the Bureau of Animal Industry and disposed of under supervision of an agent of the Federal or State Bureau of Animal Industry?

This inquiry is answered by Section 2 of the Act of 1931, supra.

> "The Commonwealth hereby agrees to compensate owners of domestic animals slaughtered to prevent the spread of disease. * * *"

The animal was enroute to be slaughtered, but died before being slaughtered. Consequently, no liability attaches to the Commonwealth unless the animal is actually slaughtered as provided by the statute. Therefore, you are advised that in this case also the Commonwealth is not liable for indemnity.

Very truly yours,

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

OPINION NO. 101

Banks and banking—Banks operating on a restricted basis under Act of March 8, 1933, P. L. 9.

Banks operating on a restricted basis which have been taken into possession by the Secretary of Banking. Status of new deposits.

Department of Justice,

Harrisburg, Pa., October 7, 1933.

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

Sir: You have asked to be advised regarding the status of "new deposits," when you take possession of institutions which have been operating on a restricted basis under Act No. 6, approved March 8, 1933.

We advise you as follows:

1. *Amounts Payable on New Deposits:* The act just referred to requires new deposits to be segregated "and invested in liquid assets as defined by the Secretary," and provides that "all such new deposits shall be available exclusively for the benefit of new depositors until such depositors have been paid in full, and shall always be withdrawable on demand without restriction."

We understand that all new deposits have been segregated and invested in United States obligations, deposits with a Federal Reserve Bank and secured deposits with other banks.

If you take possession of a bank operating on a restricted basis, you will of course immediately sell any United States obligations in which its new deposits have been invested, so that you will have available for the payment of new deposits the proceeds of those obligations, plus interest on the obligations since the investments were made, plus deposits with Federal Reserve Banks and secured deposits with other banks.

You cannot pay the new depositors more than the total of these various funds, for the act does not give the new depositors any special claim on the other assets of the restricted bank. If the funds accruing from new deposits are not sufficient to pay new deposit claims in full, each new depositor will have the status of an ordinary depositor as to his share of the deficiency.

2. *Outstanding Checks:* You have no power to honor checks presented for payment after you have taken possession of the bank, even though the drawer of the check was a new depositor.

3. *Fixing New Deposit Liabilities:* As soon as possible after taking possession, you will fix the amount owed the institution by every new depositor on matured and unmatured loans. Where a new depositor has also an old deposit, you will first apply the old deposit to the debt which he owes the institution, and if this is not enough, you will apply as much of the new deposit as is required. You will determine what outstanding collection items are to be added to or subtracted from each new depositor's account. You will also determine the amount to be deducted from any deposit to meet attachments served before the closing or claims served after the closing. As soon as you have thus determined the amount due each new depositor, you will pay him by check, as you now do in the case of advance payments. Such a payment will protect you, because the drawee and endorsing banks will guarantee the identity of the party who receives the money.

Although the Act of March 8, 1933, makes no specific provision for the immediate payment of new deposits after the closing of the depository bank, you may lawfully make such payments at once. As the new deposit account can be utilized only to pay new depositors, it was clearly the intention of the Legislature that new depositors should not be required to wait for one hundred twenty days after the closing of the institution, before receiving the amounts of their deposits, as is required in the case of ordinary deposits. The new deposits are a special fund, available immediately to depositors not only while the institution is open but after it has been taken in possession.

4. *Set-offs:* If a new depositor owes money to the closed institution, you will, as indicated above, deduct the amount owed, first from his old, and then from his new deposit account. The act makes the new deposits "withdrawable on demand without restriction." But this simply means that there is to be no restriction on the bank's right to pay; it does not prevent the bank or its receiver from withholding all or part of the new deposit to pay a debt owed the bank by the depositor. If the deposit could not be withheld under such circumstances, other creditors of the depositor would fare better than the bank itself.

No part of a new deposit made by a stockholder of a bank should be retained by the Secretary of Banking to answer such stockholder's possible assessment liability. We have advised you that a stockholder cannot set off his liability on a stock assessment; and you should therefore not take the opposite position when new deposits are concerned. New depositors are entitled to have their balances paid on demand, without deduction for what is at best a possible set-off.

5. *Attachment or Notice Served:* Where an attachment has been served on the institution by a third party who is a judgment creditor

of the new depositor, or where a notice of claim has been given to you by such a judgment creditor in accordance with Section 712 C of the Department of Banking Code, Act No. 111, approved May 15, 1933, after you have taken possession, and before the new depositor has been paid, you should deduct from the new deposit the amount needed to satisfy the attachment, and should hold that sum to answer the further order of the court having jurisdiction of your receivership.

6. *Rediscounted Notes:* If a new depositor has given the bank a note which has been rediscounted with another bank holding collateral or a cash deposit of the closed bank, you should withhold a sum sufficient to cover the note until the depositor pays it.

Very truly yours,

DEPARTMENT OF JUSTICE,

SHIPPEN LEWIS,
Special Deputy Attorney General.

WM. A. SCHNADER,
Attorney General.

OPINION NO. 102.

Insurance—Beneficial societies—Issuance of policies other than for sickness, accident and health benefits. Act of April 26, 1929, P. L. 805.

Beneficial societies incorporated prior to May 20, 1921, may issue certificates or policies of insurance for sickness, accident and death benefits and such contracts may be issued only as provided by the Act of April 26, 1929, P. L. 805. The Insurance Commissioner should refuse to approve and permit the issue and sale of any certificates or policies which provide for benefits other than those permitted by the Act of 1929.

Department of Justice,

Harrisburg, Pa., October 16, 1933.

Honorable Charles F. Armstrong, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether beneficial societies may issue certificates or policies of insurance other than for sickness, accident and death benefits, as defined by the Act of April 26, 1929, P. L. 805, and whether certificates or policies of such societies must be approved by your department.

Section 1 of that act provides as follows:

> "That any corporation organized prior to the twentieth day of May, one thousand nine hundred twenty-one under the provisions of Paragraph IX, section two, relating to corporations of the first class, as amended of the act, approved the twenty-ninth day of April, one thousand eight hundred and seventy-four (Pamphlet Laws, seventy-three) entitled 'An act to provide for the incorporation and regulation of certain corporations,' namely the maintenance of a society for beneficial or protective purposes to its members from funds collected therein, may pay or enter into contracts to pay money or benefits, not exceeding ten dollars per week, in the event of sickness, accident, or disability, and not exceeding two hundred and fifty dollars in the event of death."

Section 2 of the act makes it unlawful for such corporations to pay more than ten dollars ($10) per week in the event of sickness, accident, or disability, or more than two hundred fifty dollars ($250) in the event of death.

Section 4 of the act, as amended by the Act of June 22, 1931, P. L. 624, reads as follows:

> "Any corporation paying or entering into contracts to pay money or benefits in excess of the limitations prescribed by the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not less than one hundred dollars nor more than five hundred dollars for each payment or contract so made or entered into; or, upon satisfactory evidence of the violation of this section by any such corporation, the Insurance Commissioner may, in his discretion, pursue any one or more of the following courses of action: (1) Suspend or revoke the license of such offending corporation; (2) refuse, for a period of not to exceed one year thereafter, to issue a new license to such corporation; (3) impose a penalty of not more than one thousand dollars for each and every act in violation of this act. Before the Insurance Commissioner shall take any action as above set forth, he shall give written notice to the person, company, association, or exchange, accused of violating the law, stating specifically the nature of such alleged violation and fixing a time and place, at least ten (10) days thereafter, when a hearing of the matter shall be held. After such hearing or upon failure of the accused to appear at such hearing, the Insurance Commissioner shall impose such of the above penalties as he deems advisable. When the Insurance Commissioner shall take action in any of the ways above recited, the corporation aggrieved may appeal therefrom to the court of common pleas of Dauphin County."

Only beneficial societies organized prior to May 20, 1921, may issue and sell certificates or policies for sickness, accident, disability and death benefits as provided in that act. Beneficial societies incorporated after May 20, 1921, are not permitted to exercise these privileges. They are restricted to such activities as the Legislature intended should be performed by corporations of the first class created under Section 2 of the Act of April 29, 1874, P. L. 73, for the purpose of:

> "IX. The maintenance of a society for beneficial or protective purposes to its members from funds collected therein."

The powers of such nonprofit corporations were enlarged by the Act of May 23, 1891, P. L. 107, which authorized corporations so incorporated:

> "* * * to pay, and to enter into contracts to pay, to each member thereof, money or benefits not exceeding ten dollars per week in the event of sickness, accident or disability, or to pay not exceeding the sum of two hundred and fifty dollars in the event of death, or to pay money or benefits in the event of any or all of such contingencies: * * * "

This act was repealed by Act of April 26, 1929, P L. 805.

That it was the intention of the Legislature to limit the privileges granted by the Act of 1891 and continued by the Act of 1929 to beneficial societies created before May 20, 1921, is clear from the phraseology of the latter act. Furthermore, subsequent to May 20, 1921, no beneficial society could be legally incorporated for the purpose of exercising these privileges. Section 31 of the Act of May 20, 1921, P. L. 916, sometimes known as the Fraternal Benefit Society Act, repealed, among other acts, the following:

> "* * * paragraph nine of corporations of the first class of section two of the act, approved April twenty-ninth, one thousand eight hundred and seventy-four, entitled 'An act to provide for the incorporation and regulation of certain corporations', in so far as it applies to the incorporation of societies for the purpose of transacting any class of insurance; * * *"

A society chartered after May 20, 1921, must restrict its activities to assisting its members in need with funds collected from the membership. It can not sell certificates or policies of insurance to the public under the guise of making purchasers members of the society. It does not possess and can not legally exercise any of the powers granted by the Act of 1929. It can not do an insurance business.

Societies chartered prior to May 20, 1921, are limited to the powers designated in the Act of 1929. They can not enlarge upon them and enter the general field of life or casualty insurance.

It was not the purpose of the Legislature to permit such beneficial societies to issue and sell endowment certificates, or to provide for endowment privileges on sickness and accident or death certificates, nor to pay one-half of the face of the certificate in the event of permanent or total disability. Disability payments must be limited to ten dollars ($10) or less per week. The full amount of the policy may be paid only in the event of death.

Furthermore, beneficial societies may not guarantee members forfeiture values, nor provide for cash surrender values, nor issue certificates or policies affording any privileges or providing any insurance other than as designated in the Act of April 26, 1929, referred to.

In our opinion, a beneficial society may not issue a certificate or policy until the form thereof has been approved by your department. Section 354 of the Insurance Company Law of 1921, as added by Section 2 of the Act of June 23, 1931, P. L. 904, provides as follows:

> "It shall be unlawful for any insurance company, association, or exchange, doing business in this Commonwealth, to issue, sell, or dispose of any policy, contract, or certificate, covering life, health, accident, personal liability, and casualty insurance, or use applications, riders, or endorsements, in connection therewith, until the forms of the same have been submitted to and approved by the Insurance Commissioner, and copies filed in the Insurance Department, except riders or endorsements relating to the manner of distribution of benefits, and to the reservation of rights and benefits under any such policy, and used at the request of individual policyholders.
>
> "Any person, corporation, insurance company, exchange, order, or society that shall, either as principal or agent, issue, or cause to be issued, any policy or contract of insurance within this Commonwealth, contrary to this section, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500.00)."

We interpret this language as applying to beneficial societies engaged in the insurance business, as contemplated by the Act of April 26, 1929, P. L. 805. Consequently you should require all societies entitled to and doing business under that act to file with you copies of all policy forms or certificates used. You should refuse to approve and permit the issue and sale of any certificates or policies which provide for benefits other than those permitted by the Act of 1929.

Therefore, you are advised that only beneficial societies incorporated prior to May 20, 1921, may issue certificates or policies of insurance for sickness, accident and death benefits and such contracts may be issued only as provided by the Act of April 26, 1929, P. L. 805. The forms of such certificates or policies should be filed with the Insurance Department and approved by you before they are issued.

Very truly yours,

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

OPINION NO. 103

State Teachers Colleges—Collection of fees from pupils.

Even though rules of State teachers colleges require students to pay fees in advance, the Department of Revenue under its duty to collect such fees, may in its discretion accept adequate security for future payment in place of present cash. The Department of Revenue has no authority to prevent students from attending a State teachers college or classes thereof. That is a matter solely for the trustees of the institution. Section 206 of The Fiscal Code; Sections 2008, 2009 of the School Code.

Department of Justice,

Harrisburg, Pa., October 17, 1933.

Honorable Leon D. Metzger, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you as to your duties under the following circumstances:

The rules prescribed by the authorities of the various State teachers colleges require that all fees due from students, except enrollment and service fees, must be paid quarterly in advance. Enrollment and service fees must be paid on the date of registration. A number of students in the teachers colleges have been handicapped by the fact that their funds, or the funds of their parents, are tied up in banks which are operating on a restricted basis.

In those cases you have endeavored to have the pupils obtain responsible guarantors for the payment of fees, and where that was impossible, you have instructed your agents to obtain from the students or their parents, assignments of the deposits in the restricted banks.

Your inquiry is whether, in cases where such guarantees or assignments have been obtained, it is a violation of the law to permit the accounts to run on unpaid until such time as the funds on deposit in the banks may become available. And finally you ask whether, if this practice is not proper, you should "refuse the privilege to these students to continue their school work."

Sections 2008 and 2009 of the School Code (the latter having been last amended by the Act of June 1, 1933, No. 288), direct that the boards of trustees of the several State teachers colleges, with the approval of the Superintendent of Public Instruction, shall prescribe the fees to be paid by students.

Section 206 of The Fiscal Code of April 9, 1929, P. L. 343, makes it the duty of your department, among other things, "To collect all amounts, payable by or for pupils, for instruction and maintenance in State-owned educational institutions, including State normal schools and State teachers' colleges." Section 210 of The Fiscal Code, as last amended by the Act of June 1, 1931, P. L. 318, provides for the appointment of agents of your department at the various institutions.

In our opinion you may exercise a reasonable discretion under these circumstances. If you are satisfied that the security offered by a student, either in the form of surety or an assignment of a restricted bank account, is ample to assure payment of the amounts that will become due the Commonwealth, you would be justified in accepting such security in lieu of immediate cash payment. However, we believe that the situation could be simplified for the future if the rules of the teachers colleges which now govern payment of fees were amended to provide for the extension of the time for payment in meritorious cases and under reasonable restrictions. Authority to grant such extensions could be vested in an officer of the institution, or the trustees themselves could act if they chose to do so.

In any case, however, we do not consider it within the jurisdiction of your department to refuse any student admission to a college or to classes therein. That is a matter for control by the boards of trustees of the various colleges.

Very truly yours,

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

OPINION NO. 104

Banks and banking—Right of national bank located in another state, which has been appointed executor and trustee under a will of a Pennsylvania resident, to serve in such capacity in this State.

A national bank located in another state and authorized by the Federal Reserve Board to act as fiduciary, which has been appointed executor and trustee under a will of a Pennsylvania resident, may serve in such capacity within this Commonwealth, provided that the laws of the state in which such national bank is located authorize corporations organized under its laws to act in such fiduciary capacity in Pennsylvania and likewise authorize Pennsylvania bank and trust companies and trust companies to act in such fiduciary capacity in such other state. Such national bank is not required to place its trust department under the supervision of the Department of Banking of Pennsylvania.

Department of Justice,

Harrisburg, Pa., October 25, 1933.

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

Sir: You have asked to be advised (1) whether a national bank located in another state and having trust powers, which has been appointed executor and trustee under the will of a Pennsylvania resident, may serve in such fiduciary capacity within this Commonwealth, and (2) whether, if so, such national bank must, by resolution of its board of directors, consent to be placed under the supervision of the Department of Banking of Pennsylvania.

We shall first consider whether a national bank located in another state has the power to act as a fiduciary within this Commonwealth.

Section 1506 B of the Banking Code, Act No. 112, approved May 15, 1933, provides as follows:

> "A corporation, organized under the laws of any state of the United States other than Pennsylvania, shall not have authority to act in this Commonwealth as trustee, guardian, executor, administrator, or in any other similar fiduciary capacity unless it shall be appointed such fiduciary by any last will and testament, or codicil thereto, or other testamentary writing, or by deed of trust inter vivos, or by any court or register of wills of this Commonwealth, and unless the laws of such other state confer like powers upon corporations organized under the laws of this Commonwealth, but such corporations organized under the laws of another state shall be required to give such bond or other security as shall be deemed adequate by the court or register of wills in the Commonwealth having jurisdiction over the estate of which the corporation is acting as trustee, guardian, executor, administrator, or similar fiduciary."

Thus, when appointed executor and trustee by a will, a corporation, organized under the laws of another state and having fiduciary powers, may act as such within this Commonwealth, provided that the laws of such other state authorize Pennsylvania bank and trust companies and trust companies to serve in a similar capacity within that state.

What is the power in the same situation of a national bank located in another state?

Section 11 of the Federal Act of December 23, 1913, c. 6, 38 Stat. 264, amended by Section 2 of the Act of September 26, 1918, c. 177, 40 Stat. 968, provides, in part, as follows:

> "The Federal Reserve Board shall be authorized and empowered:
>
> * * * * * * *
>
> "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.
>
> "Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this chapter."

In *First National Bank v. Fellows,* 244 U. S. 416, 61 L. Ed. 1233 (1917), Mr. Chief Justice White, speaking for a majority of the court, said at 426, 61 L. Ed. at 1240:

> "* * * the state may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks, and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course, as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came, in virtue of authority conferred upon them by Congress, to exert such particular powers. And these considerations clearly were in the legislative mind when it enacted the statute in question. This result would seem to be plain when it is observed (a) that the statute authorizes the exertion of the particular functions by national banks when not in contravention of the state law; that is, where the right to perform them is expressly given by the state law; or, what is equivalent, is deducible from the state law because that law has given the functions to state banks or corporations whose business in a greater or less

> degree rivals that of national banks, thus engendering from the state law itself an implication of authority in Congress to do as to national banks that which the state law has done as to other corporations; and (b) that the statute subjects the right to exert the particular functions which it confers on national banks to the administrative authority of the Reserve Board, giving besides to that board power to adopt rules regulating the exercise of the functions conferred, thus affording the means of coordinating the functions when permitted to be discharged by national banks with the reasonable and nondiscriminating provisions of state law regulating their exercise as to state corporations,—the whole to the end that harmony and the concordant exercise of the national and state power might result.''

Again in *Missouri ex rel. Burnes National Bank v. Duncan*, 265 U. S. 17, 68 L. Ed. 881 (1924), Mr. Justice Holmes, speaking for a majority of the court, said at 23, 24, 68 L. Ed. at 882, 883:

> ''* * * This [the Act of 1913 amended by Act of 1918, which we have quoted above] says in a roundabout and polite but unmistakable way that whatever may be the state law, national banks having the permit of the Federal reserve board may act as executors if trust companies competing with them have that power. * * *'' (brackets ours)
>
> ''* * * the state cannot lay hold of its general control of administration to deprive national banks of their power to compete that Congress is authorized to sustain.''

Under these decisions, and under the statutes which they construe, it is clear that the Federal Reserve Board may authorize a national bank to act as fiduciary in any state in which corporations in competition with such national bank are, under the laws of the state in which the national bank is located, empowered to serve in such capacity.

In each case, therefore, two facts must be determined: (1) whether the laws of the state in which the national bank is located, permit its own corporations, which compete with national banks, to act in such fiduciary capacity in Pennsylvania, and (2) whether the laws of such state permit Pennsylvania bank and trust companies and trust companies to act in such fiduciary capacity within its borders. In addition, of course, the national bank must have been authorized by the Federal Reserve Board, pursuant to act of Congress, to serve in such fiduciary capacity.

If all these conditions are met, a national bank, appointed executor and trustee by will, may serve in such capacity within Pennsylvania. Of course, the national bank must first be approved as fiduciary by the court in this Commonwealth having jurisdiction of the estate, in accordance with Section 57 of the Fiduciaries Act of 1917, P. L. 447, and must post such bond or other security as is deemed adequate by the court or register of wills having jurisdiction over the estate, in accordance with the provisions of Section 1506 B of the Banking Code relating to corporations organized under the laws of another state.

You also ask to be advised whether a national bank located in another state, if authorized to act as executor and trustee in Pennsylvania under the will of a Pennsylvania resident, must, before exercising such power, agree to place its trust department under the supervision of the Pennsylvania Department of Banking. In our opinion, this question must be answered in the negative.

It is true that Section 1506 E of the Banking Code provides as follows:

> "Any national banking association having authority under the laws of the United States to act as trustee, guardian, executor, administrator, or similar fiduciary shall, upon the adoption by its board of directors of a resolution agreeing to place its trust department under the supervision of the Department of Banking, and upon the transmission of a certified copy of such resolution to the Department of Banking, be authorized to act as such fiduciary in this Commonwealth."

However, this provision must be interpreted to apply only to national banks located in Pennsylvania. To hold otherwise, would be to render the provision invalid as discriminating against national banks, since State institutions located in other states do not, upon acting as executor and trustee in Pennsylvania, have to agree to place their trust departments under the supervision of the Department of Banking of Pennsylvania.

Therefore, we advise you (1) that a national bank located in another state and authorized by the Federal Reserve Board to act as fiduciary, which has been appointed executor and trustee under a will of a Pennsylvania resident, may serve in such capacity within this Commonwealth, provided that the laws of the state in which such national bank is located authorize corporations organized under its laws to act in such fiduciary capacity in Pennsylvania and likewise authorize Pennsylvania bank and trust companies and trust companies to act in such fiduciary capacity in such other state; and (2) that such national bank is not required to place its trust department under the supervision of the Department of Banking of Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

BERNARD G. SEGAL,

Assistant Deputy Attorney General.

OPINION NO. 105

School districts—Pupils—Transportation—Reimbursement of district.

A school district may not legally pay a flat sum of money to its pupils under the guise of transportation expense, and the Department of Public Instruction could not legally approve a claim for reimbursement of the district for any such payments under any circumstances. Payments for transportation, either by a school district or by the Commonwealth must be only for transportation actually furnished or provided by the school district.

Department of Justice,

Harrisburg, Pa., October 31, 1933.

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

Sir: You have reported to us that a certain board of school directors adopted a resolution which provided that the school district would pay to each pupil who attended the high school of the district the sum of $5.15 per school month, for transportation, whether the pupil traveled by train or furnished his own transportation. You inquire whether payments to pupils under such a resolution would be legal, and whether the Commonwealth could reimburse the school district for such payments if the other circumstances of the case brought it within a proper class for State reimbursement.

Section 1404 of the School Code of May 18, 1911, P. L. 309, contains the following provision:

> "The board of school directors in any school district in this Commonwealth may, out of the funds of the district, provide for the free transportation of any pupil to and from the public schools."

Other sections of the Code require school districts to furnish free transportation under various circumstances.

Section 1408 of the Code, as last amended by the Act of May 13, 1925, P. L. 628 provides that "the free transportation of pupils, as required or authorized by this act, or any other act, may be furnished by using either school conveyances, private conveyances, or electric railways, or other common carriers." And under Section 1406 of the Code, as last amended by the Act of May 29, 1931, P. L. 243, contributions by the Commonwealth toward the cost of transportation are to be made only "if the Department of Public Instruction approves the transportation as to methods and means and the contracts provided therefor."

The statutory provisions to which we have referred make it quite clear that where public money is to be used for the conveyance of pupils to and from school, it is the duty of the school district to make definite arrangements for the transportation of the pupils. The payments must be for actual transportation only.

Consequently, any such arrangement as was attempted by the school district in question would be utterly improper. Apparently the payments to the pupils were to be made without regard to the distance to be traveled or the cost of actual transportation. The pupil who lived within a comparatively short distance and walked to and from the school would receive pay for walking.

It is our opinion that expenditures by a school district for pupil transportation may be made only where the district itself provides the conveyance or where it makes contracts or other arrangements directly with the persons or corporation which furnishes the means of conveyance. Of course, this may include purchase of tickets for travel by common carriers as well as the making of special contracts for carrying pupils. However, under no circumstances could a school district justify the payment of a flat sum of money to each pupil, leaving the pupil free to determine whether the money should be used for transportation or not.

Since the payment of any such sum would be illegal, you should not permit State reimbursement based thereon.

Therefore, we advise you that a school district may not legally pay a flat sum of money to its pupils under the guise of transportation expense, and your department could not legally approve a claim for reimbursement of the district for any such payments under any circumstances. Payments for transportation, either by a school district or by the Commonwealth must be only for transportation actually furnished or provided by the school district.

Very truly yours,

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

OPINION NO. 106

Banks and banking—Institutions under supervision of the Secretary of Banking—Eligibility of cashier or treasurer to serve as a director of such institution or of a national bank—Act of May 15, 1933, P. L. 624.

There is a presumption against the eligibility of a cashier or treasurer of a State banking institution subject to the supervision of the Banking Department, to serve as a director of another such institution or of a national bank. He must prove that his office as director is not gainful, either directly or indirectly.

On and after January 1, 1934, a director, officer or employe of any Pennsylvania bank or trust company which is a member of the Federal Reserve System may not at the same time be a director, officer or employe of any other corporation or of a partnership which makes loans secured by stock or bond collateral to any individual, association, partnership or corporation other than its own subsidiaries.

Department of Justice,

Harrisburg, Pa., November 2, 1933.

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

Sir: You have submitted to us two questions arising, respectively, under Section 512 B of the Banking Code (Act No. 112, approved May 15, 1933, effective July 3, 1933) and Section 33 of the so-called Glass-Steagall Act, being the "Banking Act of 1933," approved June 16, 1933 (Chap. 89. 48 Stat. 162).

1. You ask whether a cashier or treasurer of a banking institution under your supervision may serve as a member of the board of directors of any other incorporated institution under your supervision or of a national banking association.

Section 512 B of the Banking Code provides that:

> "A cashier or treasurer of an institution shall not engage in any other gainful profession, business, occupation, or calling, either directly or indirectly, but this shall not be construed to affect the right to be at the same time a member of the board of directors or the board of trustees of the incorporated institution in which he is cashier or treasurer."

Section 2 of the Code defines "institution" as including "any bank, bank and trust company, savings bank, trust company, or private bank."

Is a member of a board of directors of an incorporated State banking institution, or of a national bank, engaged in a "gainful profession, business, occupation, or calling" when performing the duties of his office?

We call attention to the fact that the act prohibits a cashier or treasurer from engaging in another gainful occupation, business, or calling "directly or indirectly."

We are not prepared to say that every director while so acting is engaged in a gainful business or calling.

However, if directors' fees are paid, clearly the office is gainful. And if a director, through his connection with a banking corporation is employed as solicitor, or in any other paid capacity, his office is, in our opinion, indirectly gainful.

And the Legislature itself evidenced its belief that directorships are prima facie gainful by providing specifically that the prohibition quoted should not be construed to forbid a cashier or treasurer from being a director of his own institution.

It is our opinion that presumably a directorship in a State banking institution is a gainful business, occupation or calling, and that the burden is upon any cashier or treasurer to show conclusively that his directorship in another State banking institution or a national banking association is not gainful, directly or indirectly.

2. You ask whether under Section 33 of the Glass-Steagall Act directors, officers and employes of national banking associations, or of institutions under your supervision which are members of the Federal Reserve System, are prohibited from serving at the same time as directors, officers or employes of other banking institutions under your supervision, or under supervision of the Comptroller of the Currency.

Section 33 of the Glass-Steagall Act amended the Act of Congress of October 15, 1914, as amended, by adding thereto Section 8A, which provides:

> "That from and after the 1st day of January 1934, no director, officer, or employe of any bank, banking association, or trust company, organized or operating under the laws of the United States shall be at the same time a director, officer, or employe of a corporation (other than a mutual savings bank) or a member of a partnership organized for any purpose whatsoever which shall make loans secured by stock or bond collateral to any individual, association, partnership, or corporation other than its own subsidiaries."

Do the words "bank, banking association, or trust company, organized or operating under the laws of the United States" include institutions supervised by your department?

Banks "organized under the laws of the United States" are those organized under an act of Congress,—national banks.

Banks "operating under the laws of the United States" are those not organized under the laws of the United States but which, because they are members of the Federal Reserve System, operate under the laws of the United States.

Therefore, it is our opinion that the quoted provision of the Glass-Steagall Act refers to all members of Federal Reserve System, including banks organized under the laws of the several states.

This conclusion is emphasized by the fact that trust companies as such cannot be "organized" under the laws of the United States. All trust companies are organized under state law but national banks after being organized under the laws of the United States, may acquire trust company powers and be permitted to use the words "trust company" in their titles.

Accordingly, all trust companies operating under the laws of the United States are trust companies organized under state laws.

It is our opinion that on and after January 1, 1934, a director, officer or employe of any bank or trust company under your supervision, which is a member of the Federal Reserve System, may not at the same time be a director, officer or employe of any other corporation or of a partnership organized for any purpose which shall make loans secured by stock or bond collateral to any individual, association, partnership or corporation other than its own subsidiaries.

Therefore, we advise you:

1. That there is a presumption against the eligibility of a cashier or treasurer of a State banking institution subject to the supervision of your department, to serve as a director of another such institution or of a national bank. He must prove that his office as director is not gainful, either directly or indirectly.

2. That after January 1 of next year a director, officer or employe of any Pennsylvania bank or trust company which is a member of the Federal Reserve System may not at the same time be a director, officer or employe of any other corporation or of a partnership which makes loans secured by stock or bond collateral to any individual, association, partnership or corporation other than its own subsidiaries.

Very truly yours,

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

OPINION NO. 107

State Emergency Relief Board—Department of Welfare—Indigent persons—Legal residence. Acts of April 11, 1929, P. L. 487; June 13, 1836, P. L. 539; April 6, 1905, P. L. 511.

The Act of April 11, 1929, P. L. 487, does not authorize the Department of Welfare to determine the residence of poor persons returned to this State, other than mental cases, or to impose liability for the maintenance of such persons on any poor district.

If the proper authorities of another state consent, paupers havings no settlement in Pennsylvania may be removed to the other state.

Department of Justice,

Harrisburg, Pa., November 10, 1933.

Mr. J. Lawrence Solly, Director of Bureau of Transients, State Emergency Relief Board, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you on two questions which may be summarized as follows:

> 1. Does the Act of April 11, 1929, P. L. 487 authorize the Department of Welfare to determine the legal residence of indigent persons other than insane, feeble-minded or epileptic persons, who are returned to this State, and to impose liability for the maintenance of such persons on local poor districts?
>
> 2. May persons who are public charges or likely to become public charges and who have no settlement in Pennsylvania, be returned to another state in which they have a settlement, provided the authorities of such other state consent?

I

The title and the pertinent provisions of the Act of April 11, 1929, P. L. 487 are as follows:

> "An act authorizing the Department of Welfare to determine the legal residence of indigent, insane, feeble-minded and epileptic persons, returned to this Commonwealth by the authorities of another State, or transferred from one poor district to another by the department, and requiring the proper district to pay the costs of the care and treatment of such persons in accordance with the laws relating to indigent insane persons.
>
> "Section 1. Be it enacted, &c., That whenever any indigent, insane, feeble-minded or epileptic person is to be returned to this State by the proper authorities of another State, or whenever any such person is to be transferred by the Department of Welfare from one poor district to another as provided by law, the legal residence of such person may be determined by the Department of Welfare, and the commitment of such person shall be made in accordance with such determination and the existing laws. * * *"

Section 2 imposes on the poor district of residence an obligation to pay the cost of care and *treatment* of such persons.

If it were not for the comma which appears after the word indigent in the first sentence of Section 1, there could be no question that the authority of the Department of Welfare under this act is limited to insane, feeble-minded and epileptic persons, who, for the sake of brevity, we shall term mental cases.

We are satisfied this act was intended to apply only to mental cases, and that the comma appearing after the word indigent was erroneously placed and must be ignored.

Punctuation contained in the printed volumes of Pennsylvania acts of assembly is not official, and cannot control the interpretation of an act. In *Commonwealth v. Reimel,* 68 Pa. Super. 240, 242 (1917), the court said:

> "* * * As was said in Com. *v.* Shopp, 1 Woodward 123, 130: 'The marks of punctuation are added subsequently by a clerk or a compositor, and this duty is performed very frequently in an exceedingly capricious and novel way.' Punctuation is not conclusive in the construction of a statute: Gyger's Est., 65 Pa. 311; Montgomery's Est., 63 Pa. Superior Ct. 318; and will not be considered when the sense is clear: Com. *v.* Taylor, 159 Pa. 451."

Our conclusion as to the intention of the act in question is supported by various parts of the act itself. In the first place the title imposes on poor districts the obligation to pay for the care *and treatment* of persons covered by the act "in accordance with the laws relating to *indigent insane persons.*" It is well settled that the title is a part of an act and aids, if need be, in its construction: *Glen Alden Coal Co. v. Scranton,* 282 Pa. 45, 51 (1925); *Matis v. Schaeffer,* 270 Pa. 141, 143 (1921). The title limits the scope of an act: *Brink v. Marsh,* 53 Pa. Super. 293, 298 (1913).

If we permitted the comma to govern our interpretation of this act, we should be compelled to construe the act as applying to all insane, feeble-minded or epileptic persons who are returned to the State, regardless of their condition of indigency. Certainly that was not the intention of the Legislature. Likewise, the provision which would apply to persons who are "transferred by the Department of Welfare from one poor district to another as provided by law" could refer only to mental cases, since the Department of Welfare has no authority to remove ordinary poor cases from a district.

The use of the word "treatment" is also significant. It would be almost universally applicable to mental cases. Indigent persons do not necessarily need treatment.

Therefore, we advise you that the Act of April 11, 1929, P. L. 487, does not authorize the Department of Welfare to determine the residence of poor persons returned to this State, other than mental cases, or to impose liability for the maintenance of such persons on any poor district.

II

The Act of June 13, 1836, P. L. 539, Section 16, as amended by the Act of April 6, 1905, P. L. 115, provides as follows:

> "Section 16. On complaint made by the overseers of any district to one of the magistrates of the same county, it shall be lawful for the said magistrate, where any per-

> son has or is likely to become chargeable to such district into which he shall come, by his warrant or order, directed to such overseers, to remove such person, at the expense of the district, to the city, district or place where he was last legally settled, whether in or out of Pennsylvania, unless such person shall give sufficient security to indemnify such district to which he is likely to become chargeable as aforesaid."

In *Overseers of the Poor of Limestone Township v. Overseers of the Poor of Chillisquaque,* 87 Pa. 294, 298 (1878), the Supreme Court said:

> "* * * It is indeed true that, by our poor laws, provision is made for the removal of paupers into other states, but this provision is nugatory in that there is no power by which it can be carried into effect; hence, the order of removal loses all force the moment it crosses the state line. In other words, the legislature of Pennsylvania cannot charge the poor districts of other states with the support of paupers, though their settlements may properly be therein, and, per contra, other states cannot so charge the poor districts of Pennsylvania."

It is obvious that a pauper may not be removed from this State to another state without the consent of the proper authorities of the other state. Likewise no state could return a pauper to Pennsylvania and impose the cost of his maintenance on the public here without the consent of the proper authorities, namely, the directors of the poor of the district to which he is to be returned.

However, if the authorities of a foreign state are willing to permit Pennsylvania to return to them a pauper whose last settlement was in that state, the obstacle suggested by the court in the Limestone Township Case is removed.

It is possible that objections to the removal might be made by the indigent person himself, on the ground that he was being deprived of personal liberty without due process of law. But we do not believe that such an objection could be sustained. The Supreme Court of the United States has said that a state, in the exercise of its police power, may exclude from its limits "convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases": *Hannibal and St. Joseph Railroad Company v. Husen,* 95 U. S. 465, 471 (1878). So far as we can discover, statutes providing for the removal of paupers from one part of the State to another have never been held to violate any personal constitutional rights. Removal across the State line would involve no different principle.

Therefore, we advise you that if the proper authorities of another state consent, paupers having no settlement in Pennsylvania may be removed to the other state.

Very truly yours,

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

OPINION NO. 108

Banks and banking—National banking associations—Fiduciary powers—Capital and surplus. Act of May 15, 1933, P. L. 624; Federal Reserve Act of December 23, 1913, c, 6, 30 Stat. 264 as amended by Section 2 of the Act of September 26, 1918, c. 177, 40 Stat. 968.

A national banking association created before July 3, 1933, and possessing fiduciary powers, may after that date exercise such powers, even though its surplus does not equal its capital; but it must proceed to increase its surplus to equal its capital.

A national banking association created before July 3, 1933, and acquiring fiduciary powers after that date, must build up its surplus to equal its capital; but in the meantime it may function as a fiduciary.

A national banking association created after July 3, 1933, whether or not it be successor to an association which exercised fiduciary powers prior to that date, must have the same capital and surplus as are required of a State institution created after July 3, 1933, which exercises fiduciary powers.

Department of Justice.

Harrisburg, Pa., November 25, 1933.

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

Sir: You have asked to be advised upon the following questions:

1. If a national banking association, having its place of business in Pennsylvania, possessed the right to act as a fiduciary before July 3, 1933, may it continue to exercise that right after July 3, 1933, even though its surplus does not at least equal its capital?

2. If a national banking association, having its place of business in Pennsylvania, acquired fiduciary powers prior to July 3, 1933, can it be obliged to increase its capital and surplus to the same extent as a State bank and trust company or trust company?

3. If a national banking association, having its place of business in Pennsylvania, is created after July 3, 1933, pursuant to a plan of reorganization of a prior existing association with fiduciary powers,

may the new association exercise fiduciary powers without complying with the State law establishing capital and surplus requirements for State institutions with fiduciary powers which were created after July 3, 1933?

Section 1506, subsection E, of the Banking Code (Act of May 15, 1933, P. L. 624), provides that:

> "Any national banking association having authority under the laws of the United States to act as trustee, guardian, executor, administrator, or similar fiduciary, shall, upon the adoption by its board of directors of a resolution agreeing to place its trust department under the supervision of the Department of Banking, and upon the transmission of a certified copy of such resolution to the Department, be authorized to act as such fiduciary in this Commonwealth."

Section 11 of the Federal Reserve Act of December 23, 1913, c. 6, 38 Stat. 264, as amended by Section 2 of the Act of September 26, 1918, c. 177, 40 Stat. 968, provides, in part, as follows:

> "The Federal Reserve Board shall be authorized and empowered:
>
> * * * * * * *
>
> "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.
>
> "Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this act."
>
> Paragraph (k) of the section quoted provides:
>
> "* * * That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers."

It is clear that Congress intended that national banks doing business in a state should have the same power as state banks to transact a fiduciary business, but that national institutions exercising fiduciary powers must have the same qualifications as are required of state banks before they may exercise such powers.

We answer your inquiries in detail as follows:

I

Section 401 of the Banking Code provides the minimum capital for institutions engaging in a trust business in communities of various populations.

Section 402 prescribes the minimum capital for an institution exercising trust powers on July 3, 1933, when the Code became effective; provides that such institution shall not be required to maintain a capital of, or to increase its capital to, more than 100% above the minimum required by the law prior to July 3, 1933; and specifies the method for increasing its capital.

Section 413 requires an institution incorporated under the act to maintain a surplus of at least 100% of its capital.

Section 414 provides that an institution existing prior to the effective date of the act, which has a surplus less than 100% of its capital, shall at the close of each dividend period, or at least annually, if no dividend is paid, credit to capital not less than one-half of its net earnings for such period, until its surplus shall equal not less than 100% of its capital.

The Code does not prohibit a bank and trust company or trust company which, prior to July 3, 1933, was authorized to and did transact a fiduciary business, from continuing to transact such business, even though its surplus is not 100% of its capital.

Section 413, which we have referred to above, provides also that a new institution created under the act shall have a surplus equal to at least 50% of its capital, but shall build up such surplus after incorporation to 100%.

As our law allows a State institution to function as a fiduciary with a surplus of only 50% of its capital, a national institution may be granted a permit under the act of Congress to function as a fiduciary in Pennsylvania, even though its surplus be only 50% of its capital, when its permit is issued. Such national banking association must, however, comply with the provisions of Section 414 of the Banking Code and build up its surplus to 100% of its capital in the same fashion as a State institution would be compelled to do.

II

The answer to your first inquiry in part answers the second.

If a national banking association exercising powers as a fiduciary prior to July 3, 1933, does not have the surplus which the Banking Code requires of a State institution to qualify it to act as a fiduciary.

the national association must build up its surplus to the same extent as would be required of a State institution. Meantime it may continue to exercise its fiduciary powers.

III

Your third inquiry raises the question whether a national banking association, which has, after July 3, 1933, been created to succeed a prior national association which exercised fiduciary powers before July 3, 1933, may itself exercise such powers without having the surplus required of State institutions with fiduciary powers which are incorporated after July 3, 1933.

The new national bank is a separate, distinct and entirely new entity. It must meet the capital and surplus requirements established by law for State institutions which exercise fiduciary powers. The Act of Congress makes this clear. A permit should not be issued to such a national banking association, authorizing it to exercise trust powers under the laws of this State, unless it has the capital and surplus required by the Banking Code for a State bank and trust company or trust company incorporated after July 3, 1933.

In summary, we advise you that:

1. A national banking association created before July 3, 1933, and possessing fiduciary powers, may after that date exercise such powers, even though its surplus does not equal its capital; but it must proceed to increase its surplus to equal its capital.

2. A national banking association created before July 3, 1933, and acquiring fiduciary powers after that date, must build up its surplus to equal its capital; but in the meantime it may function as a fiduciary.

3. A national banking association created after July 3, 1933, whether or not it be successor to an association which exercised fiduciary powers prior to that date, must have the same capital and surplus as are required of a State institution created after July 3, 1933, which exercises fiduciary powers.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,
Deputy Attorney General.

OPINION NO. 109

Child labor—Employment in homes other than their own, during school hours—Employment certificates—Industrial employment. Section 1316 of the School Code as amended by Act of May 20, 1921, P. L. 1034; Act of May 13, 1915, P. L. 286.

The Superintendent of Public Instruction may not forbid the issuance of a permit under Section 1416 of the School Code for domestic employment solely on the ground that the employment is to be in a home other than the child's own home.

School authorities who have the duty of issuing employment certificates should not refuse to issue them simply because the proposed employmnt is of an industrial nature; but they may require, as a condition precedent to the issuance of the permit, that the prospective employer certify in writing that the contemplated employment is not in violation of an N. R. A. code, agreement or license.

Department of Justice,
Harrisburg, Pa., November 28, 1933.

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

Sir: You have asked us to advise you on two questions which may be summarized as follows:

> 1. May the Superintendent of Public Instruction, under Section 1416 of the School Code, as last amended by the Act of May 20, 1921, P L. 1034, prohibit the employment of children between the ages of fourteen and sixteen years in homes other than their own, during school hours?
>
> 2. In view of the provisions of the Child Labor Law, approved May 13, 1915, P. L. 286, and of the N. R. A. regulations, would an official legally authorized to issue employment certificates be justified in refusing to issue employment certificates for minors fourteen to sixteen years of age who wish to engage in industrial employment?

I

Section 1416 of the School Code, as amended by the Act of May 20, 1921, P. L. 1034, provides as follows:

> "The provisions of this act requiring regular attendance shall not apply to any child, between the ages of fourteen and sixteen years, who has completed a course of study equivalent to six yearly grades of the public school, and is regularly engaged in any useful and lawful employment or service during the time the public schools are in session, and who holds an employment certificate issued according to law; nor shall the said provisions apply to any child, between the ages of fourteen and sixteen years, engaged in farm work or domestic service in a private home on a permit issued by the school board or the designated school official of the

school district of the child's residence, in accordance with regulations which the Superintendent of Public Instruction is hereby authorized to prescribe."

The foregoing language creates a definite exemption in favor of children between the ages of fourteen and sixteen years who are employed in private homes under proper permits. The grant of authority to the Superintendent of Public Instruction to prescribe regulations was not intended to permit him practically to abolish the exemption. A regulation which would forbid the issuance of a permit for employment in domestic service in any home other than the child's own home, would largely produce that result.

Therefore, we advise you that it would not be proper to attempt to enforce any such prohibition as is suggested by your first question.

II

The Child Labor Law of May 13, 1915, P. L. 286, provides for the issuance of employment certificates permitting the employment of children between the ages of fourteen and sixteen years under prescribed conditions. The requirements for obtaining an employment certificate are set forth in considerable detail. Prima facie, a child, who complies with all the requirements of the act and who is about to enter employment, is entitled to a certificate.

However, the President's reemployment agreement, commonly known as the Blanket Code, promulgated under the National Industrial Recovery Act, bans the employment of minors under the age of sixteen years except in limited capacities. Specific codes for various industries have included a similar provision.

However, the application of these codes to specific cases frequently involves honest differences of opinion, both as to law and fact. We do not believe that school authorities who are charged with the duty of issuing employment certificates should be injected into any such disputes by a general refusal to issue permits for any industrial employment. But it would be entirely proper and consistent with a desire to cooperate with the Federal Recovery Administration, to limit the issuance of permits for industrial employment to cases in which the prospective employer shall certify in writing that the contemplated employment of the minor is not in violation of any code, agreement or license prescribed, issued or approved by the President under the National Recovery Act.

To summarize:

The Superintendent of Public Instruction may not forbid the issuance of a permit under Section 1416 of the School Code for domestic employment solely on the ground that the employment is to be in a home other than the child's own home.

School authorities who have the duty of issuing employment certificates should not refuse to issue them simply because the proposed employment is of an industrial nature; but they may require, as a condition precedent to the issuance of the permit, that the prospective employer certify in writing that the contemplated employment is not in violation of an N. R. A. code, agreement or license.

Very truly yours,

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

OPINION NO. 110

Budget estimates—Duties of Auditor General—Powers of Governor—Requisitions —Game Code—Sections 604 and 606 of the Administrative Code of 1929, P. L. 177; Act of May 24, 1923, P. L. 359, as amended by Act of June 9, 1931, P. L. 455.

The Department of the Auditor General may not rely wholly on the Governor to enforce the provisions of Section 604 of The Administrative Code, but may rely upon statements by duly-authorized requisitioning officers of administrative agencies that the requisitions presented are within budget allotments unless it has reason to doubt the correctness of such statement in any particular instance. In this event, the department must make further inquiries to assure itself that the requisition is lawful.

It would be entirely proper, although the law does not specifically require it, for the department to demand that each requisition shall contain a statement by the duly authorized requisitioning officer to the effect that the requisition presented is within the budget estimates for the period during which the obligation covered by the requisition was incurred.

Department of Justice,
Harrisburg, Pa., November 29, 1933.

Honorable Frank E. Baldwin, Auditor General, Harrisburg, Pennsylvania.

Sir: You have requested us to answer the following questions arising under Section 604 and 606 of The Administrative Code of 1929 (Act of April 9, 1929, P. L. 177):

> "May the Department of the Auditor General rely wholly on the Governor to enforce the provisions of the Budget, except on notice as provided in the last paragraph of Section 604 aforesaid?
>
> "If the Auditor General, under the law, need not go beyond or behind the statement of the department head or the Budget Secretary that a requisition in any case is within or in accordance with an approved budget esti-

mate or allotment, should such statement over the signature of the department head or Budget Secretary accompany the requisition as a necessary part thereof?"

You also make specific request to be advised whether Section 1201 of the Game Code (Act of May 24, 1923, P. L. 359, as amended by the Act of June 9, 1931, P. L. 455), requires a different construction in the case of requisitions for payments out of the Game Fund.

You call attention to the fact that in our Informal Opinion No. 38, rendered August 20, 1931, we advised the then Auditor General as follows:

> "It is not the duty of the fiscal officers to see to it that the Governor's desire is carried out, except that the fiscal officers should in any case decline to approve requisitions in excess of approved budgeted items. In our opinion, the fiscal officers are justified in relying upon statements by department heads and by the Budget Secretary that requisitions presented are within budgeted allotments. * * *"

Section 604 of The Administrative Code requires all administrative agencies, except the Department of the Auditor General and the Treasury Department, from time to time as requested by the Governor, to prepare and submit budget estimates for ensuing monthly, quarterly, or other periods as the Governor shall prescribe. If an estimate thus submitted does not meet with the Governor's approval, it must be revised in accordance with the Governor's desires and be resubmitted for the Governor's approval. The section then continues:

> "After the approval of any such estimate, it shall be unlawful for the department, board, or commission to expend any appropriation or part thereof, except in accordance with such estimate, unless the same be revised with the approval of the Governor."

Finally, the section provides that if any agency shall fail or refuse to submit its budget estimate to the Governor, he may notify the Auditor General in writing of such failure or refusal after which the Auditor General may not draw any warrant in favor of such agency until the Governor shall notify the Auditor General in writing that the delinquency has been corrected.

Section 606 of The Administrative Code merely requires departmental administrative agencies to furnish to the departments with which they are respectively connected information necessary for the preparation of the periodical budget estimates. It has no bearing on your inquiries.

Section 1201 of the Game Code as amended, establishes a system for expenditures from the Game Fund, similar to that set up by Section

604 of The Administrative Code for other expenditures. However, it provides expressly that:

> "* * * it shall be unlawful for the Auditor General to honor any requisition for the expenditure of any moneys out of this appropriation * * * in excess of the estimates approved by the Governor. * * *"

We reaffirm the advice given to your department in our Informal Opinion No. 38, rendered August 20, 1931. It is not mandatory upon the fiscal officer to make a detailed audit in connection with every requisition received for the purpose of learning whether the payment of the requisition will cause approved budget estimates to be exceeded. On the contrary, as we advised your predecessor, the fiscal officers are justified in relying on statements made by department heads and by the Budget Secretary that requisitions presented are within the budget allotments. This does not mean that the Department of the Auditor General shall rely wholly on the Governor to enforce the provisions of Section 604 of The Administrative Code. If your department has reason to believe that any requisition will cause the approved budget estimate to be exceeded, it is your duty to make such detailed inquiry into the matter as will bring out the real facts.

A requisition exceeding budget allotments is unlawful under the express provisions of Section 604 of The Administrative Code. Your department cannot lawfully honor a requisition which you have reason to believe is unlawful.

The situation which you present to us is very similar to that discussed in our Formal Opinion of June 6, 1930, to Auditor General Charles A. Waters, reported in Opinions of the Department of Justice of 1929-1930, page 29.

As far as concerns requisitions against the Game Fund, the language of the Game Code differs somewhat from the language of Section 604 of The Administrative Code but the effect is the same.

Your department may rely upon the certificate of the Board of Game Commissioners, through its duly authorized officer, that a requisition presented is within approved budget estimates. On the other hand, if you have reason to believe that notwithstanding such certificate, the requisition would exceed approved budget allotments, it would be your duty to make further inquiries to ascertain whether in fact the requisition is lawful.

In any event, it would be entirely proper for your department to require the inclusion in all requisition forms of a statement by the authorized officer of the department, board, or commission presenting the requisition, that the requisition is within the effective outstanding approved budget estimates. There is no legal requirement of such a certification, but, as stated, it would be entirely appropriate for your department to request it.

Accordingly, we advise you:

1. That the Department of the Auditor General may not rely wholly on the Governor to enforce the provisions of Section 604 of The Administrative Code, but may rely upon statements by duly authorized requisitioning officers of administrative agencies that the requisitions presented are within budget allotments unless it has reason to doubt the correctness of such statement in any particular instance. In this event, your department must make further inquiries to assure itself that the requisition is lawful.

2. It would be entirely proper, although the law does not specifically require it, for your department to demand that each requisition shall contain a statement by the duly authorized requisitioning officer to the effect that the requisition presented is within the budget estimates for the period during which the obligation covered by the requisition was incurred.

Very truly yours,

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

OPINION NO. 111

Banks and banking—Pledge of assets to secure deposits—Postal savings—Funds in custody of State Treasurer—"Public funds"—Banking Code of May 15, 1933, sec. 1004.

While postal savings funds composed of deposits made under the Act of Congress of June 25, 1910, 38 Stat. at L. 814, its amendments and supplements, are not the property of the Federal Government and hence Federal funds, they are, by virtue of the safeguards thrown around them by Federal law, their guaranty by the United States, and their custody by Federal officials, "public funds" within the meaning of section 1004 of the Banking Code of 1933, authorizing institutions subject to its provisions to pledge their assets for Federal, State, municipal, school district, or other public funds.

Funds of the State Employes' Retirement Fund, the School Employes' Retirement Fund, the sinking fund, the State Workmen's Insurance Fund, and other funds in the custody of the State Treasurer, while not State funds, have always been, and under sections 301 and 502 of The Fiscal Code of April 9, 1929, P. L. 343, must be treated as such, and are therefore "public funds" within the meaning of section 1004 of the Banking Code of 1933.

Department of Justice,

Harrisburg, Pa., December 20, 1933.

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

Sir: You have asked to be advised whether banking institutions under your supervision may pledge their assets to secure the deposit of postal savings funds and custodial funds of the Commonwealth.

Section 1004 of the Banking Code, approved May 15, 1933, P. L. 624, and effective July 3, 1933, provides as follows:

> "Pledge of Assets for Deposits.—A bank or a bank and trust company shall not have the power to pledge or hypothecate any of its assets as security for deposits made with it, except for the following:
>
> "(1) Federal, State, municipal, school district, or other public funds.
>
> "(2) Funds deposited by the Secretary of Banking as receiver of an institution of which he has, pursuant to the provisions of law, taken possession.
>
> "(3) Funds deposited by a bank and trust company, in its own commercial department, which funds are being held by such bank and trust company in a fiduciary capacity, and are being deposited by it pending investment or distribution."

The question to be determined is whether postal savings funds and custodial funds of the Commonwealth come within the category of "Federal", "State" or "public" funds.

The Act of Congress, known as the "Postal Savings Bank Act," approved June 25, 1910, Chapter 286, 36 Stat. 814, as amended by the Acts of August 24, 1912, c. 389, 37 Stat. 559, and September 23, 1914, c. 308, 38 Stat. 716, establishes postal savings depository offices and creates a board of trustees to control, supervise and administer such offices. This board consists of the Postmaster General, the Secretary of the Treasury and the Attorney General, acting in an ex officio capacity.

Other sections of the act provide that deposits may be made by any person of the age of ten years or over, that pass books shall be issued, that interest shall be allowed and credited at the rate of two per centum per annum and that deposits may be withdrawn in whole or in part on demand, without the payment of any exchange or other fees or compensation.

Section 2 of the Act of May 18, 1916, c. 126, 39 Stat. 159, superseding the somewhat similar Section 9 of the Act of 1910 provides, inter alia, as follows:

> "That postal savings funds received under the provisions of this Act shall be deposited in solvent banks, whether organized under National or State laws, and whether member banks or not of the Federal reserve system * * * being subject to National or State supervision and examination * * *. The board of trustees shall take from such banks such security in public bonds or other securities, authorized by Act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand. * * * Such funds may be withdrawn from the treasurer of said board of trustees, and all other postal savings funds, or any part of such funds, may be at any time withdrawn from the banks and savings depository offices for the repayment of postal savings depositors when required for that purpose. * * *"

This and other sections of the Act of 1910 permit the investment of the postal savings funds in bonds of the United States and the exchange of such bonds for claims of depositors electing to accept them.

Section 12 of the Act of 1910, c. 386, 36 Stat. 814, 818, requires:

> "That postal savings depository funds shall be kept separate from other funds by postmasters and other officers and employes of the postal service, who shall be held to the same accountability under their bonds for such funds as for public moneys; * * *"

Section 15 of the Act of 1910, c. 386, 36 Stat. 814, 818, provides:

> "That all the safeguards provided by law for the protection of public moneys, and all statutes relating to the embezzlement, * * * of postal and money-order funds and the punishments provided for such offenses are hereby extended and made applicable to postal savings depository funds, and all statutes relating to false returns of postal and money-order business, the forgery, counterfeiting, * * * of postal and money-order blanks, forms, * * * are hereby extended and made applicable to postal savings depository business * * *."

Section 16 of the Act of 1910, c. 386, 36 Stat. 814, 819, provides:

> "That the faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon as herein provided."

Section 1 of the Act of August 23, 1912, c. 350, 37 Stat. 377, provides that the Secretary of the Treasury may employ such clerks, etc., as he may deem necessary to transact the business of the Postal Savings System in the office of the Treasurer of the United States.

Section 10 of the Act of August 23, 1912, c. 389, 37 Stat. 559, gives the Postmaster General power to designate depository offices, to appoint superintendents, inspectors, and employes, to fix their compensation, and to make rules and regulations with respect to deposits and the withdrawal thereof.

From this legislation it is apparent that postal savings funds are not *Federal* funds. They are not payable into the Treasury of the United States. They do not become the property of the Federal Government (See *Leka v. U. S.*, 69 Ct. Cl. 79 [1930]). Nevertheless, by virtue of all the safeguards thrown around them by Federal law, of the fact that at all times these funds are under the control of the officers of the United States and of the further fact that the faith of the United States is pledged for their repayment, they are clearly not private funds. They are within the term "public funds" as used in Section 1004 of the Banking Code.

We now consider whether or not custodial funds deposited by the State Treasurer are "State" or other "public" funds.

For some time past the State Treasurer has been responsible for the safe handling and deposit of funds such as cash belonging to the State Employes' Retirement Fund, the School Employes' Retirement Fund, the Sinking Fund, the State Workmen's Insurance Fund, etc.

The State Employes' Retirement Fund, and other accounts connected therewith, were by the provisions of Section 8 of the Act of June 27, 1923, P. L. 858, and by Section 5 of the Act of May 14, 1929, P. L. 1723, No. 565, consolidated into one fund entitled the "State Employes' Retirement Fund." These acts likewise provide for the building up of such fund by payments to the Department of Revenue by members of the retirement association and by the Commonwealth semiannually.

Section 302 of The Fiscal Code of April 9, 1929, P. L. 343, as amended by the Act of June 1, 1931, P. L. 318, provides for the crediting by the Treasury Department of moneys paid into the State Treasury to the various funds therein listed. Included among such funds is the money in the State Employes' Retirement Fund and allied funds, concerning which subsection 15 provides as follows:

> "State Employes' Retirement Fund.—All moneys in the State Employes' Contingent Reserve Fund, the State Employes' Annuity Reserve Fund, the State Employes' Annuity Savings Fund, the State Employes' State Annuity Reserve Fund, and the State Employes' State Annuity Reserve Fund Number Two, shall, upon the effective date of this act, be consolidated into one fund to be known as the State Employes' Retirement Fund, and thereafter the Treasury Department shall credit to the State Employes' Retirement Fund all moneys received by it from the Department of Revenue, arising from (a)

payments by the Commonwealth of such amounts, certified by the retirement board as necessary to provide a proper reserve to pay the State annuity to all new members in the State Employes' Retirement System, (b) deductions from the salaries of contributors in the State Employes' Retirement System, and (c) payments by the Commonwealth of amounts necessary to accumulate a reserve to meet the annuity values of all retiring original members in the State Employes' Retirement System."

Section 302, subsection 12, makes similar provision for the School Employes' Contingent Reserve Fund and allied funds which are consolidated into the School Employes' Retirement Fund. Subsection 19 of the same section makes similar provision for the State Workmen's Insurance Fund, subsection 13 for the Sinking Fund, etc.

The State Treasurer is made custodian of these various funds: of the State Employes' Retirement Fund by the Act of June 27, 1923, P. L. 858, as amended; of the School Employes' Retirement Fund by the Act of July 18, 1917, P. L. 1043, as amended; of the State Workmen's Insurance Fund by the Act of June 2, 1915, P. L. 762, as amended, etc.

Section 301 of The Fiscal Code provides as follows:

> "Deposit of Moneys.—The Treasury Department shall deposit all moneys of the Commonwealth received by it, including moneys not belonging to the Commonwealth but of which the Treasury Department or the State Treasurer is custodian, in State depositories approved by the Board of Finance and Revenue."

Section 505, subsection 2, of The Fiscal Code, as amended, makes it the duty of the Board of Finance and Revenue to select and designate State depositories, and requires that all funds deposited therein shall be secured by the bonds of corporate or individual sureties. In addition it provides:

> "* * * That, in lieu of the surety bonds of surety companies or of individuals as aforesaid, the deposit of State moneys may be secured by the deposit with the State Treasurer of United States, municipal or county bonds, to be approved by the board, in an amount measured by their actual market value equal to the amount of deposit so secured and twenty per centum in addition thereto. * * *"

The custodial funds referred to have always been treated in the same manner as funds belonging to the Commonwealth which are deposited by the State Treasurer, and are protected in the manner required by the act quoted.

These various funds are not *State* funds in the sense that they belong to the Commonwealth or may be disbursed by it for its general purposes. However, the Commonwealth contributes, in part at least, to some of these funds and administers all of them through its various officers for the benefit of those who are entitled thereto.

In the sense in which the phrase is used in Section 1004 of the Banking Code, these are "public funds."

Before the enactment of the Banking Code there was no statutory prohibition against the pledge of assets by State banking institutions to safeguard the deposit of funds, whether they were public or private. State banks incorporated under the Act of May 13, 1876, P. L. 161, had the power to pledge their assets to secure the deposit of a private individual: *Ahl v. Rhoads,* 84 Pa. 319 (1877). And in *Cameron v. Christy,* 286 Pa. 405 (1926), it was held that a trust company incorporated under the Act of April 29, 1874, P. L. 73, had authority to pledge its assets to secure county funds deposited in the name of a delinquent tax collector. See our opinion rendered to you on September 10, 1931 (Official Opinions of the Attorney General, 1931-1932, page 74). There were no court decisions limiting the right of either banks or trust companies to pledge assets generally to secure deposits, whether public or private.

We are satisfied that in using the general expression "public funds," the Legislature intended to continue the right of State banking institutions to pledge assets for the deposit of funds such as those of the Postal Savings System, the State Employes' Retirement Fund, the School Employes' Retirement Fund and other custodial funds of the Commonwealth.

In summary, therefore, you are advised that banking institutions under your supervision are authorized by Section 1004 of the Banking Code to pledge their assets to secure the deposit of postal savings funds and custodial funds of the Commonwealth.

Very truly yours,

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

OPINION NO. 112

Gifts to State institutions—Act of June 14, 1887, sec. 10—Repeal by Administrative Code of 1929—Deposit of gifts—Custody by State Treasurer—Consent of administrative department to acceptance of gifts—Blanket or specific approval—Reports to Auditor General—Restriction to donations of money.

Section 10 of the Act of June 14, 1887, P. L. 401, authorizing the trustees of certain State hospitals to receive contributions for the use of their institutions and requiring them to furnish a detailed report thereof to the Auditor General, has been superseded by The Administrative Code of 1929, which provides a complete system of administration for such institutions.

Moneys received by a State institution as a gift, as permitted by section 513 of The Administrative Code of 1929, may, under section 301 of The Fiscal Code of 1929, be deposited by the trustees of the institution in a State depository or may be placed in the custody of the State Treasurer, if he is willing to receive them, but may not be mingled with the general funds of the Commonwealth.

The consent of the appropriate administrative department to the acceptance of gifts by a State institution, required by section 513 of The Administrative Code of 1929, should be a blanket consent only where the nature and purpose of the gifts are specifically defined; in other cases, a separate approval should be obtained for each donation.

The Auditor General may require reports of donations of money received by State institutions, but should not attempt to require such reports of gifts made in kind.

Department of Justice.

Harrisburg, Pa., December 20, 1933.

Honorable Frank E. Baldwin, Auditor General, Harrisburg, Pennsylvania.

Sir: You have submitted for our opinion questions which may be summarized as follows:

1. Is Section 10 of the Act of June 14, 1887, P. L. 401 still in force?

2. Where money is received by a State institution as permitted by Section 513 of The Administrative Code of April 9, 1929, P. L. 177, should such funds be deposited in the State Treasury and credited to the institution for expenditure in the usual way in accordance with the terms of the gift?

3. Where a State institution receives gifts under Section 513 of The Administrative Code, may the required approval of the department with which it is connected be a blanket approval covering certain types of gifts or should there be a separate approval for each gift?

4. May the Auditor General require State institutions to furnish periodic reports of all gifts received whether in money or in kind?

I.

Section 10 of the Act of June 14, 1887, P. L. 401 authorized the trustees of certain State hospitals to receive contributions or donations of money and property for the use of the respective hospitals. The trustees were required to furnish the Auditor General with an itemized statement of all moneys so received, together with the names of the donors, and also to account for the expenditure thereof.

The Administrative Code of June 7, 1923, P. L. 498, abolished the boards of trustees referred to in the Act of 1887 and established a new system of boards for the control of State institutions. The whole subject was further covered by The Administrative Code of April 9, 1929, P. L. 177, which is now in force.

In our opinion the Administrative Code provided a complete system of administration for State hospitals, and therefore, the Act of 1887 no longer controls in matters so covered by those codes. The reasons for this conclusion will appear in the course of our answers to certain other of your questions.

II.

In a Formal Opinion addressed to the Budget Secretary, dated June 25, 1928 (Opinions of the Attorney General, 1927-1928, 111 at page 123), the present Attorney General said of moneys which had been received as gifts by and which remained in the hands of trustees of State institutions:

> "Prior to the passage of The Administrative Code, many of the boards of trustees of the State institutions now within the Department of Welfare were corporate bodies. As such, the Legislature had specifically conferred upon them the power to accept gifts and donations of property, both real and personal, to be held by them for the benefit of their respective institutions. When, in 1923, these corporate bodies were abolished and the present boards of trustees were substituted for them, the Legislature did not endow the present boards with the right to accept gifts for the benefit of their institutions. However, in a number of cases the abolished boards of trustees had in their possession and turned over to their successors, property which had been lawfully accepted by them to be used for particular purposes specified by the donors.
>
> "Having now come into the possession of the Commonwealth, all of this property is State property; but it can be used only for the purposes for which the donors originally gave it to the corporate bodies which had the right to receive it.
>
> "Accordingly, all such property must now continue to be used for the purposes for which it was originally contributed. In cases where such property is in the shape of money, it should be segregated from the other funds of the institution by depositing it in special bank accounts, the character of which should be clearly defined on the minutes of the respective boards of trustees. As these funds are the property of the Commonwealth they are subject to audit by the Auditor General even

though they be held for use for particular purposes, and even though they have been deposited in special bank accounts."

Since the writing of that opinion, Section 513 of The Administrative Code of 1929 was enacted which provides as follows:

> "Every administrative department, every independent administrative board and commission, and, with the approval of the department with which it is connected, every departmental administrative board or commission, may accept gifts or donations of money, securities, or other personal property, which, or the income of which, shall be used in conducting the work of such department, board, or commission, or for the benefit of the inmates or patients of any State institution administered by such department, board, or commission."

Section 301 of The Fiscal Code of April 9, 1929, P. L. 343, directs that all departments, boards, or commissions having in their possession moneys of the Commonwealth, shall deposit such moneys in State depositories and upon opening such an account, shall notify the Department of the Auditor General and the Treasury Department.

In view of the opinion of the Attorney General above quoted, and the subsequent statutory enactments, it is our opinion that moneys received by a State institution as gifts or donations for particular purposes should be kept separate and apart from general funds appropriated by the State for the maintenance of the institution, and must be used for the purposes designated by the donors.

The provision of The Fiscal Code referred to authorizes deposit of these funds in State depositories by the respective institutions. We are also of the opinion that the boards of trustees may ask the State Treasurer to act as custodian of such funds, and if he agrees to do so, he may hold the funds subject to disbursement by the trustees. In no case should these funds be deposited in the General Fund of the Commonwealth, because it would then be impossible to disburse them for the purposes designated by the donors without special legislative appropriation.

III.

The purpose of the requirement contained in Section 513 of The Administrative Code that gifts to State institutions be approved by the department with which the institution is connected was designed to prevent the acceptance of gifts which would impose undesirable obligations on the Commonwealth. Gifts for purposes for which an institution is not equipped or gifts to which are attached burdensome conditions may thus be rejected.

In our opinion the approval of gifts by a department should ordinarily be specifically given in each case, so that the department may pass on the particular conditions and purposes of the gift. However, it would be entirely proper for the department to give a blanket authority to an institution to accept specific kinds of gifts for specific purposes, but the permissible types of gifts and the purposes should be definitely defined in any such blanket grant of authority.

IV.

Certainly the Department of the Auditor General may require a State institution to report receipts of moneys donated to the institution, and if that is necessary to an audit of its accounts, should do so.

However, the Department of the Auditor General is not equipped, as we understand it, to maintain inventories of physical property on hand at such institutions; the duties imposed on that department by The Fiscal Code have to do primarily with money. The reporting of the receipt of gifts made to institutions in kind would have little value unless your department should keep inventories. In our opinion that is not a necessary part of your duties, and reports of gifts in kind need not be required. Of course good business would demand that the institutions keep records of gifts which they receive.

To summarize:

Section 10 of the Act of June 14, 1887, P. L. 401 has been superseded by The Administrative Code.

Moneys received by a State institution as gifts should be kept separate from the General Fund of the Commonwealth. They may be deposited by the trustees of the institution in State depositories or they may be placed in the custody of the State Treasurer if he is willing to receive them.

Administrative departments may give their consent to the acceptance of gifts of money and other personal property by State institutions under their supervision by blanket authorizations where the purposes and nature of such gifts are specifically defined. In any other cases, separate approvals should be obtained for each donation.

The Auditor General should require reports of donations of money received by State institutions but need not require reports of gifts made in kind.

Very truly yours,

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

OPINION NO. 113

Liquor Control Board—Appointment of secretary—Act No. 4, approved November 29, 1933, Sec. 302.

The provisions of Section 302 were not intended by the Legislature to cancel the authority given to the board under Act No. 3, to appoint as its secretary such person as it may deem satisfactory to fill this important office.

Section 302 of Act No. 4, does not apply to the selection of a secretary to the board.

Department of Justice.

Harrisburg, Pa., December 22, 1933.

Honorable Robert S. Gawthrop, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether it is necessary for the secretary of the Pennsylvania Liquor Control Board to be selected under the provisions of Section 302 of Act No. 4, approved November 29, 1933.

Your question arises from the fact that Act No. 3, approved November 29, 1933, provides that:

> "The board may appoint a secretary to hold office at its pleasure. The secretary, if appointed, * * * shall receive such compensation as the board, with the approval of the Governor, shall determine. * * *"

Section 302 of Act No. 4 provides that:

> "No officer or employe shall be appointed or employed by the board after January first, one thousand nine hundred and thirty-four, except as provided in this section. Any officers or employes engaged prior to January first, one thousand nine hundred and thirty-four, * * * shall be deemed provisional employes and shall be retained thereafter only under the provisions of this section. * * *"

It is a cardinal rule of statutory interpretation that when two acts passed on the same day contain provisions which appear to be in conflict, the acts shall be so interpreted, if possible, as to give effect to all of the provisions which are seemingly in conflict.

Section 302 of Act No. 4 is a part of Article III, which is entitled, "Pennsylvania Liquor Stores." While the secretary of the board will have duties to perform in connection with the stores, he will also have many duties to perform which have no relationship whatever to these stores.

In our opinion, the provisions of this section were not intended by the Legislature to cancel the authority, given to the board under Act

No. 3, to appoint as its secretary such person as it may deem satisfactory to fill this important office.

Accordingly, we advise you that Section 302 of Act No. 4 does not apply to the selection of a secretary to the board.

Very truly yours,

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

OPINION NO. 114

National Industrial Recovery Act—Department of Property and Supplies—Right to refrain from inviting proposals for supplies from persons who refuse to comply with the act.

Under the provision of Section 2409 of The Administrative Code of 1929, the Secretary of Property and Supplies is authorized to invite proposals "in its discretion" from at least two responsible bidders, and is not compelled to invite proposals from any concern merely because it requests the privilege of bidding.

The Secretary of Property and Supplies may lawfully refrain from inviting proposals from persons who refuse to comply with the National Industrial Recovery Act.

Department of Justice,

Harrisburg, Pa., December 29, 1933.

Honorable John L. Hanna, Secretary of Property and Supplies, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether you may lawfully refrain from inviting proposals for supplies from persons who refuse to comply with the National Industrial Recovery Act. Your inquiry relates especially to special purchases made by your department as purchasing agency for a State institution.

Purchases such as these now in question are made under the following provision of Section 2409 of The Administrative Code of 1929 (Act of April 9, 1929, P. L. 177):

> "In the event that requisitions are made upon the department for any article of furniture, furnishing, stationery, supplies, fuel, or any other matter or thing, the want of which was not anticipated at the time of the making of the schedules, the department may, in its discretion, invite proposals from at least two responsible bidders, unless the article can be procured from only one source, and, when one proposal shall be invited, such proposal or proposals, together with such requisition or

> requisitions, shall be submitted to the Board of Commissioners of Public Grounds and Buildings for approval or disapproval at its next meeting: Provided, however, That the department may, in its discretion, purchase in the open market, without inviting any proposal, any such article costing less than fifty dollars, but all such purchases shall be reported to the Board of Commissioners of Public Grounds and Buildings at its next meeting."

Under this provision your department is authorized to invite proposals "in its discretion" from at least two responsible bidders. There is no further statutory definition of your procedure in awarding or executing the contract.

You are not compelled to invite proposals from any concern merely because it requests the privilege of bidding.

Of course, it is good practice and sound policy to obtain the greatest possible amount of competition in all cases and thus to procure for the Commonwealth the lowest price for the articles to be purchased.

In an effort to relieve the distress of the present economic situation and bring the depression to an end, Congress, in the National Industrial Recovery Act, conferred broad powers upon the President of the United States. He in turn, in the exercise of the powers thus conferred, has called upon all business concerns to become members of N. R. A. Refusal to co-operate is not unlike refusal to conform to the orders of the President made under military stress in times of war; and for the same reasons which would justify you in excluding from competition alien enemies, or citizens disobeying regulations made during war times, you are entirely justified at this time in confining competition to those who are parties to or conduct their business under the applicable code of fair competition, agreement or license approved, prescribed or issued under the National Industrial Recovery Act.

In addition, it is obvious that a concern paying higher wages because of conformity to an N. R. A. code, is at a very serious disadvantage in bidding against a concern which is not conforming to the code. To admit the latter class to bid would in many cases penalize the former for their co-operation with the Federal government.

As we stated at the outset, invitation of bids is within your discretion in making purchases under that part of Section 2409 which we have quoted. Therefore, you could not be charged with violating the law even though there were no clear justification for your refusal to invite proposals from a particular concern. All the more are you free from a charge of illegality when your reason for declining to invite a particular concern to bid is its refusal to conform to the

President's regulations made under authority of the National Industrial Recovery Act.

Accordingly, you are advised that under the circumstances stated in your inquiry, the contract you have awarded is lawful and may lawfully be carried out.

Very truly yours,

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

OPINION NO. 115

Banks and banking—Officers and employes—Service in more than one institution—Act of Congress of June 16, 1933, Sec. 33—Permit by Federal Reserve Board—Effect—Duty of Department of Banking.

Where the Federal Reserve Board has, under section 8 of the Clayton Act, as amended, issued a permit entitling a director, officer, or employe of a State banking institution belonging to the Federal Reserve System to act as a director, officer, or employe of not more than two other banking institutions, either or both of which may be State or National institutions, notwithstanding the provisions of section 33 of the Act of Congress of June 16, 1933, 48 Stat. at L. 162, the Pennsylvania Department of Banking is under no duty to invoke the prohibitions of the Clayton Act against the holder of the permit.

Department of Justice,

Harrisburg, Pa., January 11, 1934.

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

Sir: You have asked what position you should take on the subject of interlocking bank directorates, in view of regulations of the Federal Reserve Board which conflict with our Formal Opinion No. 106, rendered to you on November 2, 1933.

In interpreting the provisions of Section 8A of the Clayton Antitrust Act, added by Section 33 of the Glass-Steagall Act of June 16, 1933, we advised you as follows:

> "That after January 1 of next year a director, officer or employe of any Pennsylvania bank or trust company which is a member of the Federal Reserve System may not at the same time be a director, officer or employe of any other corporation or of a partnership which makes loans secured by stock or bond collateral to any individual, association, partnership or corporation other than its own subsidiaries."

We reached this conclusion by interpreting Section 8A as applying not only to national banks, but also to State banking institutions which are members of the Federal Reserve System. In doing so we were aware that our opinion differed from that of September 10, 1917, by the acting Attorney General of the United States, interpreting similar language of Section 8 of the Clayton Act as not including state banks which are members of the Federal Reserve System.

Furthermore, we are advised that Regulation L, Series of 1933, promulgated by the Federal Reserve Board on November 2, 1933, provides that the prohibitions of Section 8 and Section 8A are cumulative but also that provisos stated in Section 8 are, in part at least, applicable to the provisions of Section 8A. We need not recite in detail these provisos and all of the exceptions established by the Board. It is sufficient to state the one affecting officers, directors or employes of state institutions.

Section IV (b) of Regulation L reads as follows:

> "(b) The provisions of section 8A of the Clayton Act
>
> * * * * * * * *
>
> "(5) Do not prohibit a private banker or an officer, director or employe of any bank or a class A director of a Federal reserve bank from being at the same time an officer, director, or employe of not more than two other banks within the prohibitions of the Clayton Act, if there is in force a permit therefor issued by the Federal Reserve Board."

"Bank" is defined by Section II of the regulation as including "any bank, banking association, or trust company organized or operating under the laws of the United States or of any State thereof."

Section V of Regulation L provides for issuance by the Board, pursuant to the Clayton Act, of permits to individuals referred to in the foregoing and other paragraphs of Section IV, if "not incompatible with the public interest." It states that "permits may be issued covering relationships between banks which are prohibited by section 8A as well as those prohibited by section 8." Permits once granted continue in force until revoked and need not be renewed.

You inquire what position you should take with respect to an individual holding such a permit, in view of the opinion we have rendered to you.

We adhere to our interpretation of the Clayton Act, as amended. We believe that our opinion correctly interpreted the clear language of the Act of Congress. However, if the Federal Reserve Board in exercise of the authority granted by Section 8 of the act issues a permit pursuant to its provisos you have no duty to refuse to recognize it. The enforcement of the provisions of the Act of Congress and the regulations issued under it, is primarily the responsibility of the Federal authorities, including the Federal Reserve Board, not of state supervising officials.

Therefore, you are advised that if a director, officer or employe of a State banking institution belonging to the Federal Reserve System holds a permit entitling him to act as a director, officer or employe of not more than two other banks, banking associations, or trust companies, either or both of which may be State or national institutions, you have no duty to invoke against him the prohibitions of the Clayton Act as interpreted by our opinion of November 2, 1933.

Very truly yours,

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

OPINION NO. 116

Sunday concerts—Admission charge—Application of proceeds to charitable purpose—Necessity for permit from Department of Public Instruction—Act of June 2, 1933.

The Act of June 2, 1933, P. L. 1423, is applicable to a concert presented on Sunday, for which neither the participants nor the owner of the building receives any compensation, but for which an admission fee is charged, the proceeds being devoted solely to a charitable purpose, and a permit therefor must first be obtained from the Department of Public Instruction in accordance with sections 2 and 3 of the act.

Department of Justice,

Harrisburg, Pa., January 16, 1934.

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

Sir: You have asked us whether under the provisions of the Act of June 2, 1933, P. L. 1423, No. 308, it is necessary for the sponsors of a Sunday concert to obtain a permit from your department if an admission fee, all of which will be devoted to a charitable purpose, is charged, but if neither the persons participating in the concert nor the owner of the building nor any other persons will receive compensation.

The act is entitled:

> "An act relating to Sunday music; permitting musicians to receive compensation for services rendered on Sunday; *authorizing pay concerts to be given and broadcast on Sunday under certain circumstances,* and allowing school and certain public buildings and parks to be used therefor; conferring powers and imposing duties on the Department of Public Instruction; and imposing penalties." (Italics ours.)

Section 2 contains the following provision:

> "Section 2. If, and when, authorized by the Department of Public Instruction of this Commonwealth, public concerts may be rendered and broadcast anywhere within this Commonwealth on Sunday after twelve o'clock noon; and it shall be lawful for the person or persons rendering any such concert to charge an admission fee thereto at a rate which it is estimated will cover the expenses of rendering such concert, including light, heat and compensation to ushers, janitors and musicians: * * *"

Section 3 provides as follows:

> "Section 3. The Department of Public Instruction may authorize concerts, or series of concerts, to be rendered and broadcast as herein provided; such concerts, or series of concerts, to maintain music of a high order, although not necessarily what is known as sacred music. Whenever the said department shall have authorized any such concert, or series of concerts, to be rendered and broadcast, it shall issue a permit, setting forth its authorization thereof, which permit shall also state the date or dates, hour or hours when, and place or places where, such concert, or series of concerts, shall be held. The Department of Public Instruction shall make a charge of five dollars for every permit issued under the provisions of this section."

The title of the act specifically refers to authorizing "pay concerts". Section 2 authorizes the holding of Sunday concerts but does not confine its provisions to concerts at which the musicians and owners of the building are paid. Section 3 provides for the issuing of permits by your department but does not make any distinction between concerts for which services are donated and those at which they are compensated.

We are satisfied that concerts such as you describe could not have been conducted legally on Sundays prior to the passage of the Act of 1933; the privilege of holding them arises solely from this act. Consequently they must be subject to the conditions prescribed by the act.

Therefore, we advise you that a concert conducted under the circumstances which you have described is such a concert as falls within the terms of the Act of 1933 and for which a permit must be obtained from your department.

Very truly yours,

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

OPINION NO. 117

Banks and banking—Pledge of assets to secure deposits—Funds in custody of receiver of National bank—"Public funds"—Banking Code of 1933, Sec. 1004.

While funds in the custody of the receiver of a national bank are not the property of the Federal Government and hence are not "Federal funds," they are, in view of the safeguards provided by the Act of Congress of May 15, 1916, 39 Stat. at L. 121, "public funds" within the meaning of section 1004 of the Banking Code of May 15, 1933, P. L. 624, and State banking institutions subject to its provisions may pledge their assets as security for deposits by such a receiver.

Department of Justice,

Harrisburg, Pa., January 17, 1934.

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

Sir: You have asked to be advised whether an institution under your supervision may pledge its assets as collateral for the deposit of funds in the name of a receiver of a national bank.

Section 1004 of the Banking Code, Act of May 15, 1933, P. L. 624, prohibits the pledge by a bank or a bank and trust company of any of its assets as security for deposits, except for the following:

> "(1) Federal, State, municipal, school district, or other public funds.
>
> "(2) Funds deposited by the Secretary of Banking as receiver of an institution of which he has, pursuant to the provisions of law, taken possession.
>
> "(3) Funds deposited by a bank and trust company, in its own commercial department, which funds are being held by such bank and trust company in a fiduciary capacity, and are being deposited by it pending investment or distribution."

The question to be determined is whether funds deposited by a national bank receiver are Federal or "other public funds."

Clearly they are not Federal funds, because they do not belong to the Federal government but to the parties who are entitled thereto as claimants against the national bank for which the depositor is receiver. They are not "public" funds in the sense that they belong to the public.

However, the receiver of a national bank is an officer of the United States. *Frelinghuysen v. Baldwin,* 12 Fed. 395; *Armstrong v. Ettlesohn,* 36 Fed. 209; *Stephens v. Bernays,* 41 Fed. 401; *Spechart v. German Nat. Bank,* 85 Fed. 12. He must safeguard funds in his custody as required by law and his superior, the Comptroller of the Currency.

The Act of May 15, 1916, c. 121, 39 Stat. 121 (12 U. S. C. A. Sec. 192), provides, inter alia, that the receiver of a national bank

> "* * * shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller. * * *.
>
> "Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited. * * *"

The fact that funds in the hands of a receiver must be delivered over to the Treasurer of the United States or deposited in banks surrounded by the required safeguards indicates that they are to be treated as funds having a public character. In Formal Opinion No. 111 rendered to you on December 20, 1933, we advised you that in the sense in which the phrase is used in Section 1004 of the Banking Code, postal savings funds and custodial funds of the Commonwealth are "public funds" and that banking institutions under your supervision may pledge their assets to secure the deposit thereof.

The reasoning of that opinion applies with similar force in the present situation. While the Government of the United States is not responsible for the payment of national bank funds in the hands of a receiver, it has by law provided for their custody and protection in such manner as to constitute them public funds within the meaning of that term as used in Section 1004.

Our Legislature, by including in the act subsection (2), above quoted, authorized institutions under your supervision to pledge assets to secure funds held by you as receiver of closed State banking institutions. This evidences the legislative intention to give to such funds the same protection that funds of closed national banks enjoy.

Before the enactment of the Banking Code State institutions pledged their assets to safeguard deposits made by national bank receivers. We are satisfied that the Legislature did not intend to make such procedure illegal and to draw a distinction between the two types of funds. Both are public funds within the provisions of Section 1004 (1) of the Code.

Therefore, you are advised that an institution under your supervision may pledge its assets as security for the deposit of funds by a receiver of a national bank.

Very truly yours,

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

OPINION NO. 118

Alcoholic beverages—Alcohol—Sale by druggists—Necessity for permit—Sale by State stores—Liquor Control Act of 1933—Necessity for tax-paid labels or State stamps on containers—Use to manufacture beverages—Distiller's permit—Act of December 8, 1933—Unlawful possession of liquor—Time of purchase—Purchase other than from State store.

Alcohol is expressly excepted from the provisions of the Liquor Control Act of 1933, may not be sold through Pennsylvania State liquor stores, and may be sold by druggists and others without obtaining licenses.

All alcohol sold for beverage purposes, regardless of where it was purchased, is subject to taxation under the act of December 5, 1933, P. L. 38, and may not be purchased at retail except in containers upon which tax-paid labels or State tax stamps appear.

Under section 3 of the Act of December 8, 1933, P. L. 57, alcohol may not be used for the purpose of producing or manufacturing any alcoholic beverage except by a person holding a permit from the Pennsylvania State Liquor Board.

It is unlawful, under the Liquor Control Act of November 29, 1933, P. L. 15, for any person to have or keep in his possession any liquor not lawfully acquired prior to January 1, 1934, or purchased from a Pennsylvania State liquor store.

Department of Justice,

Harrisburg, Pa., January 19, 1934.

Pennsylvania Liquor Control Board, Claster Building, Harrisburg, Pennsylvania.

Gentlemen: You have asked to be advised by whom and under what circumstances alcohol may lawfully be sold and used for beverage purposes in Pennsylvania.

The answer to your inquiry will be found in Act No. 4, approved by the Governor on November 29, 1933, and Act No. 9, approved by the Governor on December 8, 1933. The former act is known as the Liquor Control Act, and the latter is an amendment to the Alcohol Act of 1926.

Act No. 4 governs the sale of "liquor" both for consumption on the premises and not for consumption on the premises. "Liquor" is defined as including any alcoholic, spirituous, vinous, fermented, or other alcoholic beverage or combination thereof, except "alcohol and malt liquors."

Therefore, alcohol is expressly excepted from the provisions of this act.

The result is that you may not sell alcohol through Pennsylvania State stores and that a license is not necessary for the sale of straight alcohol.

Accordingly, druggists and others may lawfully sell alcohol without a license.

However, under Act No. 6, approved December 5, 1933, all alcohol sold for beverage purposes is subject to a tax of $1 per proof gallon; and it is unlawful for anyone to purchase alcohol at retail unless the container in which it is purchased bears either a manufacturer's label stating "Pennsylvania Spirituous and Vinous Liquor Tax Paid" or stamps evidencing the payment of the State tax.

This act imposes a fine of $25 on any person who purchases alcohol in a container not bearing either the manufacturer's tax paid label or the required State stamps.

Section 3 of Act No. 9 renders it unlawful for anyone, without a permit from your board, to manufacture, produce, distill, develop, use in the process of manufacture, denature, redistill, recover, rectify, blend, reuse, hold in bond, hold in storage, or transport for hire within Pennsylvania, any alcohol or alcoholic liquid; and Section 2 defines alcoholic liquid as including beer, ale, wines, porter, spirits, whiskey, and all liquors which contain any alcohol by volume, capable of being used for beverage purposes.

Therefore, it is unlawful for the purchaser of alcohol, without a permit from your board, to use it for the purpose of manufacturing or producing gin, whiskey, or any other form of alcoholic liquor.

Section 20 of the Act of February 19, 1926, P. L. 16, which Act No. 9 amends, imposes a penalty of not less than $100 or more than $5,000, or imprisonment for not more than three years or both, upon persons illegally manufacturing liquor; and Section 21 of the same act declares all liquor illegally manufactured to be contraband, in which the owner does not have any property rights.

Section 602 (b) of Act No. 4 also provides that it shall be unlawful for any person to keep within this Commonwealth any liquor which was not lawfully acquired prior to January 1, 1934, or has not been purchased from a Pennsylvania State Liquor Store. For this offense, the penalty imposed by Section 610 of the act is, for first offenses, a fine of not less than $300 or more than $500, and for subsequent offenses, both a fine of $500 and imprisonment for one year.

To summarize, we advise you:

1. That alcohol may be sold lawfully by druggists and others without obtaining any license.

2. That all alcohol purchased from druggists or others must be tax paid under Act No. 6 of the 1933 special session of the Legislature, and that persons purchasing alcohol, except in containers upon which tax paid labels or State stamps appear, are subject to a fine of $25.

3. That alcohol may not be used for the purpose of producing or manufacturing any alcoholic liquor except by persons holding permits from your board.

4. That it is unlawful for any person to have or keep in his possession any liquor not lawfully acquired prior to January 1, 1934, or purchased from a Pennsylvania State Liquor Store.

Very truly yours,

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

OPINION NO. 119

Banks and banking—Consolidation of State with National banks—Act of Congress of February 25, 1927—Operation in Pennsylvania—Effect of consolidation—Succession as fiduciary—Dissolution of State bank charter—Non-user—Forfeiture by Secretary of Banking—Banking Code of 1933, Sec. 1504—Reference to Attorney General—Ouster by quo warranto.

The Act of Congress of February 25, 1927, 44 Stat. at L. 1225, authorizing the consolidation of a State banking institution with a national banking association under the latter's charter, does not contravene any legislation of Pennsylvania, but was prior to and is since enactment of the Banking Code of 1933 fully operative in this Commonwealth.

Where a State banking institution has consolidated with a national bank under the latter's charter, whether before or after the effective date of the Banking Code of 1933, the latter automatically and without any court proceeding succeeds the State institution in all matters in which it has acted in a fiduciary capacity, under section 23 of the Act of Congress of February 25, 1927, 44 Stat. at L. 1225, no law of this Commonwealth being contravened thereby.

Where a State banking institution merges with a national bank under the latter's charter, the charter of the State institution continues in existence and should be dissolved by appropriate proceedings instituted by the corporation under the Act of April 9, 1856, P. L. 293; failing such action within 2 years following the consolidation, it is the duty of the Secretary of Banking to declare the charter forfeited under section 1504 of the Banking Code of May 15, 1933, P. L. 624, for failure of the corporation to exercise at least one of its powers, and the matter should then be referred to the Attorney General, pursuant to section 503 of the Department of Banking Code of May 15, 1933, P. L. 565, in order that he may proceed by quo warranto if he so desires.

Department of Justice,

Harrisburg, Pa., January 25, 1934.

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

Sir: You have asked to be advised in connection with the consolidation of a state bank, bank and trust company, or trust company and a national bank under the charter of a national bank doing business in the Commonwealth, where such consolidation was effected prior to or after July 3, 1933, the effective date of the Banking Code, Act of May 15, 1933, P. L. 624. Your specific inquiries are as follows:

1. Whether the Act of Congress authorizing the consolidation of a state institution with a national bank is operative in the absence of Pennsylvania legislation on the subject.

2. Whether a national bank without any court proceeding succeeds as fiduciary a state institution which has consolidated with it.

3. Whether following such consolidation the charter of the state institution continues in existence and, if so, whether any steps should be taken to dissolve it.

In replying to these inquiries we restrict our advice to consolidations as contemplated by the Federal law. This opinion does not cover the subject of mergers whereby the charters of two or more institutions are dissolved and new corporations created.

1.

State banks and bank and trust companies may consolidate with national banking associations under the charter of such national banking associations under the provisions of the Act of Congress approved February 25, 1927, c. 191, 44 Stat. 1225, which amends the Act of November 7, 1918, c. 209, 40 Stat. 1044, 12 U. S. C. A. Sec. 34A, by adding Section 3 thereto. This section provides inter alia as follows:

> "* * * all the rights, franchises, and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interests including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association. * * * No such consolidation shall be in contravention of the law of the State under which such bank is incorporated."

We know of no legislation of this Commonwealth which the Federal act contravenes. On the contrary, there have been on our statute books and still are certain acts which, while not directly giving cognizance to the Federal act quoted, show the intent of our Legislature to provide for the very same result in an opposite direction. The Act of April 16, 1929, P. L. 522, which was repealed by the Banking Code, provided for the merger and consolidation of national banking associations with state banks and bank and trust companies, whereby the rights, franchises, and interests of the national banking associations in and to every species of property were transferred to the state institutions. In such case, the latter, under the provisions of Section 7 of that act, held and enjoyed all the rights and property of the national banking associations, inter alia:

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

Furthermore, the Act of April 25, 1929, P. L. 763, also repealed by the Banking Code, provided for the conversion of national banking associations into state banks or bank and trust companies, which by the provisions of Section 8 succeeded to the fiduciary rights and powers of such national banking associations in the same manner as was provided by Section 7 of the Act of April 16, 1929, P. L. 522.

We are advised of no case where a national banking association merged with a state institution, or was converted into a state institution under the provisions of these acts. However, provision is made in the Banking Code specifically authorizing such mergers and conversions.

We do, however, have the precedent of a state institution consolidating with a national banking association under the charter of the latter, the national banking association succeeding to the fiduciary relationships of the state institution. In that case, the Northampton Trust Company consolidated with the First National Bank of Easton, which then became First National Bank and Trust Company of Easton. Litigation involving the question of whether the charter of the state institution continued in existence brought the matter before the Supreme Court of Pennsylvania. In *Commonwealth v. First National Bank and Trust Company of Easton,* 303 Pa. 241 (1931), the court held that (page 245):

> "There is no law in Pennsylvania which prevents or forbids such consolidation; * * *"

Accordingly, it is our opinion that the Act of Congress of 1927 was fully operative in the Commonwealth of Pennsylvania prior to the effective date of the Banking Code and is now operative therein.

2.

If a state bank or bank and trust company, which has exercised fiduciary powers, is consolidated with a national bank under the charter of such national bank, the latter automatically succeeds the state institution in all matters in which it had acted in a fiduciary capacity, provided the state law does not provide otherwise. This is clear from the provisions of Section 3 of the Act of Congress approved February 25, 1927, quoted above. Those provisions have been interpreted by the Supreme Court of the United States to mean that such automatic succession results only where the laws of the state are not thereby contravened. In *Ex Parte Worcester County National Bank of Worcester,* 279 U. S. 347, 73 L. Ed. 733 (1929), the United States Supreme Court held that the provisions of Section 3 would not be construed as transferring the office of executor from a state trust company absorbed by a national bank to the succeeding national bank, where under the law of the state no one may act as executor except by the appointment of the probate court. That case involved the consolidation of a Massachusetts bank and a national banking association under the charter of the latter. Under the law of that state no one could succeed to the void and defunct trust company as executor except by appointment by the probate court. Consequently the United States Supreme Court held that the consolidated national bank could become succeeding executor only by appointment upon application to the proper probate court.

We do not have that situation in Pennsylvania. We find no law which is contravened by the provisions of the Federal act. On the contrary, there are statutes which provide that where a state institution results from the merger or consolidation process it automatically succeeds to all the fiduciary powers of the constituent companies.

That was true prior to the enactment of the Banking Code and it is true now. In our opinion of February 24, 1930 (Official Opinions of the Attorney General, 1929-30, page 47), your predecessor, Honorable Peter G. Cameron, was advised that under the provisions of Acts Nos. 365 and 366, approved April 26, 1929, P. L. 839, no legal action was necessary for the transfer of trust estates held by a trust company that merged or consolidated with a national banking association pursuant to the provisions of the Act of Congress of 1927 above quoted. This was true whether such consolidation took effect prior or subsequent to the effective date of the state acts.

The Banking Code repealed the two acts of April 26, 1929, P. L. 839, and in lieu thereof provided as follows:

> "Section 1410. Effect of Merger or Consolidation on Estates Held or to Be Held in Fiduciary Capacity.—A. Whenever one or more of the bank and trust companies, trust companies, or national banking associations, which have participated in a merger or a consolidation, were authorized, under the laws of this Commonwealth or of the United States, to act in a fiduciary capacity, all the funds, property, or investments, held by such corporation or corporations as trustee, guardian, executor, administrator, or other fiduciary, shall be taken and deemed to be transferred to and vested in the surviving or new incorporated institution without any further act or deed, or any order or decree of any court or other tribunal, whether or not the original fiduciary was appointed by parol, by deed, by order of court, or by the issuance of letters testamentary or letters of administration. The surviving or new incorporated institution shall become fiduciary to the same extent and with the same rights, powers, duties, and liabilities in its capacity as fiduciary as the corporation which was originally fiduciary, and from which, by operation of the provisions of this section, the surviving or new incorporated institution has taken over the relationship of fiduciary."

Thereafter follow provisions requiring notice to parties interested in the estates for which the merging or consolidating institutions were acting in a fiduciary capacity.

The language quoted clearly indicates that no court proceeding is necessary to effect a transfer of the fiduciary powers and activities of the merging or consolidating institutions to the state institution which survives.

There is no law of Pennsylvania which is contravened by the Federal act. Our Legislature has provided that where a state institution survives the merger the result is the same as that effected by Federal law where a national institution survives. Accordingly, it is our opinion that the national banking association under whose charter a state institution consolidates automatically succeeds such state institution as fiduciary.

3.

Where such consolidation has been effected, there is no dissolution of the charter of the state institution but merely a consolidation of the two corporations resulting in all of the assets of the state institution becoming the property of the national bank, whose charter continues in existence. The charter of the state institution likewise continues to exist and can be dissolved only under the laws of the Commonwealth of Pennsylvania.

In *Commonwealth v. First National Bank and Trust Company of Easton,* supra, it was held that the Federal government has no power to create or destroy state institutions, and that it is necessary, in the event of a consolidation under the Act of Congress of 1927, that the charter of the state institution be dissolved.

Application for such dissolution should be made by the corporation under the provisions of the Act of April 9, 1856, P. L. 293, in the court of the county where it formerly transacted business. This act was repealed by the Business Corporation Law approved May 5, 1933, but only in so far as it relates to business corporations. It remains in effect with respect to incorporated banks and bank and trust companies.

If the institution fails to make such application its charter becomes automatically forfeited by operation of law at the end of the two-year period during which it has not exercised at least one of its powers.

Section 1504 of the Banking Code, effective July 3, 1933, provides as follows:

> "A. The articles of incorporation in the case of an incorporated institution, and the certificate of authorization in the case of a private bank, shall be automatically forfeited by operation of law, when
>
> * * * * * * * *
>
> "(3) In the case of an incorporated institution, it has formerly exercised any of the powers conferred upon it by its articles of incorporation, or in the case of a private bank, by its certificate of authorization, but for a period of two years it has not exercised at least one of such powers;"

Pursuant to the provisions of subsection B of this section, following determination that an institution consolidated under the charter of a national banking association has not exercised its powers for a period of at least two years following such consolidation, the Department of Banking should issue a certificate of forfeiture of the articles of incorporation and file it with the Department of State.

This provision, making the forfeiture of the charter automatic upon the failure of the state institution to function for two years, eliminates the necessity of quo warranto proceedings. Section 17 of the Banking Act 1923, as amended by the Act of May 5, 1927, P. L. 762, provided that upon failure of a state institution to exercise its corporate privileges for two years "such corporation shall be returned by the Secretary" to the Attorney General for procedure by quo warranto to oust the corporation from its charter rights and to have its corporate privileges declared null and void. This act was repealed by the Department of Banking Code, Act of May 15, 1933, P. L. 565. Section 503 thereof, however, provides, inter alia, as follows:

> "A. When any corporation subject to the supervision of the Department * * * (3) has formerly exercised any of its corporate powers but for a period of two years has not exercised at least one of them, the Department shall notify the Department of Justice of these facts, and the Department of Justice may then proceed by quo warranto against such corporation, in the manner provided by law, to oust it from its corporate powers and privileges."

Consequently the Secretary still has the duty to refer the matter to the Attorney General, even though he has declared the forfeiture as provided by Section 1504 of the Banking Code. The Attorney General may then, if he so desires, proceed to secure a decree dissolving the charter.

Summary

Therefore, you are advised that the Act of Congress of 1927 authorizing the consolidation of a state banking institution with a national banking association under the charter of the latter has been and now is in full force and effect in this Commonwealth. By virtue of consolidation under such act, a national banking association succeeds the state institution in its fiduciary relationships without the necessity of court proceedings. The charter of the state institution continues in existence and should be dissolved by appropriate proceedings instituted by the corporation. Failing such action, you should declare the institution's articles of incorporation forfeited upon its failure to exercise at least one of its powers during a period of two years following its consolidation with a national banking association and notify the Attorney General of such facts.

Very truly yours,

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

OPINION NO. 120

Liquor Control Board—Liquor store employes—Qualifications—Sec. 302, Act No. 4, approved November 20, 1933.

Under Section 302 of the Pennsylvania Liquor Control Act, in order to be eligible to appointment to operate or assist in the operation of a liquor store, an applicant must have the specific qualifications enumerated in Article VIII, Section 1 of the Constitution. He must not have been deprived of his right of franchise under any other constitutional or statutory provision. But he need not be a registered voter.

Department of Justice,

Harrisburg, Pa., February 1, 1934.

Honorable Robert S. Gawthrop, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you of the proper construction of the portion of Section 302 of the Pennsylvania Liquor Control Act of November 29, 1933, No. 4, which requires that all persons appointed to operate or assist in the operation of liquor stores "shall be qualified electors of the county in which the store is located."

Article VIII, Section 1 of the State Constitution, as last amended by the people on November 7, 1933, enumerates four specific qualifications for an elector. He must be at least twenty-one years of age. He must have been a citizen of the United States for at least one month, a resident of the State for one year immediately preceding the election (except in certain cases in which this period is reduced to six months) and a resident of his election district for at least sixty days before an election.

Clearly a person must have those qualifications to be eligible for appointment to a position in a State liquor store.

Likewise, it is clear that the appointee may not be subject to any disability which would directly disqualify him from voting. Provision for such a disqualification is found in Article VIII, Section 9 of the Constitution.

The real problem is whether the appointee, in addition to having the specific qualifications enumerated by the Constitution, must also be registered to vote. The question is not without difficulties, but we have concluded that such registration is not a prerequisite.

It is true that Article VIII, Section 1 of the Constitution expressly makes the right to vote subject to statutory provisions for registration of voters. But we regard registration as a means of evidencing and making a record of an elector's qualification rather than as a basic qualification itself. Constitutional, statutory, and judicial language bears out our conclusion.

Article VIII, Section 6 of the Constitution provides special absentee voting privileges for ''qualified electors'' who are in ''actual military service.'' The Act of July 10, 1919, P. L. 857, Section 49 provides that:

> ''* * * No one except a qualified elector who is in actual military or naval service * * * shall be entitled to vote * * * without being registered, * * *''

Obviously the term ''qualified elector'' as used in these cases does not include any prerequisite of registration.

The Act of March 5, 1906, P. L. 63, Section 4, as last amended by the Act of June 22, 1931, P. L. 638, provides for the placing of names on registration lists after the regular registration days in some cases. If the county commissioners refuse to register the applicant, he may appeal to the court of common pleas, and if the court is satisfied that ''the applicant * * * is qualified to vote,'' it may order his name to be listed.

Section 5 of the same act provides for the registration of a person ''who shall have paid his taxes on or before the last day for registration, *and who shall possess all the other qualifications of an elector* as provided in the Constitution and laws of this Commonwealth, * * *'' (Italics ours.)

Thus the Legislature has definitely separated registration from the term ''qualified elector.'' One must be a qualified elector in order to be registered. Registration but records the fact.

In *Sullivan's Petition,* 307 Pa. 221 (1932) the Supreme Court, after quoting Article VIII, Section 1 of the Constitution, said (pp. 224-225):

> ''We cannot agree with the contention which was earnestly advocated before us and which was also the opinion of the court below, that registration is an essential qualification of an elector. The reference which is made to registration in the first paragraph of the section of the Constitution just quoted does not require such a narrow construction of the phrase 'qualified

> elector.' Registration may be and usually is prerequisite to voting, but it is not a qualification for the exercise of the franchise. No attorney is permitted to argue before the bar of this court without being formally admitted, yet no one would contend that the mere motion for admission constitutes a qualification for practice. The same reasoning applies to registration for voting.''

Therefore, we advise you that under Section 302 of the Pennsylvania Liquor Control Act, in order to be eligible to appointment to operate or assist in the operation of a liquor store, an applicant must have the specific qualifications enumerated in Article VIII, Section 1 of the Constitution. He must not have been deprived of his right of franchise under any other constitutional or statutory provision. But he need not be a registered voter.

Very truly yours,

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

OPINION NO. 121

State institutions—Purchase of supplies—Agency of Department of Property and Supplies—Direct purchase—Administrative Code of 1929, Sec. 507—Emergency purchases—Restrictions.

1. Section 507 of The Administrative Code of 1929, as amended by the Act of June 1, 1931, P. L. 350, requires State institutions to purchase supplies, other than perishable foodstuffs and fuel, through the Department of Property and Supplies, except in cases of emergency or unless supplies conforming to the specifications of the department can be obtained, after competitive bidding, for an amount equal to or less than the price at which they can be furnished by the department.

2. A State institution may, under section 507 of The Administrative Code of 1929, as amended, make direct purchases in emergency cases, in amounts authorized by the Department of Property and Supplies, where it would be impossible to obtain the items needed through that department, and it is not restricted to items which are in the department's effecive supply contracts, but no such purchases should be made in amounts larger than necessary to meet an immediate and urgent need.

Department of Justice,
Harrisburg, Pa., February 2, 1934.

Honorable Frank E. Baldwin, Auditor General, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you as to the extent of the authority of State institutions to make direct emergency purchases of supplies under The Administrative Code. The exact nature of your question can best be illustrated by describing a particular transaction to which you have called our attention.

A State institution purchased direct from a dealer four boxes of Ivory soap at the rate of $5 per box, each box containing one hundred small size cakes. The Department of Property and Supplies has an effective supply contract for floating white toilet soap in cases of one hundred cakes at a price of slightly over five cents per pound. Under this contract the same quantity of soap could be purchased for $2.15 a box.

The excuse given by the State institution for not purchasing through the Department of Property and Supplies is that that department does not have an effective contract for the particular brand of soap purchased, namely Ivory soap.

Your question is whether you may properly approve for payment the requisition for the purchase of this soap.

Section 507 of The Administrative Code of April 9, 1929, P. L. 177, as amended by the Act of June 1, 1931, P. L. 350, requires every administrative department, independent board or commission, departmental administrative body, board or commission, advisory board or commission to purchase supplies through the Department of Property and Supplies except in certain specified circumstances. Departments, boards and commissions having charge of State institutions are authorized to purchase perishable food stuffs and fuel directly; they may also purchase other supplies directly if they can obtain them, after competitive bidding, for an amount equal to, or less than the price for which they can be furnished by the Department of Property and Supplies. However, all goods so purchased must conform to the specifications contained in the effective supply contracts of the Department of Property and Supplies or to the standard specifications of that department, unless express permission for a departure is obtained.

The following additional exception to the general purchasing requirements which appears in the same section of the code, permits:

> "Any department, board, or commission, which shall have been authorized in writing by the Department of Property and Supplies to make purchases in the field, not exceeding a specified amount, but records of all such purchases shall be transmitted periodically to the Department of Property and Supplies in such form as it may require."

The purpose of the provision just quoted was to permit institutions to make purchases in the field in emergency cases where it would be impossible to obtain the goods through the Department of Property and Supplies in time, and also to allow isolated purchases of minor items which are needed in very small quantities. For the sake of convenience we shall refer to such purchases as emergency purchases.

We are informed that the Department of Property and Supplies has authorized the institution in question to make purchases under this clause amounting to fifty dollars or less per purchase. The purchase of Ivory soap in this case was made by the institution under that permission.

In our opinion the provision for emergency purchases which we have quoted does not limit expenditures thereunder to items which are on the effective supply contracts of the Department of Property and Supplies or on the general supply schedules. Such a limitation would defeat the purpose of the exception to the general rule. If the institution, in making a small emergency purchase, were obliged to buy under the supply contracts, there would be no point in purchasing in any way other than through the Department of Property and Supplies. For example, even if Ivory soap itself were on the effective supply contract of the Department of Property and Supplies, we consider that an institution, under its emergency buying power, might properly purchase a few cakes or even a case of Ivory soap from a local store if there was a justifiable reason why the soap was needed before it could be obtained through the Department of Property and Supplies. And this would be so even if the price paid was somewhat higher than the price fixed by the supply contracts.

However, no such purchase should be made in wholesale quantities or in amounts larger than necessary to meet an immediate and urgent need. The purchase of Ivory soap which you have reported to us would seem to be within the letter of the law. However, it is quite apparent that it was clear abuse of the discretion placed in the officers of the institution. We do not believe that a purchase of such an amount of soap could be justified on any emergency basis. Nor is it the least excuse for attempting to exercise the emergency purchasing power or even for calling on the Department of Property and Supplies to purchase Ivory soap for the institution that the supply contracts do not include that soap by name. If the supply contracts make provision for a particular grade of a common article of trade, no officer or board can justify a purchase of an equivalent article simply because the one article was not specifically named in the supply contracts, nor should the Department of Property and Supplies make a special purchase of such articles for them.

If abuses such as the one here called to our attention are prevalent, then the Department of Property and Supplies should impose greater restrictions on the use of the emergency purchasing power so that the practice shall conform with the intent of the Legislature. It is essential that State institutions be in a position to make emergency purchases, but the Department of Property and Supplies should endeavor to see that such abuses as the present one are not repeated.

Therefore, we advise you that the requisition in the sum of $20 for the purchase of Ivory soap above mentioned may be paid, since it comes within the letter of the law and the letter of the permission granted by the Department of Property and Supplies for emergency purchases.

Very truly yours,

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

OPINION NO. 122

Schools—Salaries of teachers—Annual increments—School Code of 1911, Sec. 1210—Cancellation of contract—Immediate reëmployment—Effect on right to increase.

Teachers in public schools are entitled to the annual salary increments prescribed by section 1210 of the School Code of 1911 as long as they remain in the employ of a single school district, unless that district has obtained permission from the Superintendent of Public Instruction to reduce the salaries below the statutory schedule in accordance with the Act of April 25, 1933, P. L. 69; a school district may not avoid the requirements of the law by cancelling all teachers' contracts at the end of each term and reëmploying them for the next school term as new employes.

Department of Justice,

Harrisburg, Pa., February 6, 1934.

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

Sir: You report to us that a certain school district, before the close of the last school term, cancelled all contracts with its teachers, and subsequently re-employed them on new contracts. The new contracts are based on the statutory basic minimums provided by the School Code for new employes of a school district and do not include the increments prescribed for old employes. For example, a teacher who was entitled under the salary schedules of the School Code to a salary of $1,600.00 in the school year 1932-1933 has been employed on a new contract for the present year at a salary of $1,200.00.

You ask whether such a practice conforms to the requirements of the law.

Section 1210 of the School Code establishes a schedule of minimum salaries and minimum increments for teachers in various types of school districts. The real question here is whether a school district can avoid paying the statutory increments by cancelling the contracts of its teachers each year and re-employing them for the next year.

Paragraph 10 of Section 1210 of the School Code provides 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 teacher and the employing districts, which agreement shall be made a part of the contract between them."

We have no hesitation in saying that the practice outlined above does not conform to the requirements of the law. Any other conclusion would completely nullify the increment provisions of the School Code. It is the clear intention of the law that teachers shall be entitled to increments as long as they remain in the employ of a single school district. Only when they go to a new district do they lose the benefit of the increments to which they became entitled by reason of continuous service.

We note that the school district to which you refer has not obtained any permission from the Superintendent of Public Instruction to reduce its salaries below the statutory schedule as it might do under the Act of April 25, 1933, P. L. 69. Of course, where proper authorization for a reduction below the statutory schedules has been obtained, salaries may be reduced within the limits of that authorization.

Therefore, we advise you that a school district may not avoid the increment requirements of the statutory salary schedule by cancelling teachers' contracts and re-employing them for the next school term as new employes.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 123

Acting Insurance Commissioner—Powers and duties in supervising and examining title insurance companies and the title insurance departments of companies possessing and exercising other corporate powers.

Title insurance companies must be supervised pursuant to the provisions of the insurance laws.

Supervision of the department embraces the title insurance business of corporations having title insurance departments but which likewise function as banks and trust companies.

Supervision over the title insurance department of a bank and trust company or a trust company is limited to its title insurance reserve fund and does not include the duty to examine and require reports on its general assets.

The department has the power and duty to supervise the mortgage guaranty business of title insurance companies not under the supervision of the Department of Banking, but has no power and duty to supervise the fiduciary business of any such companies.

It is not the duty of the department to be substituted for the Secretary of Banking as receiver of the title insurance business of a banking institution in his possession, whether or not it has a title insurance reserve fund.

The department has no authority to fix a valuation basis for general assets of companies doing a title insurance business but subject to the supervision of the Secretary of Banking; corporations with title insurance reserves may be permitted to carry investments therein at values fixed by the National Convention of Insurance Commissioners.

Department of Justice,

Harrisburg, Pa., March 8, 1934.

Honorable Charles H. Graff, Acting Insurance Commissioner, Harrisburg, Pennsylvania:

Sir: You have asked to be advised as to the scope of your powers and duties in supervising and extending title insurance companies and the title insurance departments of companies possessing and exercising other corporate powers.

We shall state your inquiries and answer them in turn, as follows:

1

Are title insurance companies to be supervised pursuant to the provisions of the banking laws or pursuant to the provisions of the insurance laws?

There are no banking laws which have to do with the supervision of title insurance companies, as such. The Banking Act of 1923, Act of June 15, 1923, P. L. 809, by virtue of which the Department of Banking had jurisdiction over companies engaged in the title insurance business, was repealed by the Department of Banking Code, approved May 15, 1933, P. L. 565.

Section 201 of the Department of Banking Code naming the corporations and persons subject to the supervision of the Department of Banking provides, inter alia, as follows:

> "However, when any corporation subject to the supervision of the Department of Banking shall also engage in a title insurance business, a mortgage guarantee business, or any other business subject to the supervision of the Insurance Department, such branch of its business shall not be subject to the supervision of the Department of Banking."

Section 2 of the Act of May 17, 1933, P. L. 798, adds to the Insurance Department Act of May 17, 1921, P. L. 789, the following:

> "Section 221. Supervision of Title Insurance Companies by the Insurance Department.—The Insurance Department shall have the power and duty to supervise examine, and regulate all corporations possessing the power to insure owners of real property, mortgagees, and others interested in real property from loss by reason of defective titles, liens, and encumbrances, to the same extent and in the same manner as such power and duty has heretofore been conferred and imposed by law upon the Department of Banking and the Secretary of Banking of this Commonwealth, and all powers rights, privileges, and duties, heretofore by any law of this Commonwealth conferred or imposed upon the Secretary of Banking or the Department of Banking in relation to such corporations, are hereby transferred to, and conferred and imposed upon, the Insurance Department, but if any such corporation has the additional power to receive money for deposit or safe-keeping or to act as fiduciary or to engage in any other business under the supervision of the Department of Banking, the Insurance Department shall not have the power to supervise, examine, or regulate any part of the business of such corporation where such part of its business is under the supervision of the Department of Banking."

This section gives to the Insurance Department the powers and duties with respect to title insurance companies formerly placed with the Department of Banking. It is an amplification of the provisions of Section 101 of the Insurance Department Act, which is likewise amended by the Act of May 17, 1933, to extend the definition of the word "company" to include "corporations possessing the power to insure owners of real property, mortgagees, and others interested in real property from loss by reason of defective titles, liens and encumbrances,"—companies usually known as "title insurance" companies.

Such companies are now subject to the same supervision by the Insurance Department as are other types of insurance companies named in the Insurance Department Act. Such supervision is exercised pursuant to the insurance laws of the Commonwealth and not to the banking laws, but it is subject to the exceptions contained in Section 221 of the Insurance Department Act.

II

> Does supervision by your department embrace companies having title insurance departments but likewise functioning as banks and trust companies?

The qualifying clause at the end of Section 221 of the Insurance Department Act of 1921 as amended reads as follows:

> "* * * but if any such corporation has the additional power to receive money for deposit or safe-keeping or to act as fiduciary or to engage in any other business under the supervision of the Department of Banking, the Insurance Department shall not have the power to supervise, examine, or regulate any part of the business of such corporation where such part of its business is under the supervision of the Department of Banking."

It does not relieve the Insurance Department of responsibility for the supervision of the title departments of companies functioning also as bank and trust companies or as trust companies. It merely limits supervision by your department to the title insurance branch or department of such companies and leaves the other parts of their business under the supervision of the Department of Banking.

If it had been the legislative intent to exclude the title departments of such companies from supervision by the Insurance Department, it would have done so in plain language. The addition of the words "where such part of its business is under the supervision of the Department of Banking" is clear indication of the intent to reserve to that department supervision over the business of receiving money for deposit or safe-keeping or acting as fiduciary or conducting business other than that of title insurance.

Section 221 of the Insurance Department Act of 1921 as amended must be read together with the provisions of Section 201 of the Department of Banking Code referred to in the course of our discussion of your first inquiry.

Clearly the title insurance business of bank and trust companies and trust companies must be supervised by your department and not by the Department of Banking. In exercising that supervision you may require the same reports and make the same examinations of the title insurance department of a bank and trust company or a trust company as you do in the case of a company engaged only in the title insurance business, subject to limitations hereinafter stated.

For practical procedure you may arrange with the Department of Banking to make your examination of the title insurance business of an institution under its supervision concurrently with the examination made by that department.

III

> Is your supervision over the title insurance department of a bank and trust company or a trust company limited to its title insurance reserve fund or does it include the duty to examine and require reports on its general assets?

The Act of April 26, 1929, P. L. 834, requires all title insurance companies to create and maintain a reserve for policies of title insurance issued by them. Section 1, subsection (a), provides, inter alia, as follows:

> "That all companies heretofore or which may hereafter be incorporated for the insurance of owners of real estate, mortgagees, and others interested in real estate, from loss by reason of defective titles, liens, and encumbrances, as well as all title insurance and trust companies receiving deposits, heretofore incorporated and authorized by charter or by law to carry on said business, shall, from and after the approval of this act, establish and maintain a reserve fund for the protection of policy holders, in the manner herein provided."

This act applies not only to companies which restrict their activities to the writing of title insurance, but also to companies which, while functioning principally as bank and trust companies or trust companies, maintain title insurance departments.

Section 1 likewise provides for the establishment, maintenance, custody and investment of the reserve fund and its supervision by the Secretary of Banking.

Section 1 (f) provides as follows:

> "Reserve Fund to Be a Trust Fund.—It is the intent and purpose of this section that the reserve fund hereby directed to be set aside shall constitute a separate and distinct trust fund for the protection of policy holders, and shall not be subject to distribution among depositors or other creditors, until all policy holders have been paid in full, or the liability on the policies contingent or actual has been completely discharged."

Section 1 (g) provides:

> "Reinsurance by Secretary.—In the event of the secretary's taking possession of and winding up any company,

the secretary is authorized, if it shall seem advisable and practicable to him, to use the reserve fund to purchase reinsurance for the liabilities represented by the policies outstanding against such fund. Acceptance of the policy of the reinsuring company shall operate as a complete discharge of liability under the policy of the insolvent company. Should any policy holder refuse to accept the policy of the reinsuring company, he shall only be entitled to receive the pro rata portion of his reserve that shall remain upon distribution, as set forth in clause (h) of this section."

The reserve fund so established is, under the provisions of subsection (h) of Section 1 of the 1929 Act, when in the custody of the Secretary of Banking, liable for payment of only the following claims:

"One. To pay all outstanding claims of indemnity that have arisen by virtue of any policies of insurance.

"Two. For the purchase of reinsurance to indemnify and protect the remaining outstanding policies.

"Three. To distribute among policy holders, upon cancellation of their policies, the proportionate share of the reserve fund to which they are entitled, which shall in no case exceed the proportion which the premium paid for any such policy may bear to the whole amount of title insurance then outstanding."

The reserve fund may be used by a title insurance company, whether or not its business be limited to title insurance, only to pay claims arising out of losses under title insurance policies issued by it. If the fund be insufficient for that purpose such claims would be claims against the general assets of the company.

That fact, however, does not in our opinion require you to make an examination of, and call for reports from, a bank and trust company or trust company concerning its general assets. Section 201 of the Department of Banking Code imposes this duty upon the Department of Banking. Section 221 of the Insurance Department Act above referred to does not change this requirement. If there is a claim against an institution under a title insurance policy which can not be paid out of the reserve fund, it would be paid out of the general funds of the institution. Reports to and examination made by the Department of Banking should show whether or not the institution is solvent and able to pay its claims. You have the right to determine whether any title insurance claims are unpaid. You have the duty to ascertain if the reserve fund for title insurance is established and maintained as required by the Act of April 26, 1929. You have no duty to go beyond that and examine general assets of the institution or any of its business not relating specifically to title insurance.

IV

> Do you have the power and duty to supervise the mortgage guaranty and fiduciary business of title insurance companies?

Section 201 of the Department of Banking Code gives to that department the power to supervise, among others, "all corporations which are authorized to act or which do act in this Commonwealth as trustees, guardians, executors, administrators, or in other fiduciary capacities, including banks, bank and trust companies, trust companies."

Any company which has the power to act or which acts as a fiduciary in this Commonwealth is under the supervision of the Department of Banking. Under the qualifying clause of Section 221 of the Insurance Department Law, above discussed, supervision over that portion of a title insurance company's affairs which involves the fiduciary business is denied to your department.

The power to guarantee mortgages was heretofore possessed by companies organized under The General Corporation Act of 1874 as title insurance companies. It was given to them by the Act of June 1, 1907, P. L. 382, No. 275, which authorized and empowered them "to guarantee the payment of the principal and interest of bonds secured by mortgage upon real estate, and to make and execute such contracts and policies as may be required therefor."

This act was repealed by Section 1602 of the Banking Code. Section 1021 of that law provides as follows:

> "Prohibition upon Guaranteeing Mortgages.—A bank, a bank and trust company, or a trust company shall not, in any manner whatsoever, guarantee the payment of the principal or the interest of bonds or other obligations secured by mortgages upon real property.
>
> "This section shall not, however, be construed to affect contracts and policies guaranteeing the payment of the principal or the interest of bonds or other obligations secured by mortgages upon real property, when such contracts and policies have been lawfully executed by a bank, a bank and trust company, or a trust company, and are valid and outstanding upon the effective date of this act, or any continuation, extension, or renewal thereof."

All State banking institutions from the effective day of the Banking Code, July 3, 1933, have been prohibited from guaranteeing mortgages.

There is nothing in the law prohibiting a "title insurance" company not doing business as a bank, bank and trust company, or trust company from continuing in the mortgage guarantee business. That power still exists. Under what, if any, supervision may it be exercised?

The Department of Banking has no supervision over the surviving mortgage guarantee business of an institution under its supervision. The final paragraph of Section 201 of the Department of Banking Code provides as follows:

> "However, when any corporation subject to the supervision of the Department of Banking shall also engage in a title insurance business, a mortgage guarantee business, or any other business subject to the supervision of the insurance Department, such branch of its business shall not be subject to the supervision of the Department of Banking."

The Department of Banking had and now has no jurisdiction over that type of business of a non-banking institution. See our opinion to the Secretary of Banking dated June 25, 1930 (Official Opinions of the Attorney General, 1929-1930, p. 55), wherein we advised that a mortgage guarantee company not having the power to receive and receiving money on deposit or for safe-keeping was not under the supervision of the Department of Banking.

Section 661 of The Insurance Company Law of 1921, amended by the Act of June 22, 1931, P. L. 613, provides, inter alia, as follows:

> "Every surety company, to be qualified to so act as surety or guarantor, must be authorized, under the laws of the State or country where incorporated and its charter, * * * to guarantee the performance of contracts other than insurance policies, * * *."

Thereafter follows a list of requirements a company must meet in order to do business of that character in this Commonwealth.

Section 202 (c) (1) of The Insurance Company Law provides for the incorporation of domestic casualty insurance companies for the purpose, among others, of "guaranteeing the performance of contracts, other than insurance policies."

Domestic and foreign casualty companies which engage in the business of guaranteeing mortgages are subject to your department's supervision pursuant to the provisions of the Insurance Department Law. Logically there is no reason why the mortgage guaranty business of domestic companies organized as "title insurance" companies should not likewise be under its supervision. While the Legislature has not seen fit to give the Insurance Department that power in specific language, the phraseology of Section 221 of the Insurance Department Act indicates that all the business of a title insurance company, except its banking or fiduciary business, is under the supervision of the Insurance Department. It reads:

> "The Insurance Department shall have the power and duty to supervise, examine, and regulate all corporations possessing the power to insure owners of real property, mortgagees and others interested in real property from loss by reason of defective titles, liens, and encumbrances * * *."

Section 101 of the Insurance Department Act of 1921, as amended by the Act of May 17, 1933, P. L. 798, specifically includes such companies, namely, "title insurance" companies, in the definition of companies over which your department has jurisdiction.

It is our opinion that you have no power and duty to supervise the fiduciary business of any company or the mortgage guaranty business of institutions under the supervision of the Department of Banking. You do have the power and duty to supervise the mortgage guaranty business of title insurance companies not under the supervision of the Department of Banking.

V

> Should you seek appointment as liquidator of the title insurance department of a bank and trust company or a trust company now in possession of the Secretary of Banking, whether or not it has a title insurance reserve fund?

Section 511 of the Insurance Department Act, as amended by the Act of May 17, 1933, provides as follows:

> "Liquidation of Title Insurance Companies Partially under Supervision of Department of Banking.—The Insurance Commissioner may be appointed, in accordance with the provisions of this article, as liquidator of the title insurance business of any company which also has the power to transact any class of business under the supervision of the Department of Banking. The Insurance Commissioner shall promptly notify the Department of Banking of his appointment as liquidator of any such company.
>
> "Upon receipt of notice from the Secretary of Banking that, as receiver, he has taken possession of any such company, the Attorney General may procure the appointment of the Insurance Commissioner as liquidator of the title insurance business of such company in accordance with the provisions of this article."

It is clear from this language that it is optional with the Attorney General whether or not you should be appointed liquidator of the title insurance business of any company having the power to transact other classes of business under the supervision of the Department of Banking. There is, therefore, no obligation on your part to seek appointment as liquidator of the title insurance business of such institutions as have passed into the possession of the Secretary of Banking.

A bank and trust company now in possession of the Secretary of Banking is entirely in his hands, whether or not it maintained a title insurance department. The general assets of the institution are available, first, for the payment of depositors thereof, and secondly, for the payment of creditors. Included among creditors would be parties holding claims by virtue of losses arising under title insurance policies. The Secretary of Banking must accept such claims for filing and make payment thereon pursuant to decree of court following the payment of all depositors in full.

There is no way by which the general assets, even after payment of depositors in full, could be divided with respect to various claims and be delivered over to you to pay title insurance claims.

On the other hand, the title insurance reserve fund established by such institution pursuant to the Act of 1929, may be used to reinsure the title insurance business of the defunct bank and trust company or trust company as provided by the Act of June 12, 1931, P. L. 566, which gives this power to the Secretary of Banking. If this be done there should be filed in the court having jurisdiction over the affairs of the closed institution a certificate as required by the latter act. The fund may then be used in the interests of parties holding title insurance policies or claims based upon such policies.

Section 221 above quoted transfers to you the powers given by the Act of 1931 to the Secretary of Banking.

There is no duty on your part to ask the court to substitute you for the Secretary of Banking with respect to such title insurance reserve. There is no right on your part to be appointed as liquidator of any other assets of the closed institution.

VI

Should general investments of title insurance companies and title insurance reserves be valued on the basis approved by the Secretary of Banking or on that adopted by you for insurance companies?

We understand that the Secretary of Banking has established a system of valuing assets of institutions under his supervision based upon their character and past history, rather than upon current market values.

You advise that you permit companies under your supervision to carry assets at values established by the National Convention of Insurance Commissioners, rather than at current market values.

It is our opinion that you may permit any title insurance or banking institution to carry investments in its title insurance fund at values permitted by you in conformity with the practice adopted by the National Convention of Insurance Commissioners. You may permit a company engaged solely in the title insurance or mortgage guaranty business to carry at such values securities comprising its general assets.

The general assets of companies doing a title insurance business subject to the supervision of the Secretary of Banking should be carried at such values as are established by the Secretary of Banking. You have neither the authority nor duty to fix a valuation thereon.

SUMMARY

Therefore, you are advised that:

1. Title insurance companies must be supervised pursuant to the provisions of the insurance laws.

2. Supervision by your department embraces the title insurance business of corporations having title insurance departments but which likewise function as banks and trust companies.

3. Your supervision over the title insurance department of a bank and trust company or a trust company is limited to its title insurance reserve fund and does not include the duty to examine and require reports on its general assets.

4. You have the power and duty to supervise the mortgage guaranty business of title insurance companies not under the supervision of the Department of Banking, but you have no power and duty to supervise the fiduciary business of any such companies.

5. It is not your duty to be substituted for the Secretary of Banking as receiver of the title insurance business of a banking institution in his possession, whether or not it has a title insurance reserve fund.

6. You have no authority to fix a valuation basis for general assets of companies doing a title insurance business but subject to the supervision of the Secretary of Banking; you may permit corporations with title insurance reserves to carry investments therein at values fixed by the National Convention of Insurance Commissioners.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

Deputy Attorney General.

OPINION NO. 124

Insurance—Tax on foreign insurance companies—Distribution of proceeds—Proportion of original business transacted—Impossibility of allocating reinsurance—Act of June 28, 1895, Sec. 2.

Under section 2 of the Act of June 28, 1895, P. L. 408, as last amended by the Act of April, 20, 1933, P. L. 51, the State Treasurer, in making annual distribution to the treasurers of the several municipal subdivisions within the Commonwealth of the net amount derived from the 2-percent tax paid upon premiums by foreign fire insurance companies, may properly prorate the fund among such municipal subdivisions in proportion to the amount of tax paid on original insurance business transacted therein, it being impracticable to ascertain the location of properties reinsured by foreign fire insurance companies.

Department of Justice,

Harrisburg, Pa., March 9, 1934.

Honorable Leon D. Metzger, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have asked to be advised upon certain questions involved in distributing the two per centum tax on premiums by foreign fire insurance companies under Section 2 of the Act of June 28, 1895, P. L. 408, as last amended by the Act of April 20, 1933, P. L. 51.

Section 2 of the Act of 1895, as amended, requires that annually the State Treasurer shall distribute to the treasurers of the several cities, townships, and boroughs within the Commonwealth, to be paid to the relief fire association of the fire department within or serving such cities, townships, and boroughs, "the entire net amount received from the two per centum tax paid upon premiums by foreign fire insurance companies." In several previous opinions this department has advised you that a proper construction of the Act of 1895, as amended, requires you to learn what business is written in each city, township and borough within the State and to make distributions among the cities, townships, and boroughs accordingly. See Official Opinions of the Attorney General 1927-28, pages 253 and 257, and Informal Opinion No. 304, dated December 29, 1933.

You advise that this rule is practicable in the case of original business transacted by foreign fire insurance companies, but that it is difficult and often impossible to learn from foreign fire insurance companies who transact a reinsurance business in what place within Pennsylvania the reinsured properties are located. The result has been that a substantial amount of the tax on fire insurance premiums transacted by foreign companies has each year remained undistributed.

You inquire whether it would be lawful to make distribution of the tax on premiums on a different basis, namely, by prorating the total amount of tax paid by foreign fire insurance companies among the several cities, boroughs, and townships in proportion to the amount of tax on original business transacted by foreign fire insurance companies within such cities, boroughs and townships.

Section 2 of the Act of 1895, as amended, reads as follows:

> "Section 2. On and after the first day of January, one thousand nine hundred and nineteen, and annually thereafter, there shall be paid by the State Treasurer to the treasurers of the several cities, townships, and boroughs within the Commonwealth, the entire net amount received from the two per centum tax paid upon premiums by foreign fire insurance companies. The amount to be paid to each of the treasurers of the several cities, townships, and boroughs shall be based upon the return of said two per centum tax upon premiums received from foreign fire insurance companies doing business within the said cities, townships, and boroughs, as shown by the report made to the Department of Revenue. Each city, borough, or township, receiving any payment from the State Treasurer hereunder, shall forthwith pay the amount received to the relief fund association of the fire department, or of such fire company, or fire companies, paid or volunteer, now existing, or hereafter organized, in such city, borough, or township, as is or are engaged in the service of such city, borough, or township, and duly recognized as such by the council or commissioners, as the case may be, of such city, borough, or township. In any borough or township in which there is no fire department or fire company or companies, the amount received by the treasurer of the borough or township from said tax shall be forthwith paid to the relief fund association of the fire department or fire company or companies of any adjoining city, borough, or township, the fire department or fire company or companies of which afford fire protection to the inhabitants of such borough or township. Before payment of said tax to the treasurer of any such borough or township, the burgess, in boroughs, and the secretary of the board of supervisors, in townships, shall first certify to the Auditor General that the fire department or fire company or companies of such adjoining city, borough, or township afford fire protection to the inhabitants of such borough or township. Warrants for the above purposes shall be drawn by the Auditor General, payable to the treasurers of the several cities, townships, and boroughs, in accordance with this act, whenever there are sufficient funds in the State Treasury to pay the same."

The very first sentence of this section requires the State Treasurer to distribute "the entire net amount" received from the two per cent tax. The Legislature evidenced an intention that all of the tax should be distributed.

It is possible to compel foreign fire insurance companies doing business within Pennsylvania and registered here for that purpose to make annual reports upon the basis of which you can determine the risks upon which insurance was placed in the several cities, boroughs, and townships of the State; but the location of original risks cannot be determined in the case of a substantial part of reinsurance business written by foreign companies doing business in Pennsylvania. Without such information the tax on such business cannot be distributed unless it be distributed to the place where original business of these companies is written.

In our opinion the Legislature did not intend any part of the tax on premiums to be retained in the State Treasury and therefore authorized your department and the State Treasurer to distribute the fund among the several cities, boroughs, and townships in an equitable manner upon information obtained from the reports received by your department from companies within the jurisdiction of Pennsylvania.

Accordingly, we are of the opinion that the method of distribution which you have proposed is lawful and comes within the language of the Legislature as expressed in Section 2 of the Act of 1895, as amended.

Very truly yours,

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

OPINION NO. 125

School law—Retirement of employes—Acts of May 18, 1917—Powers of retirement board—Enforcement of orders—Withholding payments by Commonwealth—School Code of 1911, Sec. 1210—Surcharge for salary paid—Audit of accounts—Commonwealth's right to file exceptions.

1. The Public School Employes' Retirement Board is authorized by the Act of May 18, 1917, P. L. 1043, to retire any school employe who has reached the age of 70 years, either forthwith or at the end of the school term during which that age is attained.

2. Where a public school employe is not retired as directed by the retirement board, that body should certify the facts to the Department of Public Instruction, which may then withhold the percentage of salary payable by it under section 1210 of the School Code of 1911, as amended, and may further certify the facts to the Department of Justice with the request that the auditors of the school district involved surcharge the district with the amount of the salary subsequently paid to such retired employe, upon the annual audit of the district's accounts as provided in sections 2617, 2618, 2620, and 2625 of the School Code.

3. The Commonwealth may file exceptions to the audit of the accounts of any school district within 90 days after the report of the audit has been filed with the

Department of Public Instruction, in order to obtain a judicial determination whether a surcharge should be made against the members of the board of school directors involved.

Department of Justice,

Harrisburg, Pa., March 24, 1934.

Honorable H. H. Baish, Secretary, Public School Employes' Retirement Board, Harrisburg, Pennsylvania.

Sir: We have your letter of recent date in which you ask what procedure is available to the Public School Employes' Retirement Board to enforce the compulsory retirement provision of the Public School Employes' Retirement Act, approved May 18, 1917, P. L. 1043, as amended.

Section 14, Subsection 2, of the act provides:

> "Each and every contributor who has attained or shall attain the age of seventy years shall be retired by the retirement board, for superannuation, forthwith, or at the end of the school term in which said age of seventy years is attained."

In a letter written by Deputy Attorney General Philip S. Moyer, addressed to the Public School Employes' Retirement Board, under date of June 16, 1924, the Board was advised:

> "* * * the State School Employes' Retirement Board is entirely right in the rule or regulation which it has adopted to retire all contributors who have attained the age of seventy years during any school term at the end of said school term, and that the contract which the certain County Superintendent herein referred to has entered into for employment during a term of four years, which term of employment does not expire until two years beyond the school term in which he attains his seventieth birthday, cannot defeat or alter the ruling of the Retirement Board to retire said contributor at the end of the school term in which he attains his seventieth birthday."

See also *Smith v. J. George Becht,* Superintendent of Public Instruction, *et al.,* 28 Dauphin Co. Rep. 55 (1925). In this case A. G. Criswell Smith, County Superintendent of Public Schools of Delaware County, brought an action of mandamus against the Superintendent of Public Instruction and the members of the Public School Employes' Retirement Board to countermand and withdraw an order and notification terminating his employment and to compel the Board to reinstate him. Mr. Smith alleged that he had been elected to the office of county superintendent of schools of Delaware County for a term of four years; that though he had attained the age of seventy years, he could not be deprived of the exercise or emoluments of his position. The Board having ordered his retirement and the Superintendent of Public Instruction having refused to pay his salary, he brought this action of mandamus. The Court of Common Pleas of Dauphin County dismissed the proceeding.

The Court, in an opinion by Wickersham, J., said:

> "We have jurisdiction to issue the writ against J. George Becht, Superintendent of Public Instruction, but it ought not to be exercised. It appears from the pleadings that the plaintiff, after he attained the age of seventy years, was retired by the defendants, the members of the Public School Employes' Retirement Board of the Commonwealth of Pennsylvania, as County Superintendent, on June 30, 1924. The Superintendent of Public Instruction could not place his name on the payroll and issue a voucher and requisition upon the proper officers for the payment of his salary unless he was reinstated by said board. We have no jurisdiction to compel the said board to reinstate him by writ of mandamus. It appearing that the plaintiff is no longer county superintendent of Delaware County, he is therefore not entitled to receive his salary as such officer, nor to have granted the prayer of his petition for a writ of mandamus commanding the Superintendent of Public Instruction to issue a voucher and requisition upon the proper officer for the payment of his salary."

The School Code, (Act of May 18, 1911, P. L. 309) Section 1210, Subsection 19 provides that of the salaries therein prescribed for teachers, supervisors, principals, and other members of the teaching and supervisory staff, except part-time and night school teachers, the Commonwealth shall pay certain percentages "to such school districts as comply with the laws governing the public schools of the Commonwealth, for the payment of salaries of such persons so employed."

The financial affairs of school districts of every class in this Commonwealth are subject to audit under Sections 2617, 2618, 2620, and 2625 of the School Code. Such audit is made at the end of each school year in districts of the first class, and within thirty days after the first Monday in July, in districts of all other classes.

The auditors of school districts, except school districts of the first class, are required to file a copy of the audit with the Superintendent of Public Instruction. In the court of the proper county, the Commonwealth may file exceptions to any such audit within ninety days after the report of the audit has been filed with the Department of Public Instruction, and by so doing may initiate a proceeding in the court of common pleas of the county wherein the school district lies, to determine whether a surcharge should be made against the members of the board of school directors for all moneys unlawfully disbursed. Such exception may cover moneys disbursed for the salary of any person who after retirement by the Public School Employes' Retirement Board has been retained by the district and paid a salary from its treasury. These conclusions overrule our Formal Opinion No. 68 addressed to Honorable W. M. Denison, Deputy Superintendent of Public Instruction under date of October 6, 1932.

Our examination of the statutes and authorities outlined above leads to the following conclusions:

1. The Public School Employes' Retirement Board is authorized by the Act of May 18, 1917, P. L. 1043, to retire any person who has reached the age of seventy years, either forthwith or at the end of the school term during which the age of seventy years is attained;

2. In the case of any employe who is not retired as directed by the Retirement Board, including the classes designated in Section 1210, Subsection 19, of the Act of May 18, 1911, P. L. 309, as amended, the Retirement Board (a) should certify the facts to the Department of Public Instruction, and (b) may certify the facts to the Department of Justice with the request that the auditors of the school district involved be requested to surcharge the district with the amount of the salary of the person who, after having been lawfully retired by the Retirement Board, was continued upon its payroll, or such other action as it may deem necessary to enforce the provisions of the law.

Such a request to the Department of Justice should be made not later than the first Monday in July in any year and should disclose the names of the members of the board of directors of the school district, the name of the person employed, the date on which the Retirement Board designated he should be retired, the service in which he is employed, and the amount of salary paid to him. Due notice should be given by the Retirement Board to the board of directors of any school district, advising the district that the Board will certify to the Department of Justice the case of any person not retired in compliance with statutory provisions.

Yours very truly,

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

OPINION NO. 126

Schools—Second class school district—Audit of accounts—Employment of accountants—Aid of or substitution for controller's audit—School Code of 1911, Secs. 2601 and 2603.

Section 2603 of the School Code of 1911, as amended, authorizing school districts of the second class whose annual expenditures exceed $500,000 to employ certified public accountants, must be construed to authorize the employment of such accountants only to aid and not to displace the regular audit by the controller of the municipality in which the district is located, whose duty it is to make the annual audit of the district's finances under section 2601 of the statute.

Department of Justice,

Harrisburg, Pa., March 27, 1934.

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

Sir: You have asked us whether under Section 2603 of the School Code, as last amended by the Act of June 1, 1933, P. L. 1152, a school district of the second class which has annual expenditures in excess of $500,000 may appoint a certified public accountant to audit its accounts and thereby displace the audit provided by law to be made by the controller of the municipality in which the district is located.

Section 2603 of the Code must be read with Section 2601. As amended they read as follows:

> "Section 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:
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> * * * * * * * *
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> "Section 2603. In all school districts of the second and third class, by the controller or auditors of the city, borough, incorporated town, or township in which the whole or the greater or greatest portion of the area of each such district shall be located. 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 Formal Opinion No. 56, dated July 18, 1932, addressed to your department and reported in 17 D. & C. 507, we said that we regarded Section 2603 of the School Code as applying to the employment of certified public accountants only to assist in or to check on the regular annual audit. We have no reason to depart from the opinion so expressed, but since the question before us at that time did not directly involve this issue, we shall discuss it further here.

The provisions of Sections 2601 and 2603, in so far as they direct the regularly elected auditors or controllers of municipal subdivisions to audit the accounts of school districts, are clear and positive. The authority given to certain school districts to employ special accountants in no way intimates an intention to substitute such accountants for these officers. If it had been the intention of the Legislature to bring about any such result, it is reasonable to suppose that the Legislature would have used language clearly authorizing the change. A clear provision for a substitution of this kind appears in Section 520 of the First Class Township Law of June 24, 1931, P. L. 1206.

If it had been intended to permit such a substitution in the audit of school finances, it is not likely that the appointing power would have been vested in the school board whose finances the accountant would be called upon to audit. Examination of the Acts of Assembly discloses that it has been the consistent policy of the Legislature to have auditing officers elected by the people or appointed by persons other than the body whose accounts are to be examined.

Therefore, we advise you that the appointment of a certified public accountant under Section 2603 of the School Code does not do away with the official audit required by law to be made by the proper auditing officers of the municipality in which the school district is located.

Very truly yours,

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

OPINION NO. 127

Corporations—Credit union—Nature of business—Conduct by foreign or domestic corporation or business trust—Act of May 26, 1933, Sec. 22—Restriction to corporations supervised by Department of Banking.

1. Section 22 of the Act of May 26, 1933, P. L. 1076, restricts the conduct of the business of a credit union, consisting of the receipt of savings from members as payment on shares, the making of loans to members at legal rates of interest, and the investment of surplus funds in mortgages, real estate, and designated stocks, to corporations organized under the provisions of that statute; neither a

business trust, a foreign corporation, nor a domestic corporation organized under any other law of the Commonwealth is authorized to transact such a business.

2. The activities of a credit union being in the nature of a banking business, the Commonwealth may properly restrict the conduct thereof to certain domestic corporations operating under the supervision of the Department of Banking.

Department of Justice,

Harrisburg, Pa., April 2, 1934.

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

Sir: We have your request to be advised whether Section 22 of the Act of May 26, 1933, P. L. 1076 is applicable to a so-called business trust, to a domestic corporation, and to a duly registered foreign corporation, all of which are engaged in the business of making loans to their members.

This act is generally referred to as the Credit Union Act. Section 1 defines "credit union" as used in the act as "a cooperative society, in the nature of a corporate entity, incorporated for the two-fold purpose of promoting thrift among its members and creating a source of credit for them, at legitimate rates of interest, for provident purposes."

The act further provides for the incorporation, powers, membership, meetings, elections, loans, reserves, dividends, dissolution, and other matters pertaining to the conduct of the business of a credit union. Section 5 provides that credit unions shall be under the supervision of the Department of Banking.

Section 3 of the act gives a credit union the power to receive the savings of its members as payment on shares.

Section 15 permits a credit union to make loans "to its members only." Section 13 prohibits interest rates in excess of six per centum per annum.

Section 26 provides that nothing contained in the Credit Union Act shall apply to small loans companies organized under the Act of June 17, 1915, P. L. 1012 and its amendments.

You inform us concerning the so-called business trust that it is an unincorporated association, operating under a common law deed of trust duly recorded in the office of the recorder of deeds, and registered under the Fictitious Names Act; that it is engaged in the business of making loans to its members only, at an interest charge not in excess of six per centum per annum; and that the requisite for membership in the association is the purchase of one or more so-called shares. The domestic corporation and the foreign corporation to which you refer are operating in the same manner as the business trust. The domestic corporation was not incorporated in accordance with the provisions of the Credit Union Act.

These organizations are clearly formed to obtain a source of credit for their members at a low rate of interest. Their general purposes and methods of doing business with their members are practically the same as those of credit unions, as set forth in the Credit Union Act. In our opinion, these organizations are operating in the manner of a credit union.

Section 22 of the Credit Union Act provides as follows:

> "Section 22. Restrictions.—It shall be unlawful hereafter for *any person, association, copartnership, or corporation, except corporations organized in accordance with the provisions of this act,* to assume and use the words 'credit union' in their name or title, *or to operate in the manner of a credit union.* Any person, copartnership, or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punishable by a fine which shall not be less than ten dollars ($10) nor more than one thousand dollars ($1,000), or by imprisonment for a period which shall not be less than three months nor more than two years, or both, in the discretion of the court. The officers of a corporation shall be liable to such punishment if the offense is committed by a corporation." (Italics ours.)

This section clearly forbids "any person, association, copartnership, or corporation," except corporations organized under the Credit Union Act, from operating "in the manner of a credit union." In our opinion, this language is sufficiently broad to include the business trust, the domestic corporation, and the foreign corporation hereinbefore described.

The business of credit unions is similar to the banking business in many respects. Credit unions receive savings of their members as payment on shares, make loans, and also invest money in mortgages, real estate, and certain stocks. Apparently for this reason credit unions are placed under the supervision of the Department of Banking. The organizations other than small loans companies which have heretofore operated in the manner of a credit union within this Commonwealth have not been subject to any supervision whatsoever. No reason appears for exempting these organizations from the scope of Section 22.

The language of Section 22 expressly includes individuals and various types of associations of individuals, such as copartnerships and organizations. The apparent purpose of this section is to restrict everyone "except corporations organized in accordance with the provisions of this act" from engaging in the business of a credit union. For this reason the additional word "association" seems to refer generally to all assocations of individuals other than copartnerships or corporations; it clearly includes a business trust. Judicial decisions support this conclusion.

In *King v. Kentucky,* 197 Ky. 128, 246 S. W. 162 (1922), it was held that a business trust was an investment company within the scope of a Blue Sky Law, which defined as an investment company "Every person, corporation, copartnership, company, or association, * * * whether incorporated or unincorporated, * * *" The court said, at page 133:

> "* * * the very language employed in forming this section of the act, fairly construed, includes a common-law trust and * * * the general legislative purpose may be considered in construing the meaning of the language employed."

Similar provisions in other Blue Sky Laws have also been construed to include business trusts in *Reilly v. Clyne,* 27 Ariz. 432, 234 Pac. 353 (1925), and *State v. Cosgrove,* 36 Idaho 278, 210 Pac. 393 (1922).

In *Hecht v. Malley,* 265 U. S. 144 (1924), the Supreme Court of the United States decided that a business trust was taxable under the Federal Revenue Act of 1918, which imposed an excise tax upon corporations, defined to include "associations" "created or organized in the United States." The court said, at page 157:

> "The word 'association' appears to be used in the act in its ordinary meaning. It has been defined as a term 'used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.'
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> "We think that the word 'association' as used in the act, clearly includes 'Massachusetts trusts' such as those herein involved, having quasi corporate organizations under which they are engaged in carrying on business enterprises. What other form of 'association,' if any, it includes, we need not, and do not, determine."

It cannot be questioned that the word "corporation" used in Section 22 of the Credit Union Act includes domestic and foreign corporations. The Commonwealth has the right to place restrictions upon the formation of domestic corporations incorporated for the purpose of engaging in the banking business, and to prohibit foreign corporations from engaging in the banking business. The Commonwealth has a similar right to restrict the analogous business of credit unions.

Therefore, we are of the opinion that Section 22 of the Act of May 26, 1933, P. L. 1076, restricts the conduct of the business of a credit union, as defined and set forth by this act, to those corporations organized in accordance with the provisions of this act.

You are accordingly advised that a business trust, domestic corporation, or foreign corporation, operating on a plan such as you have described, is operating in the manner of a credit union contrary to the provisions of Section 22 of the Act of May 26, 1933, P. L. 1076.

Very truly yours,

DEPARTMENT OF JUSTICE,
GEORGE W. KEITEL,
Assistant Deputy Attorney General.

OPINION NO. 128

Traveling expenses—Department of Public Instruction—Federal employes—Representatives of colleges within the State. Act No. 300-A, 1933.

Traveling expenses of Federal employes and of representatives of colleges within the State who came to Harrisburg at the request of the Department of Public Instruction for certain conferences, may lawfully be paid from the appropriation made by the General Appropriation Act No. 300-A at page 185 of the Appropriation Acts of 1933.

Department of Justice,

Harrisburg, Pa., April 4, 1934.

Honorable Frank E. Baldwin, Auditor General, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether the Department of Public Instruction may expend moneys to pay traveling expenses of Federal employes and of representatives of colleges within the State who came to Harrisburg at the request of the department for certain conferences.

It appears that the Federal employes in question were a specialist in finance in the Bureau of Education at Washington, D. C., and a director of vocational training stationed at the University of Pittsburgh. These men were asked to come to Harrisburg to confer with the Department of Public Instruction and with a commission appointed by the superintendent, in the study of educational problems of the State, and to assist in formulating a so-called ten year plan for development of our educational system. The representatives from the various colleges of the State were summoned for the same general purposes.

The General Appropriation Act of 1933, No. 300-A, at page 185 of the Appropriation Acts of 1933, appropriated to the Department of Public Instruction:

> "For the payment of salaries, wages, or other compensation of deputies and other employes; for the payment of postage, traveling expenses, mileage charges to the Department of Property and Supplies for the use of automobiles, telephone toll charges, telegrams, expenses of operating and maintaining automobiles and other motor equipment, newspaper advertising and notices, freight, express, cartage, and incidental expenses, necessary for the proper conduct of the work of the department and the State Council of Education, the sum of six hundred thousand dollars ($600,000)."

It is to be noted that the appropriation for payment of salaries, wages and other compensation is limited to payment of deputies and other employes of the department. But the appropriation is not so restricted as to traveling and incidental expenses. The only limitations on such expenditures are that the expenses shall be necessary for the proper conduct of the work of the department.

The planning of a program for the schools of the State is undoubtedly a proper function of the Department of Public Instruction. It is also desirable that the department should have the benefit of the advice of persons outside its own ranks in working on such a plan. Therefore, consultation with such persons is a proper function of the department, and payment of their traveling expenses to Harrisburg for such consultations is a proper incidental expenditure for the conduct of the work of the department.

Therefore, we advise you that the expenses of persons so summoned to Harrisburg may be paid from the appropriation above quoted.

Very truly yours,

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

OPINION NO. 129

Taxation—Mortgages—Reconstruction Finance Corporation—Federal Land Banks —Regional Agricultural Credit Corporations.

State tax on mortgages, as provided by Section 4 of the Act of April 6, 1830, P. L. 272, cannot be imposed, nor required to be paid, upon mortgages executed to the Reconstruction Finance Corporation, Federal Land Banks, or to Regional Agricultural Credit Corporations, when such mortgages are presented to the recorders of deeds to be recorded in the manner provided by law.

Department of Justice,
Harrisburg, Pa., April 7, 1934.

Honorable Frank E. Baldwin, Auditor General, Harrisburg, Pennsylvania.

Sir: You inquire whether mortgages to the Reconstruction Finance Corporation, Federal Land Banks, and Regional Agricultural Credit Corporations are subject to the State tax imposed upon mortgages offered for record in the several offices of the recorders of deeds of this Commonwealth.

The State tax in question is imposed by Section 4 of the Act of April 6, 1830, P. L. 272, 72 PS Sec. 3173, which reads as follows:

> "The several recorders of deeds shall demand and receive for every deed, and for every mortgage or other instrument in writing offered, to be recorded, fifty cents."

Your inquiry, in so far as it relates to mortgages executed to Federal Land Banks, was answered in a Formal Opinion of this department rendered to Honorable Charles Johnson, former Secretary of Revenue, under date of December 11, 1930.

In that opinion we reached the conclusion that the State tax in question could not be imposed on mortgages executed to Federal Land Banks, because such banks and mortgages are instrumentalities of the government of the United States, and, therefore, are exempt from State taxation.

Under these circumstances, your inquiry resolves itself into whether or not mortgages to the Reconstruction Finance Corporation and Regional Agricultural Credit Corporations are subject to the State tax.

As we pointed out in our opinion mentioned above:

> "The fifty cents required to be paid to the various recorders of deeds of this Commonwealth, in accordance with Section 4 of said Act of April 6, 1830, when a mortgage or deed is offered to be recorded, is unquestionably a tax. It is separate and distinct from the fee for the recording of the instrument itself. The title of the act

> and some of the sections therein also expressly refer to these fees as taxes.''

It is an established principle of our constitutional system of dual government that the property, instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states, and that the property, instrumentalities, means and operations whereby the states and their political subdivisions exercise their governmental powers are equally exempt from taxation by the United States: *M'Culloch v. Maryland et al.,* 4 Wheat. 316, 430; 4 L. Ed. 579, 607 (1819); *Dobbins v. Erie,* 16 Pet. 435, 10 L. Ed. 1022 (1842); *Collector v. Day (Buffington v. Day),* 11 Wall. 113, 125, 127, 20 L. Ed. 122, 126, 127 (1871); *United States v. Baltimore and Ohio Railroad Company,* 17 Wall. 322, 21 L. Ed. 597 (1873); *Pollock v. The Farmers' Loan & Trust Company et al.,* 157 U. S. 429, 39 L. Ed. 759 (1895); *Ambrosini v. United States,* 187 U. S. 1, 47 L. Ed. 49 (1902).

This principle of exemption is not statutory, but is implied from the independence of the National and State governments within their own respective spheres, and from the provisions of the Constitution, which look to the maintenance of the dual system. It is aimed at the protection and self-preservation of the operations of government *(M'Culloch v. Maryland et al.,* supra), and their immunity does not extend ''to anything lying outside or beyond governmental functions and their exertion'': *Indian Motorcycle Company v. United States,* 283 U. S. 570. 575, 75 L. Ed. 1277, 1281 (1930). Where the immunity exists it is absolute, resting upon an ''entire absence of power'' *(Johnson v. Maryland,* 254 U. S. 51, 55, 56, 65 L. Ed. 126, 128, 129 [1920]), but it does not exist ''where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government'': *Willcuts v. Bunn,* 282 U. S. 216, 225, 75 L. Ed. 304, 306 (1931).

In accordance with this principle, which was expressly reiterated in the statute authorizing the creation of the Federal Land Banks, the United States Supreme Court, in the case of *Federal Land Bank of New Orleans v. D. W. Crosland,* 261 U. S. 374, 67 L. Ed. 703 (1923), reached the conclusion that the State of Alabama was without authority to impose a tax similar to the one in question upon mortgages executed to Federal Land Banks. It was contended on the part of the state that the Federal Land Bank had the option of leaving its mortgages off the record and thereby avoid the imposition of the State tax, but in answer to this, as well as in the determination of the question itself, Mr. Justice Holmes said, at page 705 (L. Ed.):

> ''The state is not bound to furnish a registry, but if it sees fit to do so it cannot use its control as a means to

> impose a liability that it cannot impose directly, any more than it can escape its constitutional obligations by denying jurisdiction to its courts in cases which those courts are otherwise competent to entertain. Kenney *v.* Supreme Lodge, L. O. M. 252, U. S. 411, 415, 64 L. Ed. 638, 640. 10 A. L. R. 716, 40 Sup. Ct. Rep. 371. * * *
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> "Of course, the state is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case the legisislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax. If it attempted to disguise the tax by confounding the two, the courts would be called upon to consider how far the charge exceeded the requirement of support, as when an excessive charge is made for inspecting articles in interstate commerce. D. E. Foote & Co. *v.* Stanley, 232 U. S. 494, 58 L. Ed. 698, 34 Sup. Ct. Rep. 377. But it has made no such attempt. It has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that it is not at liberty to reach. * * * It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The statute says that the lender must pay the tax; but, whoever pays it, it is a tax upon the mortgage, and that is what is forbidden by the law of the United States."

The answer to your inquiry, therefore, depends on whether or not the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporations are agencies and instrumentalities of the Federal Government. If this question is answered in the affirmative, the State tax does not apply to mortgages executed to these corporations; if the answer is in the negative, the tax does apply.

There can be no question that the Reconstruction Finance Corporation, which was created by the Reconstruction Finance Corporation Act, approved January 22, 1932, 15 U. S. C. A. Secs. 601-617, is an agency and instrumentality of the United States Government. The capital stock of the corporation is subscribed by the United States of America at the expense of the Treasury of the United States (Section 602); the board of directors consists of the Secretary of the Treasury and six other persons appointed by the President of the United States, by and with the advice and consent of the United States Senate (Section 603); it is entitled to the free use of the United States mails, in the same manner as the executive departments of the government (Section 604); the corporation may avail itself of the use of information, services, facilities, officers and employes of any agency of the executive departments of the United States Government (Section 604); it is required to submit a monthly report of all its activities and transactions to the President and to the Senate and House of Representatives (Section 605b (b)); the surplus money of the corporation may be deposited with the Treasurer of the United States, subject to check by the corporation, or in any Federal Reserve Bank (Section 607); confidential information required by any agency of the Federal Government is made available to the corporation (Section 608); it may issue its obligations only with the approval of the Secretary of the United States Treasury,—such obligations are fully and unconditionally guaranteed, both as to principal and interest, by the United States (Section 609); it may request the Secretary of the Treasury to market its obligations, and, in so doing, the Secretary of the Treasury is authorized to use the facilities of the Treasury Department established by law for marketing the obligations of the United States (Section 609). Section 610 provides that:

> "Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, or by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

Likewise, there can be no doubt that Regional Agricultural Credit Corporations are agencies and instrumentalities of the United States Government. Such corporations are created and supported by the Reconstruction Finance Corporation, under Section 520 of the Emergency Relief and Construction Act of 1932, approved July 21, 1932, 15 U. S. C. A. Sec. 605b (e), which reads as follows:

> "The Reconstruction Finance Corporation is further authorized to create in any of the twelve Federal land-bank districts where it may deem the same to be desirable a regional agricultural credit corporation with a paid-up capital of not less than $3,000,000, to be subscribed for by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amounts allocated and made available to the Secretary of Agriculture under section 602 of this title. Such corporations shall be managed by officers and agents to be appointed by the

> Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe. Such corporations are hereby authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, fattening, or marketing of livestock, to charge such rates of interest or discount thereon as in their judgment are fair and equitable, subject to the approval of the Reconstruction Finance Corporation, and to rediscount with the Reconstruction Finance Corporation and the various Federal reserve banks and Federal intermediate credit banks any paper that they acquire which is eligible for such purpose. All expenses incurred in connection with the operation of such corporations shall be supervised and paid by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe."

By Executive Order of March 27, 1933, the functions of the Reconstruction Finance Corporation and its board of directors, relating to the appointment of officers and agents to manage Regional Agricultural Credit Corporations formed under the Emergency Relief and Construction Act of 1932, and relating to the approval of loans and advances made by such corporations, were transferred to the jurisdiction and control of the Farm Credit Administration (see Section 1148 of 12 U. S. C. A.).

Regional Agricultural Credit Corporations are supported entirely by funds of the Federal Government, and are created to further the purposes of the Federal Government in affording credit to the farmers of the country during the current depression. As such, these corporations are undoubtedly agencies and instrumentalities of the Federal Government.

Accordingly, you are advised that the State tax on mortgages, as provided by Section 4 of the Act of April 6, 1830, P. L. 272, cannot be imposed, nor required to be paid, upon mortgages executed to the Reconstruction Finance Corporation or to Regional Agricultural Credit Corporations, when such mortgages are presented to the recorders of deeds to be recorded in the manner provided by law.

Very truly yours,

DEPARTMENT OF JUSTICE,
E. RUSSELL SHOCKLEY,
Deputy Attorney General.

OPINION NO. 130

Public entertainments—Sunday concerts—License by Department of Public Instruction—Single license for series—Accounting to department—Report of series or single concerts—Requisites of "series."

1. Under the Act of June 2, 1933, P. L. 1423, but one fee of $5 may be charged for a permit by the Department of Public Instruction to hold either a single concert or a series of concerts on Sunday.

2. Upon the issuance of a permit by the Department of Public Instruction for a series of Sunday concerts, the licensee's accounts are to be kept and the calculation of net profits and the report to the department made on the basis of the series as a whole, and not individually for each concert, which in many instances would not be feasible.

3. A "series" of Sunday concerts, within the meaning of the Act of June 2, 1933, P. L. 1423, is not a mere succession of concerts but a group having a more or less unified financial plan, with receipts and expenditures based on the series as a whole, and, ordinarily, for which series subscriptions or tickets are sold.

Department of Justice,
Harrisburg, Pa., April 11, 1934.

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

Sir: The Act of June 2, 1933, P. L. 1423, authorizes the Department of Public Instruction to issue permits for concerts or series of concerts to be held on Sundays, and provides for the collection of a fee of five dollars for each permit. The act also requires the sponsors of permitted concerts to render to the department statements of receipts and expenditures of the concerts.

You have inquired (1) whether more than one fee of five dollars should be collected where the application is for a permit for a series of concerts, and (2) whether you should require a financial statement to be filed after each concert of a series included in one permit, or only a single statement after the close of the series. You also ask whether the net receipts of each concert of a series are to be considered separately in determining whether there is any liability to pay over any part of the receipts to your department.

Section 2 of the act provides that:

> "* * * should the amount collected for admission fees to any such concert exceed the actual expenses for light, heat and compensation to ushers, janitors and musicians, the excess shall be paid to the Department of Public Instruction of this Commonwealth to be employed by it for such public music purposes as it may deem proper."

Section 3 of the act contains these provisions:

> "The Department of Public Instruction may authorize concerts, or series of concerts, to be rendered and broad-

cast as herein provided; * * * Whenever the said department shall have authorized any such concert, or series of concerts, to be rendered and broadcast, it shall issue a permit, setting forth its authorization thereof, which permit shall also state the date or dates, hour or hours when, and place or places where, such concert, or series of concerts, shall be held. The Department of Public Instruction shall make a charge of five dollars for every permit issued under the provisions of this section."

Section 5 provides:

"Any person or persons to whom the Department of Public Instruction shall have issued a permit under the provisions of this act shall keep an accurate account of all moneys received and expended in connection with the rendering and broadcasting of the concert, or series of concerts, authorized in such permit, and the Department of Public Instruction, by its duly authorized agent, shall have the right at any time to inspect and audit such account. In order to enable such audit to be made, the person or persons having charge of such account shall render a complete, verified statement of receipts and expenditures within thirty days after each concert to the Department of Public Instruction."

In our opinion, Section 3 of the act makes it clear that but one fee of five dollars is to be collected for each permit, whether it be for a single concert or a series.

The language of the act is not consistent throughout as to the accounting for receipts and expenditures of concerts and the determination of net proceeds. Section 2, (before any mention has been made of series of concerts), speaks of excess proceeds of "any such concert." Section 3 authorizes permits for "concerts, or series of concerts." Section 5 requires accurate accounts to be kept as to the receipts and expenditures of "the concert, or series of concerts, authorized in such permit," but later directs the filing of "a complete, verified statement of receipts and expenditures within thirty days after each concert."

A literal and narrow construction of isolated phrases in these sections might lead to a conclusion that reports must be filed and net proceeds be determined with respect to each separate concert, whether part of a series or not. But in many cases such a construction would impose conditions which would be extremely unreasonable.

Many, perhaps most concert series, are financed as single enterprises. Subscriptions or tickets are sold for the entire series, and many of the expenses are contracted for the series as a whole. Consequently, in most instances, it would be practically impossible to determine the net profit, if any, of a single concert in a series. It would be equally impossible to furnish to your department a "complete" statement of receipts and expenditures of each concert separately.

In *Foster's Petition,* 243 Pa. 92, 98 (1914), the Supreme Court said:

> "* * * Where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolves upon the court of ascertaining the true meaning: 36 Cyc. 1107. It is fundamental that if, giving to the words of an act their literal or natural meaning, the conclusion reached would be unreasonable or absurd, some other meaning within the reasonable scope of the words may be adopted to avoid that result, if it appears that such other meaning may probably have been the one intended: Rossmiller *v.* State (Wis.), 91 Am. St. Rep. 910, 913. It is a settled rule of construction that the legislature will be presumed to have intended what is reasonable and effectual, and not what is productive of absurd or anomalous consequences or is impossible and incapable of execution. * * *"

It is clear that the Legislature intended to provide for series of concerts, and since the term "series" is used in Section 5 of the act, it is apparent that the series was to be recognized in the accounting procedure as well as in the issuance of permits. The Legislature perceived the necessity of making different provisions for series from those made for single concerts. It contemplated a workable system.

Therefore, we conclude that a reasonable construction of the inconsistent language of the act which will carry out the real purpose of the Legislature is that net profits of a series of concerts included in one permit are to be determined and accounts are to be kept and reports made on the basis of the entire series only.

One other matter must be considered. What constitutes a series of concerts within the meaning of the act?

It is probably not possible to lay down a definition which will apply to every case. But generally speaking, in order to constitute a series within the meaning of the act, there must be more than a mere succession of concerts having little or no unified financial basis. There must be substantial financial unity of all the concerts,—with receipts and expenditures based on the series as a whole. Perhaps the clearest evidence of such unity would be the sale of series subscriptions or tickets as a material part of the financial plan.

To summarize:

(a) Only one fee of five dollars may be charged for a permit to hold a series of Sunday concerts.

(b) Where a permit is issued for such a series, the net profits are to be calculated, the accounts kept and the reports made on the basis of the series as a whole, and not as to each concert.

(c) In order to constitute a series within the meaning of the act, a number of concerts must be based on a more or less unified financial plan. A mere succession of disconnected concerts is not a series.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 131

Alcoholic beverages—State Liquor Board—Appointment of employes—Eligible list —Establishment by examination—Employes of State liquor store—Separation of eligibles by districts—Time and place of examinations.

1. Under section 302 of the Liquor Control Act of 1933, all appointments to positions in any class of employment under the Liquor Control Board, made within 6 months after an examination for such positions, are to be made from the list of eligibles obtained as the result of that examination, unless a new examination shall have been given in the meantime, and thereafter no such appointments may be made except from a list of eligibles obtained as the result of a new examination, which may be held before or after the expiration of 6 months but need not be held until there is a position to be filled.

2. Each county constitutes a separate district for the qualification and listing of applicants to operate or assist in the operation of State liquor stores, and the time and classes of positions for which examinations are given in various districts are entirely independent of one another; but the applicants from more than one district may, whenever it is deemed advisable, be examined at the same time and place if their papers are kept and graded separately and eligibility lists prepared for each district.

3. An examination of applicants for appointment by the Liquor Control Board may cover any class or classes of employment for which the board wishes to establish a list of eligibles.

Department of Justice,

Harrisburg, Pa., May 3, 1934.

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

Sir: You have asked us to advise you concerning certain provisions of the Pennsylvania Liquor Control Act of November 29, 1933, No. 4, which have to do with the conduct of examinations of applicants for employment by the Liquor Control Board.

On December 16, 1933, examinations were held throughout the State for all positions which the board had need to fill. All appointments and replacements since that time have been made from the lists of persons who qualified in those examinations, and there remain large numbers of persons on those lists.

Your inquiry is when, in what areas, and for what positions new examinations must be held.

Section 302 of the Liquor Control Act governs the situation. That section, after giving the Liquor Control Board authority to prescribe the qualifications of its employes, provides that all appointees shall be citizens of the United States "and, in the case of appointments to operate or assist in the operation of liquor stores, shall be qualified electors of the county in which the store is located."

If the applicant fulfills preliminary requirements, it is directed that he "shall be admitted to competitive examination, when competitive examinations shall next be held for positions in the class of employment he seeks."

Then follow these provisions:

> "The Department of Public Instruction shall conduct such examinations at such places in the Commonwealth as to make it reasonably convenient and inexpensive for applicants to attend them. When there are positions to be filled, examinations shall be held at least twice in each year. The department may divide the State into districts for the purpose of conducting such examinations.* * *
>
> "All offices, places and employments in Pennsylvania Liquor Stores or establishments operated by the board shall be filled by selections from persons who have satisfactorily passed the examinations. The persons receiving the highest grade shall be first appointed and so on. The list of eligibles in any district shall be valid only until the next examination is held in such district."

The provision that "When there are positions to be filled, examinations shall be held at least twice in each year," is not as clear as it might be. However, its general purpose is apparent. It was designed to provide opportunity for new applicants to qualify at reasonable intervals, and to keep the eligible lists up to date. Effect must be given, as far as possible, to every part of the statutory language.

We are satisfied that the act does not require the holding of examinations twice a year at all events. The need for new employes is also a factor to be taken into consideration in fixing the times for examinations. Moreover, the clause above quoted, which provides for the admission of a candidate to examination "when examinations shall next be held for positions in the class of employment he seeks," also indicates an intention to provide for holding examinations for different classes of positions at different times, as need to fill such positions occurs.

On the other hand, it would be impossible to adopt the suggestion that no examination need be given as long as there remains any person on the existing eligible lists, on the ground that under those circumstances there would be no "position to be filled." Such a construction, even if otherwise possible, would create an unthinkable situation which would require that the person who passed an examination with the lowest rating be given a job before a new examination could be held, and before many possibly better men could have an opportunity to qualify.

In our opinion, a reasonable and proper construction of the section in question is as follows:

1. All appointments to positions in any class of employment made within six months after an examination for such positions are to be made from the list of eligibles obtained as a result of that examination, unless a new examination shall have been given in the meantime. After the expiration of the six-month period, no appointment may be made to such a position except from a new list of eligibles obtained as the result of a new examination. The new examination may be held before or after the expiration of six months, but it need not be held until there is a position to be filled, even if the occasion does not arise within the year. The date of such examination will be the basis for determining the time for the next examination.

2. An examination may cover any class or classes of employment. The time for the examination for any class of employment is to be determined by reference to the date of the last preceding examination for that class in the area from which the appointment is required to be made.

3. Each county must constitute a separate unit or district for the qualification and listing of applicants for appointments to operate or assist in the operation of liquor stores. Each such district or unit may be entirely independent of any other as to time of examinations and as to the classes of employment to be covered at any particular time. However, this does not mean that you may not hold examinations for a group of counties at one time and fix a convenient place or places of examinations as you may deem best; but if applicants from more than one county are examined at one place, the papers of those from each county must be kept and graded separately, and eligibility lists prepared for each county. There is no requirement that the same or a similar grouping of counties be made for subsequent examinations.

If, as to any other positions, the Liquor Control Board shall have prescribed different residence qualifications, examinations for such positions should be conducted and eligibility lists compiled with respect to the areas so fixed, in the same manner as we have outlined for cases in which the statute prescribes residence in a county.

If a petition to be filled may be occupied by a resident of any part of the State, the examination should be State-wide, but, of course, may be held at such places as you may designate, having due regard to the convenience of the applicants.

Applying these principles to the immediate situation, we advise you as follows:

Since examinations in all counties and for all positions were held on December 16, 1933, no appointment may be made under Section 302 of the Liquor Control Act after June 16, 1934 except from eligibility lists obtained as the result of new examinations.

The new examinations as to any county or as to any class of employment need not be held until a position in that county and class is to be filled. In cases where there is a residence qualification other than residence in the county, the examination should cover the entire area from which appointments to the position in question may be made. Where there is no residence qualification, the examination should be State-wide.

Very truly yours,

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

OPINION NO. 132

Alcoholic beverages—Malt liquor tax—Refund on sales to dealers in other states—Malt Liquor Tax Law of 1933, Sec. 10—Transportation by manufacturer or purchaser.

Under section 10 of the Malt Liquor Tax Law of May 5, 1933, P. L. 248, as amended by the Act of December 5, 1933, P. L. 50, refund of the tax imposed thereby must be made to the manufacturer or distributor, as to malt liquors sold by him to a dealer in another state, when the liquors are transferred from a point within Pennsylvania to the dealer in the other state by the manufacturer or distributor, by his agent, or by a carrier not instructed or controlled by the buyer, provided that there is compliance with all the other provisions of the act, whether or not such sale and transportation took place before or after the passage of the amendment; but in all other cases, as where the liquors are transported by the buyer or an agent acting under his instruction and control, such liquors are not shipped by the manufacturer or distributor within the meaning of the act, and no refund should be granted as to them.

Department of Justice,

Harrisburg, Pa., May 12, 1934.

Honorable Leon D. Metzger, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning the granting of stamp or crown refunds as provided by Section 10 of the Malt Liquor

Tax Law, as amended, under various situations hereinafter set forth. All of these situations deal with various methods by which malt liquors are shipped or transported to persons in other states; and they will be individually stated and discussed after we have briefly examined the provisions of the section in question.

Section 10 of the Act of May 5, 1933, P. L. 248, as amended by the Act of December 5, 1933, Special Session P. L. 50, known as the Malt Liquor Tax Law, provides as follows: (Words in brackets were stricken out and words in italics were added by the amendment.)

> "In case any [beverages] *malt liquors* upon which stamps or crowns have been placed by [manufacturers or distributors] *a manufacturer or distributor* have been sold and shipped *by him* to a *licensed or* regular dealer in such [beverages] *malt liquors* in another state, [the seller] *such manufacturer or distributor* in this Commonwealth shall be entitled to a refund of the actual amount of tax paid *by him* upon condition that the seller in this Commonwealth shall make affidavit that the [beverages] *malt liquors* were so sold and shipped, and that he shall furnish from, the purchaser, [a written acknowledgment] *an affidavit* that he has received such [beverages] *malt liquors for sale or consumption outside the Commonwealth,* and the amount of stamps or crowns thereon, together with the name and address of the purchaser, whereupon the department shall, with the approval of the Board of Finance and Revenue, issue to the seller in this Commonwealth stamps or crowns of sufficient value to cover the refund."

Since we understand that claims for refunds have arisen under the section, both as it was originally enacted and also as amended, for the present purpose it is necessary to consider whether the addition of the words "by him," referring to manufacturer and distributor, after the word "shipped" altered or merely clarified the original intent of the section. We are of the opinion that the words referred to effected no change in the meaning of the section. Under the provisions of the act malt liquors may lawfully be sold only by manufacturers or distributors. Because of the conjunctive use of the words "sold" and "shipped," it, therefore, follows that for the purpose of this section the Legislature intended that such malt liquors be shipped by the same persons who sold them, namely, the manufacturers and distributors.

Therefore, as a prerequisite to the granting of refunds, the section both as originally enacted and as amended requires that the malt liquors in question be shipped to the buyer in another state by the manufacturer or distributor or their agents. In your request you have referred to the manufacturer and distributor throughout as the seller, as distinguished from the buyer, and in stating the situations upon which our advice is desired, we have adopted your terminology. Those situations are as follows:

I

> Where shipment is made in the sellers' own trucks or conveyances.

In this case a refund should be granted to the seller. Actual delivery is made outside the Commonwealth by him.

II

> Where shipment is made in trucks or conveyances, other than railroad, leased by the seller under an arrangement which does not constitute the operator an independent contractor or carrier.

Here again actual delivery is made by the lessee who is undoubtedly the agent of the seller and a refund should be granted to the seller.

III

> Where shipment is made in trucks or conveyances, other than railroad, under circumstances where the operator is either a common carrier or is independently engaged in transporting for hire without any control being exercised over his activities by the buyer.

The verb "ship" is defined by the Century Dictionary and Cyclopedia as follows:

> "To deliver to a common carrier, forwarder, express company, etc., for transportation, whether by land or by water or both: as, to *ship* by express, by railway, or stage."

The word "shipped" is defined in 57 C. J. Corpus Juris, 1150, as follows:

> "The natural, and ordinary meaning of the word 'shipped' in common maritime or mercantile usage, is delivered to a carrier; placed on board of a vessel, for the purchaser or consignee, to be transported at his risk, put on board."

Therefore, if the seller made delivery of the malt liquors, as to which a refund of tax is requested, to a common carrier or to an independent transporter for hire, who is not instructed by the buyer and who is not his agent, the malt liquors have been shipped within the meaning of the Act; accordingly refund of tax should be granted if the other provisions of the section are complied with. It then becomes unnecessary to consider whether or not the carrier or transporter has secured a certificate of public convenience, or a license to operate as a common carrier from the Public Service Commission or from any similar agency of another state. It is only necessary to ascertain whether or not such carrier or transporter is acting under such instructions from the buyer as to constitute him the buyer's agent or employe.

We believe it is immaterial whether the transporter for hire has secured the permit to carry alcoholic beverages required under Section 3 of the Act of December 8, 1933 (No. 9). If he has not secured such a permit it may be that his transporting the malt liquors is illegal but the remedy is not the refusal of a refund to the person delivering the liquors to him for transportation but by a prosecution under the provisions of the statute which requires him to obtain the permit to engage in such transportation.

IV

> Where shipment is made by railroad in accordance with instructions contained in the purchase order from the buyer.

A railroad is a common carrier. When malt liquors are delivered to such carrier they are shipped within the meaning of the Act. Therefore, under this situation a refund of tax should be granted as to malt liquors so transported.

V

> Where shipment is made by motor vehicle common carrier in accordance with instructions contained in the purchase order from the buyer.

There is no difference between this situation and the one described under situation four above, and a refund should be granted.

VI

> Where shipment is made by an independent contractor or motor vehicle not a common carrier in accordance with instructions contained in the purchase order from the buyer.

No categorial answer can be made covering all cases falling under this heading. If the contractor is really independent and not under the instructions of the buyer so as to constitute him the buyer's agent, delivery to him would be a shipment by the manufacturer or distributor and a refund should be granted. If, however, the carrier or contractor is actually the agent of the buyer and acting under instructions from him, no refund should be granted, because delivery to such carrier would be undistinguishable from delivery to the buyer himself or his employe in this Commonwealth; and shipment in such case would not be made by the manufacturer or distributor but on the contrary by the buyer.

VII

> Where shipment is made by motor vehicle common carrier, engaged by the buyer, with no instructions to the seller as to the method of transportation prior to the time of actual sale and shipment.

If the seller delivers malt liquors to a common carrier, such malt liquors are shipped within the meaning of the section, and it is immaterial that the carrier himself has carried or presented the order of the buyer to the seller. The presentation of the order to the seller is not an act of the carrier as a common carrier but is merely an accommodation to the purchaser. The order may and probably will designate the transporter as the carrier but if he is actually a common carrier and not the agent of and under instructions from the buyer, shipment by the manufacturer or distributor is made when delivery of the malt liquors is made to him by the seller, and a refund should be granted.

VIII

> Where shipment is made by motor vehicles not a common carrier engaged by the buyer, with no instructions to the seller as to the method of transportation prior to the time of actual sale and shipment.

In this case the operator of the motor vehicle is by definition not a common carrier. He is, obviously, engaged by the buyer and is the buyer's agent. Delivery to such transporter is not shipment by the manufacturer or distributor but is delivery to the agent of the purchaser in Pennsylvania and subsequent shipment is actually made by the buyer. Therefore, no refund should be granted in this case.

IX

> Where shipment is made by seller previously arranged for by buyer in a truck owned by the buyer which is hired or leased by the seller for the purpose of transporting malt liquors.

When the seller by a bona fide agreement hires or leases the purchaser's equipment for the purpose of the shipment and the making of delivery, the equipment is controlled by the seller. For the time being it may be said to belong to the seller. There is, therefore, no difference between this situation and the one described in situation I and II above and a refund should be granted in this situation for the same reason.

X

Where shipment is made in buyer's own trucks and conveyances.

No refund should be granted in this case. No shipment is made by the manufacturer or distributor; but delivery of malt liquors is made directly by the seller to the buyer in the Commonwealth of Pennsylvania.

CONCLUSION

In conclusion you are advised that when malt liquors are transported from a point within Pennsylvania to a licensed or regular dealer in such beverages in another state by the manufacturer or distributor, by his agent or by a carrier not instructed or controlled by the buyer, the beverages are shipped by the manufacturer or distributor within the meaning of the Act and a refund of tax as to such beverages should be granted to him, provided there is compliance with all the other provisions of the Act; but in all other cases, as where the malt liquors are transported by the buyer or an agent acting under his instructions and control, such liquors are not shipped within the meaning of the Act by the manufacturer or distributor and no refund as to them should be granted.

Very truly yours,

DEPARTMENT OF JUSTICE,
JOHN Y. SCOTT,
Deputy Attorney General.

OPINION NO. 133

Banks and banking—Directors—Eligibility to serve—Person "holding office" in State department—Head of department—Deputy—Employe—Banking Code of 1933, Sec. 502(f)—Department of Banking Code of 1933, Sec. 301—Prothonotary—Receipt of and accounting for public moneys.

1. An office holder, within the meaning of section 502 (*f*) of the Banking Code of 1933, making a person "holding office" in any of the several State departments therein enumerated ineligible to serve as director or trustee of an incorporated banking institution, is a member of such a department having a defined, fixed, and certain tenure of office, taking an oath of office, charged with some degree of executive responsibility in the exercise of a sovereign power of the Commonwealth, and allowed some exercise of discretion in the performance of his duties.

2. Broadly speaking, only heads of departments and their deputies are persons "holding office" in State departments, within the meaning of section 502 (*f*) of the Banking Code of 1933; the phrase does not include clerks, stenographers, or per diem employes.

3. Under section 301 of the Department of Banking Code of 1933, no officer or employe of the Department of Banking is eligible to serve as director or trustee of an incorporated banking institution.

4. The prothonotary of a court of common pleas, being authorized and required to collect, account for, and pay over certain State taxes on fees received from litigants and their representatives, under section 611 of The Fiscal Code of 1929, is a "person authorized to receive and account for the public moneys of this Commonwealth", within the meaning of section 502(*f*) of the Banking Code of 1933, and is ineligible to serve as director or trustee of an incorporated banking institution.

Department of Justice,

Harrisburg, Pa., May 23, 1934.

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

Sir: You have asked to be advised whether a prothonotary of a court of common pleas and any employe of your department, the Treasury Department, the Auditor General's Department, or the Department of Revenue is eligible to serve as director or trustee of an incorporated banking institution under your supervision

Section 502-F of the Banking Code, approved May 15, 1933, P. L. 624 provides, inter alia, as follows:

> "The following shall not be eligible to be directors or trustees in any incorporated institution:
>
> * * * * * * * *
>
> "(2) Any person holding office under this Commonwealth in the Department of Banking, the Treasury Department, the Auditor General's Department, or the Department of Revenue;
>
> "(3) Any person authorized to receive and account for the public moneys of this Commonwealth."

I

You inquire to what extent the phrase "holding office" in any one of the four departments of the Commonwealth named applies to the employes of those departments.

Clearly it applies to the heads of the departments. They hold office by virtue of election or by appointment of the Governor.

It also applies to all deputies in the departments. They hold office by virtue of appointment by their immediate superiors. They have the powers of their principals: *Commonwealth v. Greason*, 5 S. & R. 333 (1819). See also Section 213 of The Administrative Code of 1929. They receive or are entitled to receive a certificate of appointment, take an oath for the faithful performance of their duties, and exercise powers directly upon authority as defined by statute or as delegated to them by the head of the department.

The phrase does not apply to those employed as clerks, stenographers or per diem workers. They do not hold office. The word "office" connotes a function charged with some degree of executive responsibility and involving the exercise of discretion in the performance of the holder's duties.

The present Attorney General, then Special Deputy Attorney General, rendered an opinion to Governor Fisher on June 7, 1927, reported in 10 D. & C. 36, involving the applicability of Section 6 of Article II of the Constitution of the Commonwealth to service by members of the Legislature on the boards of trustees of State institutions. In reviewing the authorities interpreting the words "office" and "civil office" reference was made to *Commonwealth ex rel. v. Murphy,* 25 Pa. C. C. 637 (1901), where Judge Weand said, quoting Tiedman on Municipal Corporations (page 639):

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

Continuing, Judge Weand said:

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

Attorney General Carson on July 31, 1903, rendered an opinion, reported in Report and Official Opinions of the Attorney General, 1903-04, page 226, and in 12 Pa. Dist. 587, 28 Pa. C. C. 369, in which he said that public office "involves the idea of tenure, duration, fees, the emoluments and powers, as well as that of duty, and it implies an authority to exercise some portion of the sovereign power of the State, either in making, administering or executing the laws."

In that opinion Attorney General Carson cites the case of *Olmstead v. The Mayor of New York,* 42 N. Y. Superior Ct. Reps. 481, stating (page 230):

> "* * * An employe is one who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by

> the persons employing him, and whose responsibility is limited to them, and this, too, although the person so employing him is a public officer, and his employment is in and about a public work or business.''

In his opinion rendered on May 3, 1926, to Governor Pinchot, reported in 7 D. & C. 587, First Deputy Attorney General Campbell said:

> ''It is also to be noted that the definitions of the term 'office' involve the clothing of the incumbent with some part of the sovereignty and that the duties thereof shall be of a continuous character. [Citing cases]
>
> ''The term 'office' and 'appointment' as used in Article XII, Section 2 of the Constitution, are synonymous. An 'office' is an appointment with a commission; an 'appointment' is an office without one. The distinction is immaterial. Com. ex. rel. *v.* Binns, 17 S. & R. 219, 243.''

It is our opinion that broadly speaking only the heads of the departments and their deputies ''hold office under this Commonwealth'' in the departments named in the act and that clerks, stenographers and per diem employes do not hold office. Between these categories there may be assistants or special appointees of the department heads who. upon application of the tests above cited, would be found to be holding office. Determination of their status can be made only upon consideration of the circumstances of each case.

However, so far as the employes of the Department of Banking are concerned there is a definite and complete prohibition upon their serving as directors or trustees of an incorporated banking institution of the Commonwealth.

Section 301 of the Department of Banking Code, approved May 15, 1933, P. L. 565, provides, inter alia, as follows:

> ''Neither the Secretary, nor any deputy examiner, clerk, or other employe of the Department, shall be an officer, director, trustee, manager, employe, or shareholder of, or directly or indirectly have any pecuniary interest in, any institution; nor shall he, after becoming Secretary, or a deputy, examiner, clerk, or other employe of the Department, directly or indirectly receive from any institution, or from any officer, director, or employe thereof, any sum of money or other property, whether as a gift, credit, loan, or otherwise. * * *''

II

A prothonotary of a common pleas court receives from litigants and their representatives various fees, costs, taxes, etc. in connection with litigation and also receives money for deposit in court pending determination of the rights of parties making claim to such money.

Section 611 of The Fiscal Code, approved April 9, 1929, P. L. 343, requires the prothonotaries of the several courts of common pleas to make return to the Department of Revenue and to pay through it to the State Treasurer the taxes on the several writs, entries, and transcripts prescribed by law. Such moneys are obviously public moneys of the Commonwealth.

While we do not believe that the Legislature intended to disqualify from acting as bank directors all those who collect funds later paid over to the State, the language of Section 502-F (3) of the Banking Code is so clear that we must interpret it as accomplishing that result in the case of a prothonotary.

A prothonotary is authorized to receive and account for some part of the "public moneys of the Commonwealth." Were such officer not considered as being included in the prohibition it could be interpreted to apply only to those officers of the Commonwealth receiving, depositing and safeguarding its funds as are referred to in subparagraph F (2) of the same section.

SUMMARY

Therefore, you are advised that a prothonotary of any court of common pleas, the heads of the Treasury Department, Auditor General's Department or the Department of Revenue, and any deputy thereof. and the head and all deputies, clerks and other employes of the Department of Banking are not eligible to serve as directors or trustees of any incorporated institution under your supervision. Such prohibition or disqualification is not imposed by the Banking Code on any employes of the Treasury Department, the Auditor General's Department or the Department of Revenue, such as clerks and stenographers, who act entirely under the orders of the department heads or their deputies, and who do not exercise any discretionary power or perform any service other than for those who appoint them. Between these categories there may be assistants or special appointees, whose eligibility to serve as directors or trustees of an incorporated institution under your supervision can be determined only upon consideration of the circumstances of each case.

Very truly yours,

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

OPINION NO. 134

Corporations—Organization—Articles of incorporation—Statement of purposes—Degree of precision required—Business Corporation Law of 1933, P. L. 364—Determination of applicability.

Articles of incorporation must, under section 204 of the Business Corporation Law of 1933, contain a precise and accurate statement of the purpose or purposes for which the corporation is to be organized, in such language as will permit the Secretary of the Commonwealth to determine the nature of the proposed business operations and to conclude whether the corporation is among the classes excepted from the provisions of the act, or among the classes which must obtain the approval or consent of some agency of the State before creation as a body corporate and a license or certificate before it may lawfully transact the business or businesses in which it proposes to engage.

Department of Justice,

Harrisburg, Pa., May 31, 1934.

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

Sir: We have your request to be advised whether you may lawfully file articles of incorporation which by their terms are so inclusive and all-embracing as to propose that they can include the sale of alcoholic beverages, the transaction of an insurance business, the maintenance of an educational institution and other activities which, under the application of special laws, would be subject to the supervision or approval of various departments or agencies of this Commonwealth.

The Business Corporation Law authorizes the formation of a business corporation under the provisions of that act for any lawful purpose or purposes: Section 201. It also provides that if the articles of incorporation *conform to law* the Department of State shall endorse its approval thereon and * * * shall file the articles and issue a certificate of incorporation. The articles of incorporation *when approved and filed* by the Department of State, shall constitute the charter of the corporation: Section 206.

The Business Corporation Law of 1933 does not relate to, does not affect, and does not apply to:

> (1) Co-operative associations, whether for profit or not for profit.
>
> (2) Any corporation which may be organized under the Nonprofit Corporation Law, or which, if not existing, would be required to incorporate under that act.
>
> (3) Any corporation which, by the laws of this Commonwealth, is subject to the supervision of the Department of Banking, the Insurance Department, The Pub-

lic Service Commission, or the Water and Power Resources Board: Section 4.

Section 206-B also provides if the articles are intended to create a business corporation for the transaction of any business in which a corporation may not engage without the approval of or a license from any department, board or commission of the Commonwealth, the Department of State shall refer the articles to such department, board or commission and shall not file the articles or issue a certificate of incorporation until the approval or consent of such department, board or commission shall have been endorsed on the articles.

For the purpose of the administration of the Business Corporation Law, bodies corporate may be classified in three classes:

1. Associations and corporations to which the act does not apply.

2. Corporations which may be created under the provisions of the act subject to the approval or consent of an appropriate State agency.

3. Corporations which may be created under the provisions of the act for any lawful purpose or purposes.

It thus appears that corporations may not be created under the Business Corporation Law for corporate action in certain fields defined by Section 4 of the act; that they may be created for any lawful purpose or purposes in certain fields defined by Section 206-B of the act subject to the approval or consent of an appropriate State agency; and that subject to the classes excepted by Section 4 of the act and proviso noted, corporations may be created for any lawful purpose or purposes.

It is obvious from this analysis that the Department of State must be advised of the nature of the business which the proposed corporation undertakes to transact before the department can determine whether it must refer the articles to some other State agency, or whether it may file the articles and issue the certificate as it is required to do by Section 206 of the act, or refuse to file the articles for the reason that the proposed corporation is within one of the classes to which the act does not apply.

In aid of the department in the discharge of its duty, Section 204 of the act requires the articles to contain "A precise and accurate statement of the purpose or purposes for which the corporation is organized and that it is organized under the provisions of [this] *the* act."

"Precise" has been defined to mean: "Accurately expressed, definite, exact."

"Accurate" has been defined to mean: "Careful, precise, in exact conformity with a standard or with truth."

The fact that the act excepts certain classes of corporations from its provisions, and provisionally includes other classes as well as the provision that the purpose or purposes shall be precisely and accurately stated, excludes any interpretation which would permit the purpose to be deduced from a general statement that the incorporators seek to create a corporation under the Business Corporation Law or that the corporation is to be created for the purpose of transacting any lawful business. A business may be lawful but not within the field to which business corporations are limited. Again, a business may be lawful in the sense that it is not prohibited and not against public policy but a corporation may undertake to engage in it only if it be licensed to transact such business.

Therefore, we advise you that articles of incorporation which are offered for filing under the Business Corporation Law may be filed only when the purpose or purposes are precisely and accurately stated in such language as will permit you to determine the nature of the business operation or operations in which the corporation undertakes to engage and by such determination to conclude whether the proposed corporation is among the classes excepted from the provisions of the act or among the classes which must obtain the approval or consent of some agency of the State before it may be created a body corporate, and a license or certificate before it may lawfully transact the business or businesses in which it proposes to engage.

Yours very truly,

DEPARTMENT OF JUSTICE,

S. M. R. O'HARA,

Deputy Attorney General.

OPINION NO. 135

Counties—Audit of commissioners' accounts—Taxpayers' appeal—General County Law of 1929, sec. 1035—Inspection of records—Right to mandamus—Venue of proceeding.

1. Taxpayers appealing from the report of auditors, on behalf of a county, under section 1035 of The General County Law of 1929, are for the purposes of that litigation official representatives of the county, and as such they have a right to examine the commissioners' records which form the basis of the controversy, even though it would be incumbent upon the latter to produce those records at trial.

2. While a mandamus proceeding to compel the inspection of county officers' records would ordinarily be instituted in Dauphin County, the Department of Justice may direct that it be brought in another county if it is supplementary to litigation already pending there.

Department of Justice,

Harrisburg, Pa., June 7, 1934.

In Re Petition of Fred Behrens for Writ of Mandamus Against the Commissioners of Monroe County

Fred Behrens has presented to the Attorney General his petition praying that a proceeding in mandamus be instituted to require George Woolbaugh, Peter C. Van Buskirk and Harry F. Mackes, the County Commissioners of Monroe County to permit the petitioner to inspect records, accounts, minute-books and other documents in the office of the respondents.

Behrens is one of ten or more taxpayers of Monroe County, who in behalf of the county, have appealed to the Court of Common Pleas of that county from the report of the county auditors for the year 1932, in accordance with the provisions of Section 1035 of the County Code of May 2, 1929, P. L. 1278.

Before presenting this petition to the Attorney General the petitioner had applied to the Court of Common Pleas of Monroe County for an order on the county commissioners to permit examination of the records. That application was made in the appeal proceeding. The court, by Judge Samuel E. Shull, refused the application. The grounds on which the refusal were based were first, that in the absence of specific legislative authority, the records of the county commissioners' office were not open to examination by the public and that the petitioner had not shown any special interest in the records; and secondly, the court suggested that the proper procedure to obtain the relief there sought would be by petition for mandamus. However, it does not appear that the portion of the County Code hereinafter quoted was called to the court's attention.

Thereupon the present petition was filed.

The petition alleges the pendency of the appeal from the audit, possession by the respondents of records of the county upon which the audit was based and which are involved in the appeal. It further avers the refusal of respondents to permit the petitioner to examine the records.

An answer was filed in which the respondents admitted most of the allegations of the petition but alleged that the petitioner had been given access to the books for an extended period and that there was no need for further examination.

A hearing was held in the office of the Attorney General at which the petitioner was present in person and with counsel, as likewise were the respondents and their attorneys.

From the testimony produced at the hearing it was clear that the petitioner did examine the records in the office of the commissioners;

but that occurred before publication of the audit from which this appeal was taken, and petitioner then looked only at books other than those demanded here.

Both parties have cited to us cases which they consider support their respective positions. Petitioner relies primarily on two unreported cases in Luzerne County in which the court of common pleas made orders for the examination of records similar to the order sought by the petitioner in the Court of Common Pleas of Monroe County above referred to. The respondents have pointed to a number of cases which refused permission to examine certain public records and which stated generally that in the absence of statutory authority, the public does not have a right to examine every public record, and that only persons having a direct interest therein may do so.

We have no inclination to dispute the authority of the principles laid down by respondent's cases. But do not persons who have appealed from a county audit have an interest in the county records which is distinct from that of an ordinary member of the general public? We cannot escape a conviction that the question is sufficiently important to warrant the institution of a mandamus proceeding in which the matter can be tested and in which the decision of an appellate court may be obtained.

Section 1035 of the County Code of May 2, 1929, P. L. 1278, under which the appeal from the audit was taken, contains the following language:

> "Appeals *in Behalf of County* by Taxpayers.—Any ten or more taxpayers of the county may, *in behalf of such county,* appeal from the report of its county auditors or controller to the court of common pleas, or prosecute any suit or action in behalf of said county, or defend such county in any suit, process or action now pending, or that may be brought against such county, by appeals from county auditors' or controllers' reports or otherwise. * * *" (Italics ours)

It is clear from the statutory language just quoted that persons in the position of this petitioner are not acting as intermeddlers; they are not seeking to examine these books simply as members of the general public. In a sense they have a special interest in these records because they are involved in litigation which involves the records. But more important still is the fact that above any individual interest which these persons may have as litigants, they are, by virtue of express statutory provision, the representatives of the county itself. For the purposes of this litigation they are official representatives of the county, and the county commissioners are individuals defending their official conduct. It would be a strange situation indeed if persons who, under express authority of the Legislature, have become the representatives of the county to protect the county from alleged wrong-doing, and who have been required to give bond for their good faith and success, should be denied access to the records of the county which form the basis of the controversy, and if those records may be kept closed in the possession of the persons whose administration is to be examined in the litigation.

It seems to us that the intention of the Legislature can be carried out and its purposes accomplished in an orderly manner only if persons who have been willing to assume the responsibility of the appeals in behalf of the county are given every proper assistance to examine the records in question, not only by themselves but with such expert assistance as they may deem necessary, of course under reasonable restrictions and safeguards.

It was suggested by Judge Shull that there was no need for such an examination of the records because at the trial the burden of proof will be on the county commissioners, and it will be incumbent on them to bring into court all pertinent records where the appellants may examine them.

A similar suggestion was before the Supreme Court recently in *Allegheny County Election,* 314 Pa. 183 (1934), a case which involved the examination of records of a prothonotary's office which were involved in an election contest. The court said (p. 188):

> "* * * In Election Contests, 65 Pa. 20, 31, we said: 'The object of the law is to give to the people a remedy. It is their appeal from the election board to the court from an undue election or a false return. The law is therefore remedial, and to be construed to advance the remedy * * * it is not to be supposed the legislature, representing the people, intended to subject the remedy to unreasonable or impossible conditions.' So, too, in Moock *v.* Conrad, 155 Pa. 586, 597, it is stated that 'A contested election is the proceeding devised by the people and established by law for the exposure and correction of either fraud or mistake on the part of the election officers, in making up and certifying the results of an election. The laws regulating the proceedings should be liberally construed and administered, in aid of the right of suffrage and the purity of popular elections.'
>
> "Finally, the fact that we have preferred to answer this appeal by quotations from the relevant statutes, must not be misconstrued into the belief that we would reach a different conclusion if those statutes did not exist. Admittedly, the records desired are in the custody of the prothonotary of the court of common pleas and that tribunal is not required to withhold from interested parties the right of seeing them until its officer is subpoenaed to produce them on the trial of the contested election case. *The only result of this would be to cause*

> *unnecessary delay in that trial, benefiting no one, especially in times like these, when delay in judicial proceedings should be the last thing favored by other already overburdened courts."* (Italics ours)

The petition presented to the Attorney General requested that the proceeding in mandamus be instituted in the Court of Common Pleas of Dauphin County. In an ordinary case that request would be granted. However, since the present case involves, and in a sense is supplementary to litigation already pending in the Court of Common Pleas of Monroe County, we feel that that court is the proper forum for the institution of the proceeding here sought. It is true that that court has already dismissed a rule to accomplish the same result which the mandamus proceeding will seek, but, as we have pointed out, Judge Shull himself indicated that the proper method to raise the question was by mandamus. Presentation of the petition in the Court of Common Pleas of Monroe County will set in motion an orderly procedure for having the matter determined in such a way that the matter may be carried to the Supreme Court for final decision. Such an appeal was not possible from the prior ruling of the Court of Common Pleas of Monroe County since that was but an interlocutory order.

Counsel for the petitioner may submit form of petition for the signature of the Attorney General.

HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 136

Credit unions—Organization—Notice of application—Publication in legal newspaper—Act of May 3, 1909—Act of May 26, 1933—Repeal of earlier act—Inconsistency—General repealing clause.

1. Under the Act of May 3, 1909, P. L. 424, as last amended by the Act of April 9, 1931, P. L. 20, notice of intention to apply for a charter for a credit union must be advertised in the legal newspaper of the proper county as well as in one newspaper of general circulation, as required by the Act of May 26, 1933, P. L. 1076.

2. A statutory provision requiring advertisement in one newspaper of general circulation is not inconsistent with an earlier act providing that, whenever a statute requires publication of an advertisement in a newspaper of general circulation, it shall also be published in the proper legal newspaper, and a general repealing clause in the latter act does not therefore repeal the earlier one.

Department of Justice,

Harrisburg, Pa., June 7, 1934.

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

Sir: We have your request to be advised whether notice of the intention to apply for a charter for a credit union, to be created under the provisions of the Act of May 26, 1933, P. L. 1076, must be advertised in the legal newspaper of the proper county, issued at least weekly, in addition to publication in one newspaper of general circulation printed in the county where the principal place of business is situated.

The Act of May 26, 1933, P. L. 1076, providing for the incorporation of cooperative savings and credit associations, also known as credit unions, requires, in Section 2B, that notice of intention to apply for any such charter be published in one newspaper of general circulation printed in the county where the principal place of business is situated. By Section 24 of that act, all laws and parts of laws inconsistent therewith, are repealed.

The Act of May 3, 1909, P. L. 424, as amended, provides that in all counties of the first, second, third, fourth and fifth classes, every notice or advertisement required by law or rules of court to be published in one or more newspapers of general circulation, unless dispensed with by special order of court, shall thereafter also be published in the legal newspaper, issued at least weekly, in these counties, designated by rules of court for the publication of court or other legal notices if such legal newspaper exists. This act was last amended by the Act of April 9, 1931, P. L. 20.

Clearly, unless the Act of 1909, as amended, has been repealed by the provisions of the Act of 1933 relating to publication and by the general repealing clause therein, the notice of intention required by the Act of 1933 must also be published in the legal journal of the proper county. In our opinion, the provision of the Act of 1933 relating to publication is not inconsistent with the provisions of the Act of 1909 and the provisions of the latter act have not been repealed by the general repealing clause of the Act of 1933.

We find support for our position in *Kulp v. Luzerne County,* 20 Pa. Super. 7 (1902). The question presented in that case was whether the Act of February 12, 1863, P. L. 28, providing for additional publication in the legal journal of the county, was repealed by the Act of July 30, 1897, P. L. 464, relating to the publication of lists of applicants for liquor license. The court, in an opinion by Beaver J., said, at page 12:

> "It is argued by the appellant that, under the provisions relating to publication and repeal as above quoted, the act of 1863, supra, is, by the general repealing clause and by necessary implication, repealed. We do not so regard it. The act of 1897 is not necessarily inconsistent with the act of 1863. The provision in the latter is for notice of publication in addition to the publications then required by existing laws and can be construed to be in addition to the publication which might thereafter be required by legal enactment, and this we take it is the correct legal construction, in the absence of a clause specifically repealing the act of 1863. It was so held in Kulp *v.* Luzerne County, 7 Kulp, 312, so far as the act of 1887 was concerned. The act of 1897, although containing a general repealing clause as to laws inconsistent therewith, does not in legal effect repeal the act of 1863 any more than did the act of 1887. We think the two acts can stand together, without inconsistency or repugnance and should be so construed."

Therefore, you are advised that notice of intention to apply for a charter for a cooperative savings and credit association, or "credit union," must be published in the legal journal of the proper county as required by the Act of 1909, P. L. 424, as last amended by the Act of April 9, 1931, P. L. 20, in addition to publication in a newspaper of general circulation as required by the Act of May 26, 1933, P. L. 1076.

Yours very truly,

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

OPINION NO. 137

Trusts and trustees—Corporate fiduciary—Statutory restrictions on investments—Waiver by instrument creating trust—Validity—Investment of funds—Purchase of securities from commercial department—Banking Code of 1933, Sec. 1111.

While the creator of a trust may authorize his trustee to invest in securities other than those designated by the Fiduciaries Act of 1917 as legal investments for trust funds, he may not authorize a corporate fiduciary operating under the supervision of the Department of Banking to purchase securities from its commercial department for trust investments, in violation of Section 1111 of the Banking Code of 1933, nor may he waive the application of any other provision of the law relating to the powers and functions of the corporate fiduciary or regulating its execution of the trust.

Department of Justice,

Harrisburg, Pa., June 8, 1934.

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

Sir: In your letter of March 7 you advise that an institution under your supervision acting as trustee under a life insurance trust agreement, has since July 3, 1933, invested assets of the trust in mortgages which were formerly the property of the commercial department and were not earmarked for trust investment. You ask to be advised whether this is a violation of Section 1111 of the Banking Code, approved May 15, 1933, P. L. 624, and effective July 3, 1933.

Section 1111 provides as follows:

> "A bank and trust company shall not, directly or indirectly, purchase with funds held by it as fiduciary, or exchange for any real or personal property held by it as fiduciary, any asset of its commercial department, but this prohibition shall not apply in the case of bonds or other interest-bearing obligations of the United States, of this Commonwealth, or of any county, city, borough, township, school district, or poor district of this Commonwealth, nor in the case of assets of its commercial department earmarked for future trust investment at the time of acquisition by the commercial department, and purchased or exchanged, within one year after acquisition, with funds or for property held by it as fiduciary. A report shall be made monthly to the board of directors and to the Department of all transactions, including earmarked acquisitions, within the exception to the foregoing prohibition."

It appears that the third article of the life insurance trust agreement provides, in part, as follows:

> "II. In making or disposing of any investments, the Trustee may purchase the same from, or sell the same to, Company of , as freely as it might or could deal with an independent third party and without any greater responsibility, all rules or provisions of law to the contrary being hereby expressly waived."

The question to be determined is whether or not the creator of a trust may authorize a State institution acting as fiduciary to do what the Banking Code prohibits it from doing.

There are several sections of the Banking Code making provision for the investment of trust funds by a bank and trust company or a trust company. Section 1108 provides for the segregation and designation of such funds, the deposit of uninvested funds and the pledging of securities of certain limited character to safeguard such funds when deposited in the company's commercial department.

Section 1109 authorizes the creation and operation by a trust company or a bank and trust company of mortgage or security pools for the investment of fiduciary funds. It imposes certain regulations upon the institution acting as fiduciary in operating the pool.

Section 1110 prohibits a bank and trust company or a trust company from lending funds held by it as fiduciary to its officers, directors, or employes and provides that any director, officer or employe granting or accepting such loan with knowledge that it was granted in violation of the section shall be guilty of a misdemeanor.

In our opinion, these sections and Section 1111 are mandatory upon institutions under your supervision which function as fiduciaries. They apply to incorporated institutions which are governed by the provisions of the Banking Code and which function subject to your supervision, as provided by that Code and the Department of Banking Code, approved May 15, 1933, P. L. 565.

These provisions of the law do not affect the right of an individual acting as a trustee, executor, or in any other fiduciary capacity. Limitations upon individuals as fiduciaries with respect to the investment of funds held by them in such capacity are prescribed by Section 41 (a) 1 of the Fiduciaries Act, approved June 7, 1917, P. L. 447, as last amended by the Act of April 26, 1929, P. L. 817, providing, inter alia, as follows:

> "When a fiduciary shall have in his hands any moneys, the principal or capital whereof is to remain for a time in his possession or under his control, and the interest, profits, or income whereof are to be paid away or to accumulate, or when the income of real estate shall be more than sufficient for the purpose of the trust, such fiduciary may invest such moneys in the stock or public debt of the United States; or in the public debt of this Commonwealth; or in bonds or certificates of debt constituting the direct and general obligation of any of the counties, cities, boroughs, townships, school districts or poor districts of this Commonwealth; or in first mortgages on real estate in this Commonwealth, securing bonds or other obligations not exceeding in amount two-thirds of the fair value of such real estate; or in ground rents in this Commonwealth; or in bonds, payable not more than twenty years after date, of one or more individuals, secured by a deed or deeds of unencumbered real estate in this Commonwealth conveyed to a corporation organized under the laws of this Commonwealth and authorized to act as trustee, in trust for the benefit of all such bondholders, but the total amount of any such bond issue shall not exceed two-thirds of the fair value of the

> real estate securing it, and the trustee shall not be exempted, by contract or otherwise, from responsibility for performing the ordniary duties of trustees; or in trust certificates, issued by a trust company organized under the laws of this Commonwealth, certifying that the holders thereof are respectively the owners of undivided interests in deposits, with such trust company, of securities in which trust funds may be invested under the preceding provisions of this clause: Provided, That nothing herein contained shall authorize any fiduciary to make any investment contrary to the directions contained in the will of the decedent in regard to the investment of such moneys."

It will be noted that the proviso quoted applies to a corporate, as well as an individual, fiduciary. It is restrictive. It does not extend the powers of a fiduciary. It limits a fiduciary to the trust instrument where such instrument is less liberal than the act. It does not enlarge the power of a corporate fiduciary and permit it to evade the restrictions imposed by the provisions of the Banking Code to which we have referred.

Section 1103 of the Banking Code, stating the power of a bank and trust company or a trust company to act as fiduciary, provides, inter alia, as follows:

> "Any agreement of such bank and trust company or such trust company as fiduciary shall be in the manner provided by law for the agreement of such fiduciaries, and any acts performed by the bank and trust company or the trust company as such fiduciary shall be in accordance with any provisions of law which govern such relationships. Except as specifically otherwise provided in this act, or by the instrument creating the fiduciary relationship, or by any other agreement by the parties, such bank and trust company or such trust company shall have the same powers and shall be subject to the same duties as are granted to, or imposed upon, any such fiduciaries by the laws of this Commonwealth."

The clause, "Except as specifically otherwise provided in this act," evidences the legislative intent that the provisions of Section 1111 shall operate as a limitation on the general power granted.

As stated in its title, the Banking Code relates to the business of banking and to the exercise of fiduciary powers by corporations. It defines the rights, powers, duties, liabilities and immunities of such corporations with or without fiduciary powers and of the officers, directors, trustees, shareholders, attorneys, and other employes of all such corporations.

In our opinion, it is entirely proper and legal for a testator or trustor creating a living trust to make provision in the indenture creating the trust for the investment of its assets in securities other than those designated by the Fiduciaries Act as legal investments for trust funds. It is an entirely different matter, however, for the creator of a trust to override, intentionally or otherwise, any provisions of the laws of the Commonwealth which specifically bear upon the corporate powers and functions of a corporation created under the laws of the Commonwealth. If it were legal for a testator or settlor to do this, it could result in the gradual weakening of the law regulating the activities of corporate fiduciaries. It would permit a corporate fiduciary, with the consent and perhaps through the connivance of individuals dealing with it, to render entirely inoperative the intent of the Legislature to restrict the scope of action of a corporate fiduciary. It would permit it to fall into the same unfortunate practices as caused disaster to many trust estates during the period when corporate fiduciaries were given a free rein which the Legislature of 1933 in no unmistakable terms sought to check.

Therefore, in our opinion, no institution under your supervision acting in a fiduciary capacity may execute a trust in such manner as to violate the provisions of Section 1111 of the Banking Code. In the situation concerning which you inquire, the action of the trust company in investing assets of a life insurance trust in securities owned by its commercial department and not earmarked for trust investment at the time of their acquisition is illegal and violates Section 1111 of the Banking Code.

Very truly yours,

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

OPINION NO. 138

Alcoholic beverages—Liquor Control Board—Employes—Change of position—Necessity for examination—Supervisory positions—Encroachment on established classifications—Employment of craftsmen—Occasional or regular services—New classes of employment—Relation to existing classes—Salaries—Control by Executive Board regulations.

1. Under section 302 of the Liquor Control Act of 1933, the Liquor Control Board may not shift an employe from one position to another, whether of the same or a different nature, for which there is a separate classification and eligibility list, without requiring the employe to qualify for the new position by competitive examination.

2. The Liquor Control Board may assign to an employe the duty of supervising others who are doing work of the same type, without creating a separate classification and holding examinations for the supervisory position, but it may not

assign to such a supervisor duties properly within the scope of another established classification of employment.

3. The Liquor Control Board may employ carpenters or other craftsmen for occasional services without holding examinations and preparing eligibility lists, but may not employ such craftsmen as regular employes.

4. Where there is an immediate need for employes to do work not definitely included in any classification for which examinations were given, the Liquor Control Board may employ persons who have been examined for positions closely approximating those which it is desired to fill, but if the new work is of a distinct class the method of competitive examinations provided by the act should be followed.

5. Under section 6 of the Liquor Control Act of 1933 and section 709 of The Administrative Code of 1929, all questions of classification of employes of the Liquor Control Board for salary purposes and all questions of change of salary must be governed by the regulations of the Executive Board.

Department of Justice,

Harrisburg, Pa., June 12, 1934.

Honorable Robert S. Gawthrop, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: You have submitted for our opinion a number of matters concerning employment, promotion, and compensation of employes of the Liquor Control Board. We can best consider them by summarizing them in a series of definite questions, and answering them in order.

> 1. May the Liquor Control Board promote an employe from one position to another without requiring him to take a new competitive examination?

The Liquor Control Act of November 29, 1933, P. L. 15, Sec. 302, expressly provides that all employes shall be appointed after competitive examinations, and the person receiving the highest grade must be appointed first, and so on.

We are informed that when the Department of Public Instruction held the examinations from which present eligibility lists resulted, different tests were given to applicants for various types of positions. Even where the same examination covered several positions, each applicant was bound to elect which one he would compete for, and he was not allowed to apply or compete for more than one position. As a result, separate eligibility lists were compiled for each classification of positions.

(a) Where the Types of Employment are Fundamentally Different

There would seem to be little difficulty in this problem where the question arises as to promotion between fundamentally different classes of employment, as for example, truck drivers and store managers. Obviously one who has, by examination, qualified as a truck driver, could not be regarded as having qualified also for a position of store manager, or vice versa. Therefore, we say without hesitation that you may not shift an employe from one class of employment to a totally and fundamentally different class without requiring him to qualify in competitive examinations for the second position.

(b) Where the Types of Employment are Not Fundamentally Different

The answer is less obvious where the types of employment are not substantially different. We shall use as an example the positions of store manager and assistant manager. The same principles will apply to other employments which are closely allied in the nature of the duties required.

We understand that applicants for store managerships and applicants for assistant managerships took the same examination. However, in other cases separate examinations were given for more or less closely related positions. Where the same examination was given, it is obvious that, except for prerequisites as to prior experience, the applicant who passed the examination was in fact qualified for either position. Where different examinations were given for similar positions, the test for one might in fact have been an adequate test of the applicant's fitness for either job.

However, we are faced with the fact that you have two eligibility lists applicable to these positions, one consisting of persons who have qualified to be managers, and the other of those who have qualified as assistants. The law requires you to fill vacancies from the top of the eligibility lists. If you should promote an assistant manager to a managership, you would be filling a vacancy without compliance with that requirement. A man who has qualified as manager and who was bound to elect for which position he would try, would thus be prevented from obtaining a position; and instead, if any new appointment were made, the beneficiary would be the man at the head of the list of eligibles for assistant managerships. In our opinion, such a result would be both unfair and illegal.

Therefore, we advise you that you may not promote an assistant manager to a position as manager of a store, under the present classification of positions and eligibility lists. Or, to state the proposition in general terms, you may not promote an employe from one position to another position for which there is a separate classification and eligibility list, without requiring the employe to compete for the position in the regular way.

We suggest that from a legal standpoint the difficulty which this situation creates might be obviated by your board or the Department of Public Instruction when new examinations are given. There would seem to be no legal reason which would require separate examinations and separate eligibility lists for positions of different grades but involving similar duties. A single examination for managers and assistant managers, or perhaps for all store employes could legally be given, and a single eligibility list compiled. Or you could include in the qualifications for managers a requirement of previous experience as assistant managers.

Thus all applicants for managerships and assistant managerships might be put in a single class, and there could be no legal objection to moving an employe up within the class and then filling his vacancy from the top of the eligibility list for the general class.

2. May the Liquor Control Board assign supervisory duties to employes without further examination?

You state that it has become necessary to have persons to supervise certain of the clerical and office activities of the board. No classification for such position was included in the December examinations.

We see no objection to your assigning to an office employe, for example, the duty of supervising others who are doing work of the same class, without creating a separate classification, and holding special examinations for it. That would not be the creation of a distinct type of position. Of course, you should be careful in doing this, not to assign to such a supervisor the duties which would properly fall within the duties of another established classification of employment.

3. May the board place clerks in charge of stores?

What we have already said probably furnishes the answer to this question. In our opinion, since you have designated managers, assistant managers and store clerks in different classes and have set up separate eligibility lists for them, you may not make clerks into assistant managers or managers. Section 303 of the Liquor Control Act expressly requires that each store be in charge of a manager. A clerk cannot fill that position; consequently he may not be put in charge of a store. If, hereafter, you should group all store employes together for purposes of examination and eligibility lists, one who had qualified in the general class could act as clerk or be made a store manager.

4. May the board employ carpenters or other craftsmen without examination?

If your inquiry concerns regular employment of such persons, our answer must be "No." If you need such regular employes, competitive examinations must be held as in the case of all other employes. On the other hand, if your needs for such services are only occasional, we are satisfied that you may, without holding examinations, employ a carpenter, or other craftsman to do a specific job. Such a one would not be a regular employe, but rather an independent contractor.

> 5. May persons who have qualified for a particular class of employment be employed to do work of a different type?

You tell us that there have been occasions when you had immediate need for employes to do work not definitely included in any classification for which examinations were given. Your inquiry is whether in such cases you may employ persons who had been examined for positions closely approximating the positions which you desire to fill. There can be no objection to this as long as there is some reasonable relation between the work for which the person was examined and that for which he is employed. However, if the new work is a distinct class of work, you ought to call for examinations.

> 6. Are matters of compensation of employes subject to the regulations of the Executive Board?

Yes. Section 6 of the Act of November 29, 1933, P. L. 13, expressly provides that the Liquor Control Board shall be subject to The Administrative Code except where otherwise expressly provided by law. By Section 709 of The Administrative Code the Executive Board is given jurisdiction of all questions of compensation of employes of departments, boards and commissions. No exception is made as to your board.

Therefore all questions of classification of employes for salary purposes, and all questions of change of salary must be governed by the regulations of the Executive Board.

Very truly yours,

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

OPINION NO. 139

Pennsylvania Historical Commission—Transfer of certain historical sites and parks to the Department of Property and Supplies and the Department of Forests and Waters—Acts of June 26, 1931, P. L. 1387; April 26, 1929, P. L. 781; May 8, 1929, P. L. 1667; July 21, 1919, P. L. 1086; April 10, 1931, P. L. 23 as amended by the Act of June 22, 1931, P. L. 872 and the Act of May 21, 1931, P. L. 185.

Until the Legislature shall see fit to make a change in the designation of jurisdiction of the properties in question, responsibility for their supervision and management cannot be shifted from the Pennsylvania Historical Commission to any other department. However the cost of making repairs and improvements to buildings on these properties may be paid from the appropriation made to the Department of Property and Supplies.

Department of Justice,

Harrisburg, Pa., June 13, 1934.

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

Sir: We have your communication in which you state that the Pennsylvania Historical Commission desires to have transferred to the supervision of the Department of Property and Supplies or to the Department of Forests and Waters, the supervision and care of certain historical sites and parks. You state that this desire is founded on the fact that the commission has no facilities for supervising and managing the properties and that the interests of the Commonwealth are not being properly cared for at present.

The properties in question are Fort Augusta at Sunbury, The Pennsbury Memorial in Bucks County, Conrad Weiser Memorial Park in Berks County, Old Economy Park and Memorial in Beaver County, Drake Well Memorial Park in Crawford County, and Cornwall Charcoal Furnace in Lebanon County.

All of these properties have been accepted by the Commonwealth or dedicated to public use by specific acts of assembly as follows: Fort Augusta, Act of June 26, 1931, P. L. 1387; Pennsbury Memorial, Act of April 26, 1929, P. L. 781; Conrad Weiser Park, Act of May 8, 1929, P. L. 1667; Old Economy Park, Act of July 21, 1919, P. L. 1086; Drake Well Park, Act of April 10, 1931, P. L. 23, as amended by the Act of June 22, 1931, P. L. 872 and Cornwall Furnace, Act of May 21, 1931, P. L. 185.

Each one of the acts above mentioned specifically gives supervision, control and management of the respective properties to the Pennsylvania Historical Commission, and it is clear that the commission was expected to attend to the maintenance and preservation of the properties. As to Drake Well Park, the act directs that the Department of Forests and Waters shall cooperate with the commission "in developing forest resources of the said lands."

Appropriation Act No. 28-A of 1933 appropriated $1,200.00 to the Historical Commission for the development and maintenance of Drake Well Memorial Park. And by the General Appropriation Act of 1933, No. 300-A, the sum of $20,000.00 was appropriated to the Department of Public Instruction for the conduct of the work of the Pennsylvania Historical Commission. Thus the commission has a specific fund for the Drake Well Park as well as the general appropriation which the Legislature intended to be used, among other things, for the supervision and maintenance of these properties.

The only ground on which it might be suggested that the Department of Forests and Waters would have jurisdiction would be the provision contained in Section 1806 of The Administrative Code which directs that the department shall supervise, maintain, preserve, regulate and police all parks belonging to the Commonwealth except certain ones specifically excepted. In our opinion, this general delegation of power cannot overcome the provisions of the acts above referred to which specifically vest jurisdiction of these particular properties in the Pennsylvania Historical Commission.

The General Appropriation Act of 1933 does make an appropriation of $40,000.00 to the Department of Forests and Waters for supervision, maintenance and improvement of State parks and for the acquisition of lands to be set aside as State parks. However, we consider that appropriation as limited to parks definitely under the supervision of that department.

As to the Department of Property and Supplies, we find no provision in The Administrative Code which would give that department jurisdiction to maintain or exercise jurisdiction over these properties. Of course, if building operations were to be conducted or purchases made, the Department of Property and Supplies would have the same functions with respect to such operations as it does with similar operations by any department of the State government.

The General Appropriation Act of 1933 appropriated to the Department of Property and Supplies the sum of $900,000.00 for various purposes among which are included "alterations, materials, supplies, repairs, equipment, renovations and improvements, for or on * * * any buildings or monuments of historical interest heretofore or hereafter acquired by the Commonwealth." In our opinion, the moneys of these appropriations may be used for the work of the nature stated in the act on buildings or monuments located on the properties here in question. However, that does not give to the Department of Property and Supplies any general jurisdiction or supervision over the properties.

Therefore, we advise you that until the Legislature shall see fit to make a change in the designation of jurisdiction of the properties in question, responsibility for their supervision and management cannot be shifted from the Pennsylvania Historical Commission to any other department. However, the cost of making the repairs and improvements to buildings on these properties may be paid from the appropriation made to the Department of Property and Supplies above mentioned.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRIS C. ARNOLD,

Deputy Attorney General.

OPINION NO. 140

Banks and banking—Pledge of assets—Qualification as fiduciary in another State—Banking Code of 1933, sec. 1004.

Section 1004 of the Banking Code of 1933, prohibiting the pledge of assets by a bank or bank and trust company as security for deposits made with it, except in certain instances, does not prevent such an institution from pledging assets with the authorities of another state or with the court having jurisdiction, in accordance with the laws of that state, as a guaranty for the faithful performance of trusts assumed by it, and in order to qualify as fiduciary.

Department of Justice,

Harrisburg, Pa., June 14, 1934.

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

Sir: You have asked whether an institution which has pledged assets with authorities of another state as a guarantee for the faithful performance of trusts assumed by such institution in such other states, may (a) be required by you to terminate the pledge and secure the return of the assets pledged; and if not, may (b) accept new trusts after July 3, 1933, without a written stipulation that the pledge shall not extend as a guarantee of the faithful performance of such new trusts.

You suggest such pledges are prohibited by Section 1004 of the Banking Code, Act of May 15, 1933, P. L. 624, which prohibits the pledge of assets by a bank or a bank and trust company as security for deposits made with it, except in certain instances. We do not believe that that section of the Banking Code has any application to the problem now before us. What we are here concerned with is the pledge of assets to qualify an institution as a fiduciary, not to secure money deposited with it.

A bank and trust company or a trust company may act as trustee, guardian, receiver, executor, administrator, etc., under the provisions of Section 1103 of the Banking Code. Section 1106 provides that it shall not be required to execute the bond or put up the security required by law of fiduciaries, its capital being considered as security for the faithful performance of its duties. But this exemption does not extend beyond the borders of the Commonwealth.

If a neighboring state is willing to permit a bank and trust company or a trust company of Pennsylvania to act as a fiduciary in such state, it may impose upon the institution such terms as it deems necessary to protect its residents who are beneficiaries of the estates for which the institution acts as fiduciary. It may require posting of securities or other assets of the fiduciary with the authorities of the state or with the court having jurisdiction.

There is no reason why a Pennsylvania corporate fiduciary should not comply with such requirements. If it does so, it does not violate any provisions of the banking laws.

Our reasons for this conclusion follow:

(1) A Pennsylvania bank and trust company or trust company has the power to serve in a fiduciary capacity beyond the boundaries of the Commonwealth. This power is not specifically recited in the Banking Code. But it is a power that many of our corporate fiduciaries have exercised for years, the existence of which the Code by the strongest implication recognizes.

> "A corporation, organized under the laws of any state of the United States other than Pennsylvania, shall not have authority to act in this Commonwealth as trustee, guardian, executor, administrator, or in any other similar fiduciary capacity, unless it shall be appointed such fiduciary by any last will and testament, or codicil thereto, or other testamentary writing, or by deed of trust inter vivos, or by any court or register of wills of this Commonwealth, and unless the laws of such other state confer like powers upon corporations organized under the laws of this Commonwealth but such corporations organized under the laws of another state shall be required to give such bond or other security as shall be deemed adequate by the court or register of wills in the Commonwealth having jurisdiction over the estate of which the corporation is acting as trustee, guardian, executor, administrator, or similar fiduciary."

(2) Having the power to serve as fiduciary in another state, a Pennsylvania institution is authorized to meet the prerequisites to such service imposed by the laws of that state and not prohibited by Pennsylvania law. Section 1506-B contemplates that the pledging of assets by the institution is a requirement to qualification that a foreign state may impose. Foreign corporations "shall be required to give such bond or other security" as Pennsylvania courts or registers of wills require. Conceivably they may require the pledge of assets. Under the reciprocal provisions of the law Pennsylvania corporate fiduciaries may be required to make such pledge in other states where they desire to function.

It is our opinion that they may do so under the Banking Code. They may continue old pledges and make new ones.

Therefore, you are advised that you need not require an institution to terminate a pledge of assets made by it prior to July 3, 1933, in another state to qualify as a fiduciary therein and that it is legal for an institution after July 3, 1933, to continue in another state its pledge of assets as a guarantee for the faithful performance of trusts assumed after that date.

Very truly yours,

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

OPINION NO. 141

Banks and banking—Mortgage pools—Prohibition by Banking Code of 1933—Continuation of old pool—Maintenance for trust estates—Issuance of participation certificates in single mortgage—Sale and assignment of mortgage—Guaranty of certificates or mortgages.

A bank or bank and trust company may not, under section 1013 of the Banking Code of May 15, 1933, P. L. 624, create a new mortgage pool and issue participations therein after July 3, 1933, the effective date of that act, except that under section 1109 it may create such a pool for estates for which it is fiduciary.

A bank or bank and trust company may, after the effective date of the Banking Code of 1933, continue to maintain a mortgage pool theretofore created and issue certificates against it, but it must from time to time, as conditions permit, liquidate the pool and terminate its liability with respect thereto, and may not replenish it by reinvesting in additional mortgages.

A bank or bank and trust company may not, except to estates for which it is acting as fiduciary, issue participations in an individual mortgage, title to and control over which it continues to hold, but it may sell an absolute interest in a single bond and mortgage to a purchaser if it delivers to him a duly acknowledged assignment of such absolute interest.

A bank or bank and trust company may not, under section 1021 of the Banking Code of 1933, issue or give a guaranty of any participation certificate, bond, or mortgage issued or held by it.

Department of Justice,

Harrisburg, Pa., June 15, 1934.

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

Sir: You have asked to be advised whether or not a bank or a bank and trust company after July 3, 1933, may issue and deliver to the public certificates of participation in mortgage pools created prior to that date, sell to the public participations in individual mortgages held by it, and guarantee any participation certificate, bond or mortgage.

I

Section 1013 of the Banking Code, Act of May 15, 1933, P. L. 624, provides as follows:

> "A. Except as otherwise specifically provided in this act, a bank or a bank and trust company shall not have the power to establish a pool or fund of any bonds secured by mortgages, or of any securities, and to sell to any particular corporations or persons, or to the general public, fractional undivided interests therein.
>
> "B. This section shall not be construed to affect a pool or fund of bonds secured by mortgages, or of securities, created by a bank or a bank and trust company prior to the effective date of this act."

Paragraph A of Section 1109 of the Code provides, inter alia, as follows:

> "A trust company, or a bank and trust company in its trust department, may establish a pool or fund of bonds secured by mortgages, or of other securities, purchased solely with funds of estates held by it as fiduciary. * * *"

Clearly no new mortgage pool may be created by any institution under your supervision after July 3, 1933, the effective date of the Banking code, except for estates for which the institution is fiduciary.

The continued operation of a mortgage pool created before July 3, 1933, for other than trust estates, is not prohibited by the Code. After that date a certificate issued against a pool in which participations have been sold to the public may be exchanged for a new certificate issued against the same pool. Such new certificate may be issued to the holder of the old certificate or to a new holder. A new certificate in an amount less than that of the old certificate may be issued when the occasion requires it.

However, the pool may not be replenished from time to time and thus be maintained perpetually. The intent of the Legislature was to prohibit the operation of mortgage pools and the sale of participations therein to the public. At the same time the Legislature has permitted existing pools to continue in operation until participants therein are paid off.

An institution maintaining a pool on July 3, 1933, must from time to time distribute to the certificate holders the cash proceeds of mortgages which have been paid in full or in part, so that eventually the pool will be finally liquidated and the institution's liability therefor terminated. It may not reinvest such funds in additional mortgages for the pool.

II

With regard to the issuance to the public of participations in a single mortgage held by an institution and under which it continues to hold title and complete control of the mortgage, the Banking Code is not altogether clear. The practice heretofore followed by banks and bank and trust companies in selling such participations, whether or not evidenced by certificates of participation, may have been based upon or assumed from the power to create pools and issue participations therein. This power was connected with that given by legislation to what were then called "trust companies" to act in a fiduciary capacity. Section 29 of the Act of April 29, 1874, P. L. 73, as amended by the Act of May 9, 1889, P. L. 159, Clause 5, as last amended by the Act of April 11, 1929, P. L. 512, gives the power to an institution engaged in fiduciary activities to assign to trust estates participations in a general trust fund of mortgages upon real estate securing bonds held by the institution.

Under such prior existing law it is questionable whether, except for pools established for the benefit of estates for which the institution was fiduciary, there was any power in a bank or in a trust company (now a bank and trust company) to set up and maintain pools and sell participations therein to the public generally. Whether or not they did have such power it is clear that under the Banking Code they do not have it. If authority for the sale to the public of participations in individual mortgages was dependent on or derived from such power, it does not exist under the Banking Code, which repealed the prior law.

Section 1001 of the Banking Code gives to banks or bank and trust companies, in addition to the general corporate powers granted by the act, various other powers, as therein enumerated. The power to sell participations in mortgages is not included among such enumerated powers. The omission is significant. If the Legislature had intended that after July 3, 1933, banks and bank and trust companies should have the power to purchase mortgages and, in turn, to sell participations therein to the public, while continuing to hold title and control thereof, it is our opinion that it would have so stated.

It is clear that a bank or a bank and trust company is permitted under certain circumstances to invest its assets in a mortgage. Section 1001-A (5) gives banking institutions the power:

> "To discount, buy, sell, negotiate, or assign promissory notes, drafts, bills of exchange, trade and bank acceptances, stocks, bonds, or other evidences of debt;"

A mortgage is an evidence of debt. But it is one thing for an institution to purchase and to sell a mortgage for its own account. It is an entirely different matter for it to sell to the public participations in such mortgage and to continue to hold title thereto. To do so requires that the institution have a fiduciary relationship with those to whom it has sold such participations, as it alone is the mortgagee named in the mortgage and it must hold it for the benefit of those who have beneficial interests therein.

Only a bank and trust company or a trust company has fiduciary powers.

As a bank does not have the power to act in a fiduciary capacity, it is our opinion that it may not sell participations in a single mortgage. After all, dealing in mortgages and selling participations therein to the general public, and at the same time continuing to hold title thereto, is not banking.

Paragraph D of Section 1109 of the Banking Code provides as follows:

> "A bank and trust company or a trust company shall likewise have the power to create undivided interests in any single bond secured by a mortgage, or in any single security, to be apportioned among estates of which it is fiduciary, in the proportion to which their funds were used to purchase such asset. The bank and trust company or the trust company shall create and assign such interest and shall designate upon its records the names of the estates to which any such undivided interest shall have been apportioned, and may issue participation certificates therefor in the same manner, under the same conditions, and subject to the same limitations as are authorized or imposed by this section in the case of a pool of more than one bond secured by mortgages, or of more than one security."

It is significant that this phraseology, which appears in a section dealing entirely with the powers of a bank and trust company or a trust company acting as a fiduciary, is limited to the company's fiduciary relationship to the beneficial owner of the participation. It is authority for such companies to issue participations in a single mortgage to a trust estate of which it is fiduciary. It does not go beyond that.

In our opinion, neither a bank nor a bank and trust company has the power to issue and sell to the public participations in a single mortgage whereby the institution continues to hold title to and control over the mortgage.

However, there is no reason why a bank or a bank and trust company should not sell an absolute interest in a bond and mortgage, provided it delivers to the purchaser a duly acknowledged assignment of such absolute interest. If it does so, the institution has divested itself completely of the interest sold and does not continue to hold title to or control over that portion of the bond and mortgage. Such a transaction is not a sale of participation, but a sale outright of a portion of the bond and mortgage, title to which portion is thereafter absolutely in the purchaser.

III

In no event may an institution guarantee the payment of the principal and interest of bonds secured by mortgages held by the institution, whether or not participations therein have been issued by it. The Act of June 1, 1907, P. L. 382, No. 275, gave this right to trust companies. Banks chartered under the Act of May 13, 1876, P. L. 161, whether or not they acquired the right to act in a fiduciary capacity by accepting the Act of July 17, 1919, P. L. 1032, did not have the power to guarantee the principal and interest of bonds secured by mortgages upon real estate, which bonds it sold to its customers. See the opinion of Deputy Attorney General Anderson to then Secretary of Banking Cameron, dated December 3, 1926 (Official Opinions of the Attorney General, 1925-26, p. 150, 8 D. & C. 599).

Section 1021 of the Banking Code specifically prohibits an institution under your supervision from guaranteeing the payment of the principal or the interest of bonds or other obligations secured by mortgages upon real property. Excepted from this prohibition are such guarantees as were valid and outstanding on the effective date of the act.

Summary

Therefore, you are advised that after July 3, 1933,

(1) A bank or a bank and trust company may not create new mortgage pools, except for the benefit of estates for which it is acting as fiduciary. It may maintain after that date pools theretofore created and may issue certificates against such pools, provided, however, that it must from time to time, as conditions permit, liquidate the pool and terminate its liability with respect thereto.

(2) A bank or a bank and trust company may not, except for the benefit of estates for which it is acting as fiduciary, issue participations in an individual mortgage, title to and control over which it continues to hold, but it may sell an absolute interest in a single bond and mortgage to a purchaser if it deliver to him a duly acknowledged assignment of such absolute interest.

(3) A bank or a bank and trust company may not issue or give a guarantee of any participation certificate, bond or mortgage issued or held by it.

Very truly yours,

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

OPINION NO. 142

Health Officer—Chief of Police—Policemen—Dual Offices—Borough—First Class Township—Acts of June 18, 1895, P. L. 203; April 3, 1903, P. L. 138; June 12, 1913, P. L. 471; April 7, 1927, P. L. 155; May 4, 1927, P. L. 519; June 24, 1931, P. L. 1206.

A chief of police or a policeman of a borough or of a first class township is not ineligible to serve at the same time as health officer of such borough or township, regardless of whether such health officer is appointed by the board of health thereof or is appointed in lieu of a board of health by the borough council or board of township commissioners.

Department of Justice,

Harrisburg, Pa., July 3, 1934.

Honorable Theodore B. Appel, Secretary of Health, Harrisburg, Pennsylvania.

Sir: We have your request to be advised on the following questions:

(1) Whether Section 20 of the Act of June 18, 1895, P. L. 203, as amended by the Act of April 3, 1903, P. L. 138, renders a chief of police or a policeman of a borough or first class township ineligible to be appointed a health officer by the board of health of such borough or first class township.

(2) If so, whether in the case of a borough or first class township in which the council elects to appoint a health officer or health officers in lieu of a board of health, as provided by the Act of April 7, 1927, P. L. 155, amending the Act of June 12, 1913, P. L. 471, a chief of police or a policeman of such borough or first class township likewise is ineligible for such appointment.

We shall first consider whether a chief of police or a policeman of a borough or a first class township may be appointed a health officer of such borough or township by the board of health.

Section 20 of the Act of June 18, 1895, P. L. 203, as amended by the Act of April 3, 1903, P. L. 138, provides as follows:

> "No justice of the peace, member of council, or other officers, except school directors, constables, or election officers, shall, at the same time, be a member of the board of health of such municipality, or hold any office or appointment under the same."

We shall first discuss the application of the Act of 1895, as amended, to a borough chief of police or policeman.

The real question involved is whether a chief of police or policeman is an "officer" within the meaning of that act.

The universal rule to be applied in the construction of a statute is that the legislative intent, as expressed in the statute, is to be effectuated. However, where the words of a statute create an ambiguity, or their meaning is not self-evident, the courts follow certain rules of construction in interpreting them. One of the well established rules of construction is the so-called rule of "eiusdem generis", to the effect that where general words, such as the words "or other officers" in the statute under discussion, follow an enumeration of specific persons or things, the general words will be construed to apply only to persons or things of the same general class or classes as those specifically enumerated. *Warren v. Geer,* 117 Pa. 207 (1887); *Weiss v. Swift & Company,* 36 Pa. Super. 376 (1908).

The offices of "justice of the peace and member of council" are specifically enumerated before the words "or other officers" in the Act of 1895, as amended. Both of these offices are elective. Neither bears any possible relationship to the position of policeman, either in the manner in which the offices are filled or in the duties which they entail.

The officers specifically excepted from the operation of the statute, that is, school directors, constables, and election officers, likewise indicate the classes of officers contemplated by the general term "other officers." School directors and constables were added by the amendment of 1903. While many of the duties of a constable, as they existed in 1903, corresponded to those today imposed upon a policeman, many other of his duties were quite different. In general, school directors, constables, and election officers are executive officers elected by the people.

Borough policemen and chiefs of police are appointed by the borough council. Their duties are primarily ministerial in character and subject to the entire direction and control of the burgess. They cannot be regarded as being of the general classes of officers typified by justices of the peace or members of council, nor of the classes represented by school directors, constables, or election officers.

Under the rule of construction stated above, we are of the opinion that a borough chief of police or a policeman is not barred from serving as a health officer under the board of health of the borough.

We are reinforced in our conclusion that a chief of police or a policeman is not an "officer" within the meaning of that word as used in the statute by the decisions of our courts and of this department interpreting the word "officer" as used in various statutes and in Article VI, Section 4, and Article III, Section 13, of the Constitution of Pennsylvania.

For general definitions of "holding office" and "officer," see Formal Opinion No. 133 of this department, issued May 25, 1934, and the decisions of courts and opinions of this department cited therein.

In *Commonwealth v. Black,* 201 Pa. 433 (1902), it was held that a policeman is not an "officer" within the meaning of Article VI, Section 4 of the Constitution. The court said at page 436:

> "* * * Without going into the discussion at length, we are of opinion that a policeman is a subordinate ministerial agent or employe, like a fireman, a watchman or superintendent of public squares or other property, under the orders of a municipal department. He is not an independent 'municipal officer exercising grave public functions' in the language of Houseman v. Com., supra, * * *"

The policeman there involved was a third class city policeman, but the language of the court is equally applicable to the case of a borough policeman.

In *Weaver v. Schuylkill County,* 23 C. C. 507 (1900), the court, employing language similar to that used later in *Commonwealth v. Black* and quoted above, held that a borough policeman was not an officer within the meaning of that word as used in Article III, Section 13, of the Constitution of Pennsylvania.

In our opinion the language and decisions of *Commonwealth v. Black* and *Weaver v. Schuylkill County,* which are cited above, would apply with equal force in the case of a chief of police.

A borough chief of police is merely a policeman whom the borough council has designated as chief of police. The General Borough Act (Act of May 4, 1927, P. L. 519) specifies no duties for the chief of police different from those of a policeman.

Section 1125 of that act provides as follows:

> "* * * The burgess of the borough shall have full charge and control of the chief of police and the police force, and he shall direct the time during which, the place where, and the manner in which, the chief of police and the police force shall perform its duties."

It is apparent from this provision that the duties of the chief of police, as well as those of any other member of the police force, are primarily ministerial, being subject to the complete control of the burgess.

Thus, in *Commonwealth ex rel. Morrison v. Peace,* 27 Pa. Dist. 897 (1918), the court held that no distinction in this regard could be drawn between a policeman and a chief of police, and that the rule of *Commonwealth v. Black,* from which we have quoted above, likewise applied to a chief of police.

We have been able to discover no decisions or legislation, other than those which we have cited, which bear on the compatibility of the position of borough chief of police or policeman and that of health officers appointed by a borough board of health.

Therefore, we conclude that a borough chief of police or a policeman may serve as a health officer under a local board of health.

In the case of a chief of police or a policeman of a first class township, this result is specifically effected by later legislation.

Section 1401 of the First Class Township Law (Act of June 24, 1931, P. L. 1206) provides in part, as follows:

> "* * * No policeman shall at the same time hold any public office other than constable and health officer. * * *"

Clearly the word "policeman" as used in the portion of the Act of 1931 quoted above includes a policeman who has been designated by the board of township commissioners as the chief of police.

Under our recognized rules of statutory construction, this latter statute specifically covering the compatibility of the offices of policeman and health officer supersedes any prior statute on the same subject. In Section 3502, it repeals "all other acts and parts of acts inconsistent therewith." In so far as the Act of 1895, as amended, is in conflict with the portion of the Act of 1931 quoted above, it is repealed, *Commonwealth v. Matthews,* 303 Pa. 163 (1931) and *Devine v. John Lang Paper Co.,* 307 Pa. 566 (1932).

We conclude, therefore, that a chief of police or a policeman of a first class township is not ineligible to be appointed as health officer of such township by the board of health thereof.

2. Your second inquiry is predicated upon our replying in the affirmative to your first inquiry. Since we have replied in the negative, the answer to your second inquiry becomes self-evident.

Under the Act of June 12, 1913, P. L. 471, as amended, by the Act of April 17, 1927, P. L. 155, the council of a borough may appoint a health officer or health officers in lieu of a board of health.

Since there was nothing in the law prior to the granting of this privilege to the borough council, which rendered the positions of borough chief of police or policeman incompatible with the position of a health officer appointed by the board of health, and since there are no statutes or decisions specifically bearing on the incompatibility of the position of borough chief of police or policeman with the position of health officer appointed in lieu of a board of health, the conclusion is clear that there is no such incompatibility.

In the case of first class townships, this result is specifically provided by the First Class Township Law. In Section 1601, the act provides for the administration of the health laws in a first class township either by a board of health and health officers appointed by it, or by a health officer appointed by the board of township commissioners to act in lieu of the board of health. In Section 1401 which we have discussed above the act authorizes a policeman to act as health officer. The "health officer" referred to may of course be either the health officer appointed by the board of health or the one appointed by the board of township commissioners to act in lieu of the board of health. The act uses the words "health officer" when speaking of either position.

In our opinion, therefore, the chief of police or the policeman of a borough or a first class township is not ineligible, at the same time, to be appointed as health officer of such borough or township, where the borough council or board of township commissioners, respectively, has elected to appoint a health officer or health officers in lieu of a board of health.

CONCLUSION

In conclusion, therefore, we advise you that a chief of police or a policeman of a borough or of a first class township is not ineligible to serve at the same time as health officer of such borough or township, regardless of whether such health officer is appointed by the board of health thereof or is appointed in lieu of a board of health by the borough council or board of township commissioners.

Very truly yours,

DEPARTMENT OF JUSTICE,
BERNARD G. SEGAL,
Assistant Deputy Attorney General.

OPINION NO. 143

School districts—State subsidy—Second year of biennium—Acts of May 18, 1911, P. L. 309, Sec. 1210; May 13, 1925, P. L. 681.

Payments to a school district in the second year of a biennium may not exceed the amounts calculated on the report filed in the year preceding the biennium, except on account of teachers added or schools closed. Increases because of these two reasons are permitted.

Department of Justice,

Harrisburg, Pa., July 10, 1934.

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

Sir: You have asked us whether a school district may receive in the second year of a biennium a larger State subsidy than it received in the first year of the biennium. You say that it has been the practice of your department to refuse to pay a greater amount in the second year than was paid in the first, even though changes in personnel, classification of teachers, or classification of the school district would have entitled the district to an increased amount.

The answer must depend on the construction of the Act of May 13, 1925, P. L. 681, which amended paragraphs 19 and 21 of Section 1210 of the School Code. Prior to these amendments the code required the filing of reports by school districts in the fall of the year preceding each fiscal biennium, and provided for the payment of subsidies to the districts during the biennium on the basis of the information contained in those reports, and payments in the second year of the biennium could not exceed the amounts calculated on the reports.

The Act of 1925, supra, was entitled:

> "An act to further amend paragraph nineteen and and paragraph twenty-one of section one thousand two hundred and ten of an act, approved the eighteenth day of May, one thousand nine hundred and eleven (Pamphlet Laws, three hundred and nine), * * * to provide payments for teachers added and for schools closed in the second year of the biennium."

The body of the act added the following proviso to paragraph 19:

> "* * * And provided further, That in addition to the payments herein provided on account of members of the teaching and supervisory staff employed in any school district, and on account of schools permanently closed or discontinued in any district, each distirct shall receive its proportionate share of the minimum salaries required to be paid to such additional members of the teaching and supervisory staff as may have been employed subsequent to the certificate to the Superintendent of Public Instruction in the November previous to the biennium year, and its apportionment as herein provided for additional schools permanently closed or discontinued subsequent to such certificate. Payments required by this proviso shall be made after certificate to the Superintendent of Public Instruction in the November of the biennium year in connection with and in addition to the first quarterly payment of the following biennium, as hereinafter provided."

It also amended paragraph 21 to read as follows:

> "The Superintendent of Public Instruction shall ascertain and determine the amount of funds required to meet each of the four payments to school districts which become due and payable within the two fiscal years beginning June first, one thousand nine hundred and twenty-three, and ending on May thirty-first, one thou-

> sand nine hundred and twenty-five, and each biennium thereafter, on the data and material contained in the certificates which school districts are required by law to file with the said superintendent on November first immediately preceding the beginning of each biennium, and the said superintendent shall also apportion and allot the same to and among the respective districts; *Provided, That the amount paid to any school district within any biennium shall be computed on the data and information contained in the certificates required to be filed on the first day of November of each year, as herein provided.* In no case shall the amount paid to any school district exceed the amounts computed on such data." (Italics ours)

The only change made in paragraph 21 was in the last proviso, which prior thereto had read as follows:

> "* * * Provided, That the amount paid to any school district within any biennium shall in no case exceed an amount computed on the data and information contained in their certificate required to be filed in the November immediately preceding such biennium."

The change in paragraph 19 is clear. Thereafter, if, in the second year of a biennium a school district employed additional teachers or closed schools which entitled it to additional subsidies, it was to receive the additional amounts, on the basis of reports filed in the first year of the biennium. We understand that you have regularly allowed such increases since that time, and have made up your budgets in contemplation of possible increases in the subsidies for the second year of the biennium arising from these causes.

Your present inquiry is whether you must also permit increases in subsidies within the biennium where the cause is a reclassification of the district or changed classification of teachers in the district.

Looking only at the body of the act, we would conclude that increases for any cause could be made in the second year of the biennium. The amendment to paragraph 19 authorized increased subsidies for limited purposes, but the amendment to paragraph 21 was broad enough to require all subsidies to be based on annual instead of biennial reports, and to entitle districts to increases during a biennium if their annual reports showed grounds for it.

Here, however, the title of the Act of 1925 checks our progress. If the draftsman had contented himself with entitling the act as one to amend the specified paragraphs and section of the School Code, there could be no doubt that all of the provisions of the act could stand, since they are germane to the subject of the code as it then existed. But, instead, the title attempted to specify the subject of the amendment. The Superior Court has ruled in *First National Bank of Johnstown v. Teachers Protective Union,* 109 Pa. Super. 467 (1933), that such a specification in the title of an amending act limits the scope of the act to the subject so named.

Here the title declares only the purpose of the Act of 1925 to amend the School Code with respect to payments for teachers added or schools closed during the biennium. Consequently, the force of the act is limited to those subjects in spite of the terms of paragraph 21; and as to any other matters, the School Code must be read as though the amendment of 1925 had not been made.

Therefore, we advise you that because of this defect in the title of the amendatory act, payments to a school district in the second year of a biennium may not exceed the amounts calculated on the report filed in the year preceding the biennium, except on account of teachers added or schools closed. Increases because of these two reasons are permitted.

Very truly yours,

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

OPINION NO. 144

Department of Justice.

Harrisburg, Pa., July 12, 1934.

In the matter of the petition of taxpayers of Carbon County for writ of quo warranto against the county commissioners.

Certain taxpayers of Carbon County have petitioned the Attorney General to institute quo warranto proceedings to oust Morris G. Prutzman and George H. Enzian, two of the county commissioners of that county from office. The respondents filed an answer to the petition, and by agreement of counsel the case has been considered on petition and answer.

The respondents were county commissioners of Carbon County during a prior term which included the fiscal year 1929, and were reelected in 1931 for a new term of four years beginning in January 1932.

An appeal was taken from the county auditors' report for the year 1930, alleging irregularities in the accounts of the commissioners for the year 1929. On September 22, 1933, the court of common pleas sustained the appeal and surcharged the commissioners (two of whom are the respondents here) in the sum of $129,497.61.

The charges against the commissioners which were thus sustained involved a large number of items. Moneys were expended for purposes of a public nature but not within the jurisdiction of the commissioners; other expenditures were made without compliance with prerequisites prescribed by law; minutes and records were not kept; and clerks in the commissioners' office altered checks, vouchers and minutes, apparently committing actual fraud on the county. The record, as recited in the opinion of the court, discloses a course of carelessness and incompetence on the part of the commissioners, but does not show embezzlement or actual fraud on their part. The court expressly declared that there was no testimony showing that the commissioners profited directly or indirectly by any of the transactions which necessitated the surcharges.

No prosecution has been instituted against the commissioners for any of the acts involved in the appeal proceeding.

With the record in this condition, could a quo warranto proceeding to oust the two commissioners who were reelected be successful? We are forced to conclude that it could not.

Writs of quo warranto in Pennsylvania are authorized only by the Act of June 14, 1836, P. L. 621, Sec. 2, which provides as follows:

> "Writs of quo warranto, in the form and manner hereinafter provided, may also be issued by the several courts of common pleas, concurrently with the supreme court, in the following cases, to wit: * * *
>
> "II. In case any person, duly elected or appointed to any such office, shall have done, suffered, or omitted to do, any act, matter or thing, whereby a forfeiture of his office shall by law be created."

The statutory provision just quoted leads us to an inquiry as to what act, if any, is shown by the present record whereby a forfeiture of office has by law been worked.

The grounds of forfeiture of the right to hold office fall into two broad classes. The first includes the large group of cases in which the simple happening of an event or the commission of an act, whether it involve misconduct or not, disqualifies a person from holding office. Thus, where residence is a qualification, loss of that residence works a forfeiture: Act of May 15, 1874, P. L. 186, Sec. 12. Similarly, where the law provides for forfeiture if an officer shall "commit" or "be guilty" of certain acts, which may also be crimes, the commission of the act works the forfeiture, and conviction of the crime is not a prerequisite to removal by quo warranto. Examples of this type of case are found in *Commonwealth v. Allen*, 70 Pa. 465 (1872), *Common-*

wealth v. Walter, 83 Pa. 105 (1876), and *Commonwealth v. DeCamp,* 177 Pa. 112 (1896). See also *Commonwealth v. Bennett,* 233 Pa. 286 (1912).

The second general class consists of situations in which *conviction* of a crime is a necessary prerequisite to forfeiture of office or disqualification from holding office. Article VI, Section 4 of the State Constitution exemplifies such a provision. It provides as follows:

> "All officers shall hold their offices on the condition that they behave themselves while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. * * *"

In such cases, nothing short of a sentence in a criminal proceeding creates a forfeiture: *Shields v. Westmoreland County,* 253 Pa. 271, 273 (1916); *Wilner's Petition,* 12 Pa. D. & C. 680 (1930); *Commonwealth v. Woods,* 33 Dauphin Co. 45 (1930).

The petitioners have not directed our attention to, and our independent investigation has failed to disclose any Act of Assembly or any constitutional provision which would bring the case within the first general class above mentioned and which would operate to create a forfeiture of the office of county commissioner simply by reason of the commission of the acts here complained of.

It is likely that the acts of these respondents were such as to make them liable to prosecution at common law for misbehavior in office: *Commonwealth v. Rosser,* 102 Pa. Super 78 (1930). Under Article VI, Section 4 of the Constitution, supra, conviction of such a charge would have worked a forfeiture of office: *Commonwealth v. Rosser,* supra, at pages 88, 89. But there has been no such prosecution and no conviction of any crime.

Under these circumstances we are convinced that a quo warranto proceeding could not be successfully maintained on the present record.

This conclusion makes it unnecessary to consider respondents' contention that they could not now be removed for acts committed in a prior term of office.

For the reasons stated, the petition is refused.

HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 145

State Teachers Colleges—Boards of Trustees—Employment of member to act as examining physician.

The employment by the trustees of a State teachers college of one of their own number to render medical services to students at the college to be paid for from public funds is invalid as contrary to public policy and the common law.

Department of Justice,

Harrisburg, Pa., July 16, 1934.

Honorable Frank E. Baldwin, Auditor General, Harrisburg, Pennsylvania.

Sir: You inform us that the trustees of a State teachers college employed one of their own members who is a physician, to make certain physical examinations of students and to render medical and surgical attention to students who were injured in school athletics. The doctor-trustee presented a bill for $787.00 for services performed during a year. As we understand it, the bill consisted of itemized charges of from $1.00 to $3.00 for each treatment or examination.

You inquire as to the propriety of paying this bill in view of the fact that the doctor is a member of the board which employed him.

We find no express statutory provision which would make it improper to pay this bill. Section 66 of the Criminal Code of March 31, 1860, P. L. 382, is not applicable because it applies only to the furnishing of materials and supplies by members of public boards and institutions.

However, in our opinion the contract under which this bill is presented is invalid under well established principles of the common law, and no statutory prohibition is needed to condemn it.

In 6 R. C. L. 740 it is said:

> "* * * The rule prohibiting public officers from being interested in public contracts is embodied in the statutes of some states. The rule is, however, not dependent on statute. According to the weight of authority, a contract by a board or public body with a member thereof or in which a member thereof is interested is unenforceable even in the absence of a statutory prohibition, although from some of the decisions it is not clear whether such contracts are to be regarded as void or voidable. The reason is that in such case the member's public duty and his private interests are directly antagonistic. It matters not if he did in fact make his private interests subservient to his public duties. It is the relation that the law condemns, not the results. It might be that in a particular case public duty triumphed in the struggle with private interests; but such might not be the case again or with another officer, and the law will not increase the temptation or multiply opportunities for malfeasance. Neither will it take the trouble to determine whether in any case the result show a wrong or crime, but it absolutely and unequivocally refuses its sanction to any contract of any kind whatever where such relation exists. * * *"

In 19 R. C. L. 898 the principle is repeated in the following form:

> "* * * Even in the absence of statute a contract entered into between a municipal corporation through its council and one of the members of council is not enforceable. * * *"

A similar statement appears in 22 R. C. L. 460.

Cases in Pennsylvania and in other jurisdictions provide ample foundation for the rules above quoted.

In *Commonwealth v. Douglass*, 1 Binn. 77 (1803), a mayor and four magistrates of Philadelphia met to appoint a prison inspector, and appointed one of the four magistrates to that position. The Supreme Court sustained an attack on the propriety of the appointment, saying (page 84):

> "* * * One having a discretionary authority to appoint a fit person to a public office appointing himself, seems a solecism in terms; and it cannot be deemed the fulfillment of his duty. * * *"

In *Commonwealth v. Bowman*, 44 Pa. C. C. 127 (1916), the Court of Common Pleas of Clearfield County sustained a quo warranto proceeding against a mercantile appraiser. The appraiser had been appointed by the county commissioners while he was one of the commissioners. The court said (page 129):

> "Several questions are involved in this proceeding. It is alleged on behalf of the relator, and also as the moral ground for the action taken by the present board, that the appointment of H. L. Bowman was illegal because he was a member of the board making the appointment. 'It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of a statutory inhibition all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.' Cyc. Vol. XXIX, page 1381. In Com. *v.* Douglass, et al., 1 Binney 77, decided in 1803, the Supreme Court said: 'One having a discretionary authority to appoint a fit person to a public office appointing himself seems a solecism in terms; and it cannot be deemed the fulfillment of his duty.' "

In *Wilson v. Montrose Borough*, 12 Pa. Dist. 754 (1903), the Court of Common Pleas of Susquehanna County did permit a member of the board of health of the borough to collect a fee for services rendered in fumigating the house of a person who had died of smallpox. However, the decision was based squarely on the fact that there was an immediate emergency and that the jury had determined that it was impossible to obtain any other competent person to do the work. The court said that the employment by the board of health of one of its own members to perform this work was indeed contrary to public policy and it could be excused only under the peculiar circumstances of the case in which the necessity for the protection of the public health and the pressing emergency were present.

In *City of Fort Wayne v. Rosenthal,* 75 Ind. 156, 39 Am. Rep. 127 (1881), the court refused to allow a member of the board of health to collect fees for vaccinating school children in spite of the fact that there seemed to be a pressing need for the vaccination in the presence of an outbreak of smallpox.

In *Smith v. City of Albany,* 61 N. Y. 444 (1875), the court refused to permit a member of city council to collect for the hire of horses and carriages which he furnished to a committee of the council for a celebration which had been authorized by council. The refusal was based squarely on the ground that such a contract was contrary to the public policy and invalid under common law without respect to any statute.

In *Young v. Mankato,* 97 Minn. 4, 105 N. W. 969, 3 L. R. A. (N. S.) 849 (1905), the Supreme Court of Minnesota refused to permit a member of an official board to collect fees for legal services rendered to the board, in spite of the fact that it was admitted that he had done good work, and that the amount of his bill was entirely reasonable. The court said (3 L. R. A. [N. S.] at page 850):

> "The question thus presented is not whether the board having the appointive power also had the power to fix the compensation of the person engaged to further its legal purpose, but whether such board is prohibited by law from employing, at the cost of the public, one or more of its own members. The validity of such a contract as is here involved is not to be determined by the fact that, as a result, the public received a benefit or suffered an injury, but by general principles of public policy governing it, and by a construction of the terms of the law creating such board and regulating its employment of assistants. 'It is among the rudiments of the law that the same person cannot act for himself and at the same time with respect to the same matter as the agent of another whose interests are conflicting * * * The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, "constituted as humanity as, in the majority of cases duty would be overborne in the struggle." Marsh *v.* Whitmore, 21 Wall. 178, 22 L. ed. 482.' Mr. Justice Field, in Wardell *v.* Union P. R. Co., 103 U. S. 651, 658, 26 L. ed. 509, 511. * * *"

Other cases to the same effect are collected in a note appended to the last mentioned case in 3 L. R. A. (N. S.) 849 and in a note in 15 L. R. A. 520.

Therefore, we advise you that the employment by the trustees of a State teachers college of one of their own number to render medical services to students at the college to be paid for from public funds is invalid as contrary to public policy and the common law.

Very truly yours,

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

OPINION NO. 146

Sunday concerts—Admission fee—Reasonable expenses for conducting concert—Amount collectible by Department of Public Instruction. Act of June 2, 1933, P. L. 1423.

Sponsors of a Sunday concert authorized under the Act of 1933 may charge an admission fee which will cover the estimated expenses of conducting the concert. These expenses need not be confined to payment of light, heat and compensation to ushers, janitors and musicians but may include other legitimate costs of the concert. Having collected admission fees for the concert the sponsors may apply them to all such expenses and not simply to those enumerated in the last proviso of Section 2 of the Act of 1933. Only after such expenses have been paid must the excess be paid to the department. Just what items of expenses may be included and which ones rejected will be a matter for the exercise of sound discretion in each case. In dealing with the question it should be kept in mind the purpose of the act to permit Sunday concerts to be self-sustaining, but at the same time, to exclude any element of commercialization or promoters' profits.

Department of Justice,

Harrisburg, Pa., September 11, 1934.

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

Sir: You have asked us to advise you as to the proper construction of the provisions of the Sunday Concerts Act of June 2, 1933, P. L. 1423 which require payment to your department of certain proceeds of Sunday concerts held under authority of that act.

Section 2 of the act provides as follows:

> "If, and when, authorized by the Department of Public Instruction of this Commonwealth, public concerts

> may be rendered and broadcast anywhere within this Commonwealth on Sunday after twelve o'clock noon; and it shall be lawful for the person or persons rendering any such concert to charge an admission fee thereto at a rate which it is estimated will cover the expenses of rendering such concert, including light, heat and compensation to ushers, janitors and musicians: Provided, That the cost of light and heat and compensation to ushers, janitors and musicians shall not exceed an amount computed at the rate charged for light and heat and compensation to ushers, janitors and musicians for week-days: And provided further, That should the amount collected for admission fees to any such concert exceed the actual expenses for light, heat and compensation to ushers, janitors and musicians, the excess shall be paid to the Department of Public Instruction of this Commonwealth to be employed by it for such public music purposes as it may deem proper."

Your particular question is whether the sponsors of a Sunday concert may pay from the proceeds, expenses such as costs of printing, telegrams, postage, music sheets, advertisements, and rental of hall, or whether all the proceeds above the amounts paid for light, heat and compensation to ushers, janitors and musicians must be paid to your department.

The purpose of the Sunday Concerts Act was to legalize concerts held on Sunday at which admission fees were charged. At the same time the Legislature sought to prevent the conduct of purely commercialized projects engaged in by the sponsors for profit. Hence the restrictions on the amount of admission charges and the requirement for the return of the excess receipts to your department. Keeping this general purpose in view, let us examine the language of Section 2 of the act in further detail.

The first statement concerning the amount of admission fees which may be charged is that the amount may be such as is estimated will cover *"the expenses of rendering such concert, including* light, heat and compensation to ushers, janitors and musicians". There can be little doubt that this language authorizes the collection of admission fees sufficient to cover all the reasonable expenses of conducting the concert, and is not confined simply to the cost of light, heat and compensation to ushers, janitors and musicians. The use of the word "including" in the phrase makes this conclusion clear. That word has several shades of meaning but in its present use it is not a word of limitation. Similar uses are comparatively common.

In *Achelis v. Musgrove*, 212 Ala. 47, 101 So. 670, 672 the court said:

> "Include * * * has * * * two shades of the same meaning. It may apply where that which is affected is the only thing included, and it is also used to express the

> idea that the thing in question constitutes a part only of the contents of some other thing. It is more commonly used in the latter sense. Including is not a word of limitation, rather it is a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language which precedes it."

In *Cunningham v. Sizer Steel Corporation*, 1 Fed. (2nd) 337 (1924), the court had before it for construction a mortgage which created a lien on all the real estate and fixed property of the mortgagor and also all personal property, expressly including certain specific things mentioned that were located upon the described real estate. It was argued that the enumeration of the specified articles limited the general language which preceded the word "including" The court rejected this contention, saying (p. 338):

> "* * * But the word 'including,' in view of the general provision preceding the specific enumeration of the things mortgaged, is not a term of limitation. On the contrary, it implies an additional inclusion to that evidenced by the use of general language. * * *"

In *United States v. Fifteen Drilled Diamonds*, 127 Fed. 753 (1904) there is also presented an example of the use of the word "including" in the same sense.

Does the subsequent language of Section 2 of the Sunday Concerts Act alter the meaning of the phrase just construed, and limit the amount of admission fees to the estimated cost of light, heat and compensation of ushers, janitors and musicians only? We find no warrant for such a construction. The admission charges may cover all proper costs of the concert.

There can be no doubt that if it stood alone, the final proviso of Section 2 would compel payment to your department of all the proceeds of the Sunday concert which were not needed for the specific items enumerated in that proviso. However, we cannot read this clause independently of its context. We may not overlook the fact that the Legislature has expressly authorized the collection of admission fees sufficient to cover expenses in addition to those specified in the proviso. Can we say that the Legislature intended to allow the collection of this greater amount simply to require its payment to your department and not to permit it to be used for the very expenses upon the estimates of which the fund was collected? Our answer must be "No." The act is not a revenue act and was not designed to levy a tax on the concerts or to augment the State Treasury.

In *Foster's Petition*, 243 Pa. 92, 98 (1914), the Supreme Court said:

> "* * * Where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provi-

> sions, the duty devolves upon the court of ascertaining the true meaning: 36 Cyc. 1107. It is fundamental that if, giving to the words of an act their literal or natural meaning, the conclusion reached would be unreasonable or absurd, some other meaning within the reasonable scope of the words may be adopted to avoid that result, if it appears that such other meaning may probably have been the one intended: Rossmiller *v.* State (Wis.), 91 Am. St. Rep. 910, 913. It is a settled rule of construction that the legislature will be presumed to have intended what is reasonable and effectual, and not what is productive of absurd or anomalous consequences or is impossible and incapable of execution. * * *"

In our opinion the proviso at the end of Section 2 of the Sunday Concerts Act must be construed in the light of the principle just stated. We could not attribute to the Legislature the unbelievable intention to permit the collection of fees based on general expenses of the concert and then forbid the use of the fees for any but a very limited part of those expenses, and require the balance to be forfeited to the State. Moreover, the purpose of the act to permit and encourage proper Sunday concerts, the expenses of which should be borne by those who enjoy them, would be defeated by any such construction. A concert of any size necessarily involves many expenditures other than those for light, heat and compensation to ushers, janitors and musicians. Tickets and programs must be printed, tickets must be sold, and many other small expenses are inevitable. If the admission fees may not be used for these costs, somebody must pay for them out of his own pocket. That was not the purpose of the act. It was designed to allow concerts to be self-sustaining.

Therefore, we advise you that the sponsors of a Sunday concert authorized under the Act of 1933 may charge an admission fee which will cover the estimated expenses of conducting the concert. These expenses need not be confined to payment of light, heat and compensation to ushers, janitors and musicians but may include other legitimate costs of the concert. Having collected admission fees for the concert, the sponsors may apply them to all such expenses and not simply to those enumerated in the last proviso of Section 2 of the Act of 1933. Only after such expenses have been paid must the excess be paid to your department.

Just what items of expense may be included and which ones rejected will be a matter for the exercise of sound discretion in each case. In dealing with the question you should keep in mind the purpose of the act to permit Sunday concerts to be self-sustaining, but at the same time, to exclude any element of commercialization or promoters' profits.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 147

Liquor Control Board—Disposition of fines and penalties imposed by courts of quarter sessions for violation of the Pennsylvania Liquor Control Act of November 29, 1933, P. L. (Special Session) 15.

Fines, penalties and forfeitures imposed under the Liquor Control Act must be paid into the State Treasury through the Liquor Control Board and the Department of Revenue. County officers who collect the fines in the first instance are required to remit them to the board, and, in accordance with the act, all moneys so received by the board are to be paid into the State Treasury through the Department of Revenue.

Department of Justice,

Harrisburg, Pa., September 14, 1934.

Honorable Robert S. Gawthrop, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether fines and penalties imposed by courts of quarter sessions for violation of the Pennsylvania Liquor Control Act of November 29, 1933, P. L. (Special Session) 15, must be paid into the State Treasury.

Section 702 of the Liquor Control Act provides as follows:

> "All application fees and moneys accruing from sales of liquor at Pennsylvania Liquor Stores, and all fines, penalties and forfeitures collected, received, or recovered by the board under the provisions of this act, shall be paid into the State Treasury, through the Department of Revenue, into a special fund to be known as 'The State Stores Fund.' All moneys in such fund shall be available for the purposes for which they are appropriated by law."

Although, with certain exceptions not important here, fines, penalties and forfeitures imposed by the courts are ordinarily payable into the county treasuries, that is not the case where the Legislature has directed that they be paid into the State Treasury: County Code of May 2, 1929, P. L. 1278, Sec. 384; Act of March 31, 1860, P. L. 427, Sec. 78. Therefore, our sole question is whether Section 702 of the Liquor Control Act constitutes a legislative direction that the fines and penalties imposed under the act shall be paid into the State Treasury. There could be no need for the question if the section did not speak of fines, penalties and forfeitures "collected, received, or recovered by the board."

To construe the section as limiting payments into the State Treasury to such fines, penalties and forfeitures which are collected from defendants by the Liquor Control Board in the first instance would be to deprive it of practically all meaning, since the board has no authority to impose or collect fines.

In our opinion there can be no doubt that the Legislature intended all fines, penalties and forfeitures imposed under the Liquor Control Act to be paid into the State Treasury through the Liquor Control Board and the Department of Revenue. County officers who collect the fines in the first instance are required to remit them to your board, and, in accordance with the act, all moneys so received by the board are to be paid into the State Treasury through the Department of Revenue.

Very truly yours,

DEPARTMENT OF JUSTICE,

HORACE A. SEGELBAUM,

Special Deputy Attorney General.

OPINION NO. 148

Banks and banking—Application of the laws of the Commonwealth to the provisions of the Federal Banking Act of 1933 relating to the insurance of deposits.

The laws of Pennsylvania permit banks, bank and trust companies, and savings banks to purchase class A stock of Federal Deposit Insurance Corporation and to assume the obligations incident to the ownership thereof as now provided by law.

Pennsylvania law does not permit that Corporation to act as receiver of such institutions.

In the event of the failure of a Pennsylvania institution, which is a member of the Corporation, enjoyment by the corporation of the right to receive dividends would be dependent upon its becoming assignee of depositors or being subrogated to their rights by paying them the amount of their claims. The Corporation would be entitled to receive the dividends of depositors when it had paid all or part of their deposits, to the extent of such payment, (a) by virtue of the doctrine of subrogation, (b) by receiving written assignments from such depositors, and in either case, by proving their claims in the manner provided by the Banking Code.

Department of Justice,

Harrisburg, Pa., September 26, 1934.

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

Sir: You have asked to be advised concerning the application of the laws of the Commonwealth to the provisions of the Federal Banking Act of 1933 relating to the insurance of deposits. You refer to various questions listed in an inquiry made by general counsel for Federal Deposit Insurance Corporation. We shall state and answer these questions as follows:

I

> Whether the laws of the State authorize or permit State banks, bank and trust companies, or mutual savings banks, organized or doing business under the laws of the State, to purchase class A stock of the Federal Deposit Insurance Corporation and to assume the obligations incident to the ownership of such stock.

The Act of January 2, 1934, P. L. 128, amends Section 1001 of the Banking Code, approved May 15, 1933, P. L. 624, by enlarging the general corporate powers granted to a bank and a bank and trust company to include the power:

> "(16) To become a member of the Federal Deposit Insurance Corporation, in accordance with the provisions of the Federal Banking Act of one thousand nine hundred and thirty-three, approved the sixteenth day of June, one thousand nine hundred and thirty-three, its amendments and supplements, or of any other corporation hereafter organized by the United States for the purpose of insuring deposits in banks or bank and trust companies, and to purchase and hold so much of the capital of the Federal Deposit Insurance Corporation, or of such other corporation, as will qualify it for membership therein."

Therefore, the laws of Pennsylvania now specifically authorize State banks and bank and trust companies to purchase class A stock of the Federal Deposit Insurance Corporation and to assume the obligations incident to the ownership of such stock.

A trust company under existing Pennsylvania law does not have the power to receive money on deposit, but is confined generally to the transaction of a safe deposit and fiduciary business. Prior to the passage of the Banking Code, which defined for the first time "a bank and trust company," the term "trust company" was usually applied either to institutions created by special act and given a variety of powers, including that of a bank and of a fiduciary, or to institutions created as title insurance companies under the Corporation Act of 1874 and later given by various acts the power to operate as banks and fiduciaries.

A bank and trust company, as it is now known, is a bank with the additional power of acting as a fiduciary.

Savings banks, with one exception, operate on the mutual principle. By virtue of the Act of January 2, 1934, P. L. 128, which amended Section 1202 of the Banking Code, both mutual and stock companies are given the same power as banks and bank and trust companies to become members of the Federal Deposit Insurance Corporation.

Accordingly, all State banks, bank and trust companies and savings banks may purchase class A stock of the corporation and assume the obligations incident to ownership thereof, as now set forth in the act.

II

> Whether the laws of the State authorize or permit the Federal Deposit Insurance Corporation to be appointed receiver of a State bank, bank and trust company, or mutual savings bank, organized or doing business under the laws of the State in the event the bank should be closed on account of inability to meet demands of its depositors.

Under the laws of Pennsylvania only the Secretary of Banking may act as receiver of a State bank, bank and trust company, trust company, or savings bank organized or doing business under the laws of the State.

Sections 504 and 601 of the Department of Banking Code, approved May 15, 1933, P. L. 565, provide for the taking of possession of the business and property of an institution by the Secretary of Banking as receiver.

Section 606 provides that no court shall appoint anyone but the Secretary as receiver of an institution. If proceedings are instituted in a court which shall determine that a receiver should be appointed, the Secretary of Banking must be appointed as receiver.

It is our opinion, therefore, that under the express prohibitions of Pennsylvania law, the Federal Deposit Insurance Corporation may not act as receiver of a State bank, bank and trust company, trust company, or savings bank of the Commonwealth of Pennsylvania.

III

> In the event the law of the State does not permit the appointment of the Corporation as receiver, how may the Corporation be assured of the enjoyment of its right to

> receive dividends on the same basis as in the case of a closed national bank? Will such recognition: (a) be accorded by State law; (b) be evidenced by the allowance of claims by appropriate State authority; (c) be effected by assignment of claims by depositors; or (d) be accorded by some other method? Recognition in one or more of the forms indicated must be accorded before the amount of insured deposit liabilities so recognized can be made available in a new bank.

Section 8 of the Federal Banking Act of 1933, approved June 16, 1933, c. 89, 48 Stat. 162, at page 168, adds Section 12 (B) to the Federal Reserve Act. Clause (1) of Section 12 (B) provides, inter alia, as follows:

> "Whenever any State member bank which is a class A stockholder of the Corporation shall have been closed by action of its board of directors or by the appropriate State authority, as the case may be, on account of inability to meet the demands of its depositors, and the applicable State law does not permit the appointment of the Corporation as receiver of such bank, the Corporation shall organize a new national bank, in accordance with the provisions of this subsection, to assume the insured deposit liabilities of such closed State member bank, to receive new deposits, and otherwise to perform temporarily the functions provided for in this subsection. Upon satisfactory recognition of the right of the Corporation to receive dividends on the same basis as in the case of a closed national bank under this subsection, such recognition being accorded by State law, by allowance of claims by the appropriate State authority, by assignment of claims by depositors, or by any other effective method, the Corporation shall make available to such new bank, in accordance with the provisions of this subsection, the amount of insured deposit liabilities as to which such recognition has been accorded; and such new bank shall assume such insured deposit liabilities and shall in other respects comply with the provisions of this subsection respecting new banks organized to assume insured deposit liabilities of closed national banks. In so far as possible in view of the applicable provisions of State law, the Corporation shall proceed with respect to the receiver of such closed bank and with respect to the new bank organized to assume its insured deposit liabilities in the manner prescribed by this subsection with respect to closed national banks and new banks organized to assume their insured deposit liabilities; except that the Corporation shall have none of the powers, duties, or responsibilities of a receiver with respect to the winding up of the affairs of such closed State member bank. The Corporation, in its discretion, however, may purchase and liquidate any or all of the assets of such bank."

There is no provision in Pennsylvania law giving to the Federal Deposit Insurance Corporation the right to receive dividends on the same basis as in the case of a closed national bank. Pennsylvania law does not specifically authorize the Secretary of Banking as receiver of a closed State institution to allow payment to the Corporation of depositors' claims.

Recognition of the Corporation's right to receive dividends would be accorded in the manner following:

The State law provides a method by which depositors of a closed bank or bank and trust company may prove their claims. Section 1002 of the Department of Banking Code, Act of May 15, 1933, P. L. 565.

State law also provides that a depositor may assign his claim to another subject to the provision, however, that unless assignments are received by the institution before it is taken in possession, they "shall be regarded as, and shall have only the legal incidents of, assignments made after the Secretary takes possession." Section 712 B of the Department of Banking Code.

Therefore, under Pennsylvania law the Corporation may receive dividends from the Secretary of Banking as receiver of a closed bank or a bank and trust company by the simple expedient of receiving from all depositors to whom it makes any payment, assignments in the amount of such payment.

The method of receiving assignments would seem to be the most expedient one. However, under the equitable doctrine of subrogation established by the case law, as distinguished from statutory law, the Corporation would be entitled to all the rights of the depositor to the extent to which it had paid to him the amount of his deposit. Therefore, upon proof of its claim in the manner provided by the section of the Banking Code cited above governing proofs of claim, the Corporation would be entitled to the dividends which would otherwise go to such depositors by virtue of deposits for which the Corporation had already reimbursed them.

As was stated in *South Philadelphia State Bank's Insolvency*, 295 Pa. 433 (1929), where a deposit claim has been paid by another, the latter is entitled to stand in the shoes of the depositor, having acquired such right under the equitable doctrine of subrogation. See also *South Philadelphia State Bank v. National Surety Company*, 288 Pa. 300 (1927).

Under this principle upon proper proof that Federal Deposit Insurance Corporation has, directly or through the instrumentality of a national bank, paid all claims owing to depositors of a closed State institution, the Corporation would be entitled to payment, up to 100% of its liabilities to depositors, out of the assets of the closed State institution in the hands of the Secretary of Banking after payment of administration expenses and certain other types of preferred claims. The Federal Deposit Insurance Corporation will, of course, be entitled to the same preference over general creditors of the State bank as is accorded all depositors by State law.

In summary, we advise as follows:

I

The laws of Pennsylvania permit banks, bank and trust companies, and savings banks to purchase class A stock of Federal Deposit Insurance Corporation and to assume the obligations incident to the ownership thereof as now provided by law.

II

Pennsylvania law does not permit that Corporation to act as receiver of such institutions.

III

In the event of the failure of a Pennsylvania institution, which is a member of the Corporation, enjoyment by the Corporation of the right to receive dividends would be dependent upon its becoming assignee of depositors or being subrogated to their rights by paying them the amount of their claims. The Corporation would be entitled to receive the dividends of depositors when it had paid all or part of their deposits, to the extent of such payment, (a) by virtue of the doctrine of subrogation, (b) by receiving written assignments from such depositors, and in either case, by proving their claims in the manner provided by the Banking Code.

Very truly yours,

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

OPINION NO. 149

Banks and banking—Trust funds—Bonds of The Delaware River Joint Commission as legal investments for trust funds in Pennsylvania.

Under the provisions of the Act of June 12, 1931, P. L. 575, authority is given to fiduciaries in the Commonwealth of Pennsylvania to invest funds in the bonds of The Delaware River Joint Commission which are legal investments for trust funds.

Department of Justice,

Harrisburg, Pa., October 1, 1934.

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

Sir: You have asked to be advised whether bonds of The Delaware River Joint Commission are legal investments for trust funds in this Commonwealth.

The Delaware River Joint Commission is the public corporate instrumentality of the Commonwealth of Pennsylvania and of the State of New Jersey created by virtue of the Act of June 12, 1931, P. L. 575, and similar legislation of the State of New Jersey, approved June 30, 1931, as Chapter 391 of the Laws of New Jersey of 1931. As a result of this legislation the compact embodying the provisions of these acts was entered into on July 1, 1933, by the Governor of Pennsylvania and representatives of the State of New Jersey, which compact was in turn ratified by the Congress of the United States. The Commission operates the Philadelphia-Camden Bridge over the Delaware River and is intended to promote the use of that river as a commercial highway to the sea.

Article X of the acts of the two states and of the compact provides as follows:

> "The bonds or other securities or obligations which may be issued by the commission for any of its authorized purposes, and as security for which there may be pledged the tolls, rents, rates and other revenues, or any part thereof, of any properties or facilities owned, operated or controlled by the commission (including the aforesaid existing bridge across the Delaware River and the aforesaid facilities for the transportation of passengers across the said bridge), are hereby made securities in which all state and municipal officers and bodies of the Commonwealth of Pennsylvania and State of New Jersey, all banks, bankers, trust companies, savings banks, saving and loan associations, investment companies, and other persons carrying on a banking business, all insurance companies, insurance associations, and other persons carrying on an insurance business, *and all administrators, executors, guardians, trustees and other fiduciaries, and all other persons whatsoever, who now or may hereafter be authorized to invest in bonds or other obligations of the Commonwealth of Pennsylvania or of the State of New Jersey, may properly and legally invest any funds, including capital belonging to them or within their con-*

trol, and said bonds or other securities or obligations are hereby made securities which may properly and legally be deposited with and received by any state or municipal officer or agency of the Commonwealth of Pennsylvania or the State of New Jersey for any purpose for which the deposit of bonds or other obligations, either of the Commonwealth or of the State, is now or may hereafter be authorized." (Italics ours.)

Section 41 (a) 1 of the Fiduciaries Act of June 7, 1917, P. L. 447, as last amended by the Act of April 26, 1929, P. L. 817, provides that funds in the hands of a fiduciary may be invested:

> "* * * in the stock or public debt of the United States; or in the public debt of this Commonwealth; or in bonds or certificates of debt constituting the direct and general obligation of any of the counties, cities, boroughs, townships, school districts or poor districts of this Commonwealth; or in first mortgages on real estate in this Commonwealth, securing bonds or other obligations not exceeding in amount two-thirds of the fair value of such real estate; * * *"

Bonds of The Delaware River Joint Commission do not come within the categories named. They do not constitute part of the public debt of the Commonwealth nor are they obligations of any governmental subdivision thereof. The Commission is not a political subdiviison of Pennsylvania and its bonds are not real estate bonds. They are revenue bonds, as security for payment of which is the revenue of the Commission received principally from its operation of the bridge connecting the cities of Philadelphia and Camden.

Therefore, the Fiduciaries Act as amended is not authority for the investment of funds in the hands of a fiduciary in the bonds of the Commission.

There is, however, no prohibition upon the investment of trust funds in the Commission's bonds. Section 22 of Article III of the Constitution, in effect until amended by the electors in November, 1933, prohibited the General Assembly from authorizing the investment of trust funds "in the bonds or stock of any private corporation." While this section has been amended to read as follows:

> "The General Assembly may, from time to time, by law, prescribe the nature and kind of investments for trust funds to be made by executors, administrators, trustees, guardians and other fiduciaries."

the Legislature has not yet exercised the powers therein granted.

At the time the bonds of the Commission were issued, namely, September 1, 1933, the prohibition of the Constitution was still in effect.

However, The Delaware River Joint Commission is not a private corporation. As stated in Article I of the Act of 1931, The Commission is:

> "* * * a body corporate and politic * * * which shall constitute the public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey for the following public purposes, and which shall be deemed to be exercising an essential governmental function in effectuating such purposes, to wit:"

Bonds of the Commission are not affected by the constitutional provision in effect on September 1, 1933. Under Section 22 of Article III of the Constitution, as amended, the Legislature has authority to make the bonds legal investments for trust funds.

Therefore, it is our opinion that Article X of the Act of June 12, 1931, P. L. 575, enlarges the field for the investment of trust funds provided by the Act of 1917. The later act does not refer to the former, and neither specifically amends nor repeals it. But it does in effect enlarge its terms and expand the field in which fiduciaries may make investments.

The Legislature has clearly provided for the investment by fiduciaries of funds in their hands in bonds of The Delaware River Joint Commission.

Therefore, you are advised that under the provisions of the Act of June 12, 1931, P. L. 575, authority is given to fiduciaries in the Commonwealth of Pennsylvania to invest funds in the bonds of The Delaware River Joint Commission which are legal investments for trust funds.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

Deputy Attorney General.

OPINION NO. 150

Banks and banking—Institutions incorporated under Act of May 13, 1876, P. L. 161—Bonds in favor of the Commonwealth on employes.

The Act of 1876 is no longer in effect and there is no obligation on a bank created under its provisions to continue bonds on its employes in favor of the Commonwealth. If bonds required by Section 513 of the Banking Code of officers, directors, trustees, or employes of an institution, who receive payments of moneys or handle securities, are given in only nominal amount, it is within your discretion

to require such bonds in additional amounts if it is deemed necessary as a safeguard. In determining whether to do so consideration should be given to the fact that other bonds not so conditioned are held by the institution amply protecting it against embezzlement, theft, forgery, etc. by such officers, directors, trustees, or employes. All bonds given to institutions to safeguard them against illegal acts of officers and employes need not be conditioned upon the faithful performance of duties.

Department of Justice,

Harrisburg, Pa., October 3, 1934.

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

Sir: You have asked to be advised (1) whether an institution incorporated under the Act of May 13, 1876, P. L. 161, must continue to provide bonds in favor of the Commonwealth on employes, (2) whether bonds required by Section 513 of the Banking Code may be given in nominal amount if other bonds sometimes known as bankers blanket bonds, insuring the institution against loss by embezzlement, theft, forgery, etc., are held by the institution, and (3) whether all officers' and employes' bonds must be conditioned upon the faithful performance of duties.

1. Section 18 of the Act of May 13, 1876, P. L. 161, provided as follows:

> "* * * before the cashier, teller, bookkeeper or other persons necessary for executing the business of the corporation shall enter upon their duties, they shall each * * * enter into a bond to the Commonwealth of Pennsylvania in such amount as the board of directors may require, conditioned for the proper and faithful performance of his duties, the security of which bonds shall be approved by the court of common pleas of the county in which the corporation is located, and recorded within thirty days thereafter in the office for recording deeds in such county; * * *"

Under the provisions of this law, bonds in favor of the Commonwealth were given by an employe to insure against any loss arising from the failure of the principal properly and faithfully to perform his duties.

This act was repealed by Section 1602 of the Banking Code and is no longer in effect.

It is our opinion that there is no requirement on any bank incorporated under the provisions of the Act of 1876 to secure from its cashiers, tellers, bookkeepers or other employes, bonds running in favor of the Commonwealth.

2. Section 513 of the Banking Code of May 15, 1933, P. L. 624, provides as follows:

> "A. The officers and employes of every institution as well as any director or trustee of an incorporated institution who is authorized to receive payments of moneys, or to handle negotiable securities on behalf of such incorporated institution, shall, before entering upon the performance of their duties, furnish to it bonds in such amount as is specified, with such surety as is approved, in the case of an incorporated institution, by the directors or trustees, and in the case of a private bank, by the private banker or bankers. Such bond shall be conditioned upon the faithful performance of the duties of such officers, directors, trustees, or employes. The cost of such bonds may be paid by the institution.
>
> "B. The Department shall have the power to require any such officer, director, trustee, or employe, at any time during his term of office or employment, to furnish a bond in an amount greater than that required by the board of directors or trustees of the incorporated institution, or by the private banker or bankers, as the case may be, or it may require new or additional surety."

This section, which applies to all banking institutions, was enacted in lieu of the provisions of Section 18 of the Act of 1876, which applied only to banks. It calls for a bond given not only by a cashier, teller, or bookkeeper, but also by any employe, officer, or director who is authorized to receive payments of moneys or handle negotiable securities for the institution. It is given in favor of the institution and not in favor of the Commonwealth.

You have asked whether you must require a bank, a bank and trust company, or a trust company, to secure such bonds in more than nominal amount if the institution holds other bonds amply safeguarding it against any loss due to embezzlement, theft, forgery, etc., by its officers, directors, and employes.

We are informed that many institutions hold what is known as bankers blanket bonds, insuring them against loss in substantial amount arising from defalcation or fraud on the part of the various individuals named therein. These individuals are not principals on these bonds; they do not execute them. The bonds are really in effect insurance policies.

Other institutions hold "name" or schedule bonds on which the employes, officers, or directors are principals and either individuals or corporations are sureties. These bonds do not provide that they are conditioned on the faithful performance of the duties of the various persons whose acts they concern. To include in the coverage given by the bond phraseology to that effect, the premium thereon would be increased materially in amount.

In our opinion it is a matter for the board of directors or trustees of the bank, bank and trust company, or trust company, to determine in what amount it is necessary for the protection of the institution that a bond "conditioned upon the faithful performance of the duties" of its officers, directors, trustees or employes, be given by them. If the institution holds other bonds safeguarding it against loss due to embezzlement, theft, forgery, etc., on the part of these individuals in such amount as the institution believes it necessary that it be protected against such acts, you need not require the institution to provide itself with a bond such as is exacted by the provisions of Section 513, in other than nominal amount. If, however, you do require a bond in larger amount, such bond must be conditioned on the faithful performance of the principal's duties. There is nothing in the law making it your duty to require an institution to secure a bond or other obligation containing any other conditions or otherwise protecting the institution from acts of its officers, directors, or employes.

3. Where an institution secures additional bonds safeguarding it against embezzlement, theft, forgery, etc., by its officers and employes, it is not necessary that such bonds be conditioned upon the faithful performance of the duties of such individuals.

SUMMARY

1. The Act of 1876 is no longer in effect and there is no obligation on a bank created under its provisions to continue bonds on its employes in favor of the Commonwealth.

2. If bonds required by Section 513 of the Banking Code of officers, directors, trustees, or employes of an institution, who receive payments of moneys or handle securities, are given in only nominal amount, it is within your discretion to require such bonds in additional amounts if you deem this safeguard necessary. In determining whether to do so, you may give consideration to the fact that other bonds not so conditioned are held by the institution amply protecting it against embezzlement, theft, forgery, etc. by such officers, directors, trustees, or employes.

3. All bonds given to institutions to safeguard them against illegal acts of officers and employes need not be conditioned upon the faithful performance of duties.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

Deputy Attorney General.

OPINION NO. 151

Banks and banking—Institutions under supervision of Secretary of Banking—Affiliates—Acts of May 15, 1933, P. L. 565; January 2, 1934, P. L. 128; Federal Banking Act of 1933, c. 89, 48 Stat. 162.

Powers of supervision over and regulation of corporations or persons affiliated with institutions under supervision of the Secretary of Banking, as provided by the Department of Banking Code, the Banking Code and the Federal Banking Act of 1933. Effect of various provisions of the Federal Banking Act of 1933 upon the powers and duties of the Secretary of Banking over institutions under his supervision, including those which are not members of the Federal Reserve System.

Department of Justice,
Harrisburg, Pa., October 24, 1934.

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

Sir: You ask to be advised respecting your powers of supervision over and regulation of corporations or persons affiliated with institutions under your supervision, as provided by the Department of Banking Code, the Banking Code and the Federal Banking Act of 1933.

You have made several inquiries regarding the effect of various provisions of the Federal Banking Act of 1933 upon your powers and duties over institutions under your supervision, including those which are not members of the Federal Reserve System.

In complying with your request, we shall state first your inquiry and then our opinion thereon.

I

> Do the definitions of "affiliate" and "holding company affiliate" in the Federal act become the definitions of affiliates for the purposes of Section 402 of the Department of Banking Code and Section 2 of the Banking Code?

Section 402 of the Department of Banking Code, Act of May 15, 1933, P. L. 565, provides as follows:

> "The Department of Banking shall have the power to supervise, regulate, limit, or prohibit the activities of corporations or persons affiliated with institutions to the same extent as such activities of corporations or persons affiliated with national banking associations, or with members of a Federal Reserve Bank, are, or shall be, supervised, regulated, limited, or prohibited by general law, or by regulations issued by any Federal authority pursuant to law."

Section 2 of the Banking Code, Act of May 15, 1933, P. L. 624, as amended by Section 2 of the Act of January 2, 1934, P. L. 128, defines "affiliated corporation or person" as:

> "* * * such an affiliated corporation or person, as is defined, by any Federal law or any regulation issued by any Federal authority pursuant to law, to be a corporation or person affiliated with a national banking association or a member of a Federal Reserve Bank or as a holding company affiliate."

The Federal "Banking Act of 1933," approved June 16, 1933, c. 89, 48 Stat. 162, contains amendments to the Federal Reserve Act and the National Banking Act and additional provisions for the regulation of affiliates of national banks and state institutions which are members of the Federal Reserve System.

In general, Section 2 of the Federal Banking Act of 1933 defines an "affiliate" as a corporation, business trust, association or other similar organization more than fifty per cent. of the voting stock of which is owned by a banking institution which is a member of a Federal Reserve Bank or the majority control of which is held by the shareholders of such member bank or of which a majority of the directors or trustees have similar functions in a member bank.

It defines a "holding company affiliate" as such similar organization holding a majority interest in a member bank by stock ownership or control by trustees.

Section 402 of the Department of Banking Code refers to "corporations or persons affiliated with institutions" and to "corporations or persons affiliated with national banking associations or with members of a Federal Reserve Bank." The section of the Federal Banking Act of 1933 referred to clearly describes such corporations or such persons as are associated in a business trust, association or similar organization as "affiliates" or "holding company affiliates" of banks which are members of the Federal Reserve System.

In our opinion, Section 402 applies to all corporations and persons which are defined in the Federal Banking Act of 1933 as "affiliates" or "holding company affiliates," for such affiliates are "supervised, regulated, limited or prohibited by general law," namely, by Act of Congress. Similarly the phrase "affiliated corporation or person," wherever it appears in the Banking Code, includes such corporations and persons as are defined in the Federal Banking Act of 1933 as "affiliates" or "holding company affiliates," and are by that act regulated and supervised.

In short, whatever provisions of the Federal Banking Act of 1933 affect corporations or persons therein designated as "affiliates" or "holding company affiliates" of national banks, or of State banks which are members of the Federal Reserve System, are by virtue of Section 402 read into the Department of Banking Code, and by the definition of Section 2 of the Banking Code, are read into that Code wherever reference therein is made to affiliated corporations or persons.

II

Do the limitations on loans to affiliates imposed by the Federal Banking Act of 1933 supersede limitations imposed by the Banking Code?

Section 1006 of the Banking Code limits loans made by an institution under your supervision to one corporation or person to a maximum of twenty-five per centum of the unimpaired capital and twenty-five per centum of the unimpaired surplus of the institution. Exceptions provide that this restriction has no application to certain types of loans, with which we are not here concerned.

Section 13 of the Federal Banking Act of 1933, adding a new Section 23A to the Federal Reserve Act, regulates transactions by Federal Reserve member banks with affiliates thereof. It prohibits a member bank from making loans or extending credit to an affiliate, and investing funds in and making advances secured by the capital stock or obligations of any affiliate, in excess of ten per centum of the capital stock and surplus of the member bank where one affiliate is concerned, and in excess of twenty per centum of the capital stock and surplus in such transactions with more than one affiliate.

In so far as banks or bank and trust companies which are members of the Federal Reserve System are concerned, they, of course, without any action by your department, are bound by the provisions of Section 13 of the Federal Banking Act.

Section 402 of the Department of Banking Code gives the department the power to supervise, regulate, limit, or prohibit the activities of affiliates. By virtue of that authority you may enforce compliance with its terms by institutions under your supervision, even though they are not members of the Federal Reserve System, and you may likewise compel compliance by affiliates dealing with such institutions. But so far as nonmember banks are concerned, you can not prohibit their activities with third parties affecting affiliates, for example, the acceptance of stock holdings therein as collateral securing loans made to third parties by a nonmember bank. As to the acceptance of shares of capital in an affiliate as collateral, Section 1008 of the Banking Code controls.

The Department of Banking Code relates to the powers and duties of your department and of you as Secretary over banking institutions of this Commonwealth. Section 202 provides that the department "shall enforce and administer all laws of this Commonwealth which relate to any institution, and shall exercise such general supervision over institutions as will afford the greatest possible safety to depositors, other creditors, and stockholders thereof." The Code gives you and your department power to apply, not only to their affiliates but to institutions themselves, all provisions of the Code and of Federal banking laws respecting corporations or persons affiliated with banking institutions affected by those laws.

Therefore, the limitations imposed by the Federal act on loans to affiliates of institutions which are members of the Federal Reserve System supersede those imposed by the Banking Code, in so far as members of the Federal Reserve System are concerned. As to nonmember banks, you may by official order promulgate the provisions of Section 13 of the Federal Banking Act of 1933, in so far as relations directly between the nonmember bank and its affiliates are concerned. However, as to the power of nonmember banks to lend to third persons or corporations and accept as collateral shares of stock in an affiliate of the nonmember bank, the provisions of Section 1008 of the Banking Code control.

III

> May a holding company affiliate vote shares of stock of an institution without entering into an agreement as provided by the Federal Banking Act of 1933, and if so, in what manner may the institution be required to withhold dividends on its shares owned by a nonagreeing affiliate?

Section 19 of the Federal Banking Act of 1933 prohibits a holding company affiliate from voting the shares of an institution owned or held by it, unless it receives a voting permit from the Federal Reserve Board. Such permit is obtained only when the holding company affiliate agrees to submit itself, and in some instances its subsidiaries, to examination by duly authorized examiners and agrees to the filing and publication of reports of condition, etc. Violation of the agreement subjects the affiliate to the penalty of having its permit revoked, in the event of which revocation the Federal Reserve Board may proceed to forfeit the charter in the case of a national bank. Section 5 (c) of the Federal Banking Act of 1933 requires a state member bank to obtain a similar permit from holding company affiliates or surrender membership in the Federal Reserve System.

So far as State institutions which are members of the Federal Reserve System are concerned, permits will be issued by the Federal Reserve Board. The Department of Banking may require that the member bank secure a permit issued by the department or it may accept the permit of the Federal Reserve Board in lieu of its own permit.

In the case of nonmember banks, the Department of Banking may likewise, of course, require that they secure permits of the department, as it holds in this respect a position analagous to that of the Federal Reserve Board.

If a holding company affiliate of a State institution does not enter into such an agreement, as required by Section 19 of the Federal Banking Act of 1933, or violates the terms of such agreement, you may prohibit it from voting its stock in an institution under your supervision, and you may issue an order requiring the institution whose shares of stock are involved to withhold dividends on such shares owned by a noncomplying holding company affiliate. If the institution refuses to comply with your order, you may proceed against it in the manner provided by Article V of the Department of Banking Code for violation of orders of the department, as hereinafter referred to.

IV

> May you impose the penalties prescribed by the Federal Banking Act of 1933 upon institutions failing to divorce securities affiliates?

Section 20 of the Federal Banking Act of 1933 provides that after one year from the date of its enactment, which was June 16, 1933, no member bank shall be affiliated in any manner described in Section 2 (b) of the act with any corporation, association, business trust or other similar organization engaged principally in the issue, underwriting, distribution, sale, etc. of securities. Section 20 further provides a penalty not exceeding one thousand dollars per day to be assessed by the Federal Reserve Board against a member bank violating this section. If the violation continues for six months after the member bank is warned to discontinue it, forfeiture of the rights and privileges of membership in the Federal Reserve System may be declared.

Institutions under your supervision, which are members of the Federal Reserve System, are subject to the prohibitions of Section 20.

Nonmember banks are not subject to these provisions. However, by virtue of Section 402, you have authority to subject them to the same requirements. You may order such institutions to divorce themselves forthwith from affiliates engaged in the securities business. If they violate such order, you do not have the power to impose the penalties prescribed by the Federal act. Section 402 of the Department of Banking Code does not give you authority to impose penalties provided by Federal legislation. However, you may proceed against the institution under the provisions of Article V of the Department of Banking Code for violation of the department's order.

V

> May you require an institution in computing its loans to a corporation not affiliated with it to include therein

> obligations of subsidiaries in which such corporation owns or controls a majority interest, even though the institution is not a member of the Federal Reserve System?

Section 26 of the Federal Banking Act of 1933 amends the first paragraph of Section 5200 of the Revised Statutes, by adding at the end thereof the following:

> "* * * and shall include in the case of obligations of a corporation all obligations of all subsidiaries thereof in which such corporation owns or controls a majority interest."

The section to which this provision is an amendment limits loans to any corporation or person to ten per centum of the combined unimpaired capital and surplus of the institution. Section 1006 of the Banking Code establishes the limit of loans to one corporation or person to twenty-five per centum of the unimpaired capital and surplus.

The provisions of Section 26 of the Banking Act of 1933 apply to institutions under your supervision which are members of the Federal Reserve System. They do not apply to nonmember institutions because a subsidiary in which a corporation not affiliated with an institution owns or controls a majority interest is not, under the definitions of Section 2 (b) of the Federal Banking Act of 1933, an affiliate, and for that reason does not come within the scope of Section 402 of the Department of Banking Code.

Every institution under your supervision, which is a member of the Federal Reserve System, in computing its loans to a corporation, must include therein loans to subsidiaries in which such corporation owns or controls a majority interest. The total of the loans to such corporation as so computed must not exceed ten per centum of the combined capital and surplus of the institution.

You may not require an institution which is not a member of the Federal Reserve System, in computing its loans to a corporation not affiliated with it, to include therein those it makes to any subsidiary of such corporation, except in so far as such loans are "made for the benefit of the corporation." The limit of a loan by a nonmember institution to any corporation not affiliated with it remains at twenty-five per centum of the combined unimpaired capital and surplus of the institution.

VI

> May you require an institution to obtain from its affiliates reports of condition and impose a penalty for noncompliance with such requirement?

Section 27 of the Federal Banking Act of 1933 authorizes the Comptroller of the Currency to require a national bank to obtain from any affiliate or holding company affiliate not less than three reports of condition during each year and to furnish such reports to the Comptroller. For failure to do so, the national bank shall be subject to a penalty of one hundred dollars for each day that any such failure shall continue.

Under Section 402 of the Banking Code you have the same power with respect to affiliates of institutions under your supervision as Federal authorities have over affiliates of national banks.

In our opinion, therefore, you may issue a regulation requiring any institution under your supervision to obtain from each of its affiliates and holding company affiliates reports in such form as you shall prescribe. An institution failing to comply with your request is not subject to the penalty imposed by the Federal Banking Act of 1933. For its failure to comply with an order issued by you pursuant to the provisions of Section 27, you may proceed against it under the provisions of Article V of the Department of Banking Code.

VII

May you require affiliates of State institutions to submit to an examination?

Section 28 of the Federal Banking Act of 1933 authorizes the Comptroller of the Currency to examine the affairs of any affiliate of a national bank.

In our opinion, under Section 402 of the Department of Banking Code you clearly have the same power with respect to an affiliate of an institution under your supervision and may issue regulations requiring such an affiliate to submit to examination by your department.

VIII

What procedure should you follow when an institution fails to comply with an order issued by your department?

Section 501 of the Department of Banking Code provides that when an institution violates any provision of its charter or of any law of the Commonwealth, the department may by written order direct it to discontinue such violation.

In the event that any written order issued by you pursuant to this section is not promptly complied with, you should proceed under Section 502 of the Code. This provides that through the Department of Justice you may petition the Court of Common Pleas of Dauphin County, or of the county where the institution has its principal place of business, for an order directing compliance with your order. Such petition must be granted by the court following proof at a hearing that the department's order was lawfully issued.

Furthermore, Section 503-B of the Code provides for the institution of quo warranto or injunction proceedings by the Department of Justice following hearing, when an institution violates provisions of its articles of incorporation or of an order lawfully issued by your department.

In addition to the remedy of quo warranto given by the Code, Section 504 provides that the department may take possession of an institution, upon approval of the Department of Justice following hearing, if the institution has violated provisions of its charter, of any order of the court issued upon application of the Department of Banking, or of any law of the Commonwealth regulating its business.

SUMMARY

To summarize, we therefore advise:

I

The definitions of ''affiliate'' and ''holding company affiliate'' used in the Federal Banking Act of 1933 become the definitions of affiliates for the purposes of Section 402 of the Department of Banking Code and Section 2 of the Banking Code and are read into those codes wherever reference therein is made to affiliated corporations or persons.

II

The limitations on loans to affiliates imposed by the Federal Banking Act of 1933 supersede absolutely limitations imposed by the Banking Code with respect to institutions under your supervision, which are members of the Federal Reserve System. As to nonmember institutions, you may promulgate by order the provisions of the Federal act so far as relations directly between the nonmember banks and their affiliates are concerned.

III

A holding company affiliate may not vote shares of stock of an institution under your supervision without agreeing, if it is an affiliate of a member of the Federal Reserve System, to be examined as provided by the Federal Banking Act of 1933, and, if it is affiliated with a nonmember institution, to be examined in the same manner by the Department of Banking. If any affiliate of a nonmember bank fails so to agree or violates the terms of its agreement, you may proceed against it in the manner provided in the Department of Banking Code for violations of any valid order of your department.

IV

The penalties prescribed by the Federal Banking Act of 1933 upon institutions failing to divorce securities affiliates may be imposed only by the Federal authorities upon institutions under your supervision which are members of the Federal Reserve System. If a nonmember institution violates your order to divorce from it an affiliate engaged in the securities business, you may proceed against such institution only for violation of the department's order.

V

You may require an institution under your supervision in computing loans to a corporation to include therein obligations of subsidiaries thereof only if such institution is a member of the Federal Reserve System.

VI

You may require an institution to obtain from its affiliates reports of condition and for its failure to do so you may proceed against it for violation of your order, as provided in the Department of Banking Code.

VII

You may require affiliates of institutions to submit to examination by your department.

VIII

Where an institution fails to comply with an order issued by your department, you may through the Department of Justice petition the court for an order directing the institution to obey the order of your department, or you may notify the Department of Justice, which may institute quo warranto proceedings. For violation of a court order you may take possession of the institution with the consent of the Department of Justice following a hearing before that department.

Very truly yours,

DEPARTMENT OF JUSTICE,

HAROLD D. SAYLOR,

Deputy Attorney General.

OPINION NO. 152

Liquor Control Board—Competitive examinations—Employes—Non-employes—Filling of vacancies.

A plan proposing that when examinations are given to persons desiring employment by the board, there be two sets of examinations, one for persons already in the employ of the board and the other for persons not so employed, would not conform to the requirements of the law. Section 302 of the Act of November 29, 1933, P. L. (Special Session) 15.

Department of Justice,
Harrisburg, Pa., November 7, 1934.

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

Sir: You have asked us to advise you as to the legality of a proposed plan for the examination and employment of employes of the Liquor Control Board which may be summarized as follows:

It is proposed that when examinations are given to persons who desire employment by the board, there be two sets of examinations, one for persons who are already in the employ of the board and the other for persons not so employed. The purpose of the examination for present employes would be to make it possible for them to qualify for positions of higher rating than those then held.

As a result of these separate examinations, two eligibility lists would be prepared. When a vacancy would occur, the board would take first any persons available on the list made up of employe-applicants. Only after that list was exhausted would the other list be drawn upon.

In our Formal Opinion No. 138, dated June 12, 1934, we advised the Liquor Control Board that since our law contains no provisions for promotions such as are found in many civil service laws, employes of the board could not be promoted from one classification to another without examination. Your present inquiry arises from that ruling.

Section 302 of the Liquor Control Act of November 29, 1933, P. L. (Special Session) 15 provides that no officer or employe shall be appointed or employed by the board except as provided by that section. The board is then authorized to determine the qualifications which must be met by applicants for employment, and all applicants are required to take competitive examinations. The concluding paragraph of the section is as follows:

> "All offices, places and employments in Pennsylvania Liquor Stores or establishments operated by the board shall be filled by selections from persons who have satisfactorily passed the examinations. The person receiving the highest grade shall be first appointed, and so on. The list of eligibles in any district shall be valid only until the next examination is held in such district."

In our opinion the board could prescribe as a prerequisite to the taking of an examination for particular classes of employment that all applicants shall have had certain experience as an employe of the Liquor Control Board. This, of course, would provide for the promotion of existing employes.

However, in our opinion, the additional feature of your proposition, namely, a separate examination for non-employes, would not be in accord with the law as it now stands.

The act requires that any vacancy shall be filled by employment of the person who received the highest grade in his examination, and so on. Under the proposed plan persons not already in the employ of the Liquor Control Board would not be competing at all in the examinations with the employe-applicants, although both were seeking the same position. The man who, as an outsider, received the highest grade in his examination would have no chance of obtaining the position until the lowest candidate on the employes' list had been promoted to a higher position.

In our opinion, such a plan would not constitute a system of competitive examination such as the act contemplates, and selections of employes from one of two concurrent lists would not satisfy the requirement that vacancies be filled by the person having the highest rating and so on.

Therefore, we advise you that the proposed plan as outlined in the earlier part of this opinion would not conform to the requirements of the law.

Very truly yours,

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

OPINION NO. 153

Liquor Control Board—Assistant to the Secretary—Appointment without examination—Act of November 29, 1933, P. L. (Special Session) 15.

An assistant to the secretary of the board will have to qualify in accordance with the provisions of Section 302 of the act.

Department of Justice,
Harrisburg, Pa., November 20, 1934.

Honorable Robert S. Gawthrop, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: You have asked us whether your board may appoint without examination an assistant to the secretary of the board.

By Formal Opinion No. 113, dated December 22, 1933, the Attorney General advised you that the board might appoint a secretary without requiring him to take a competitive examination under the provisions of Section 302 of the Act of November 29, 1933, P. L. (Special Session) 15, No. 4.

Section 302 of the act just mentioned provides that no officer or employe shall be appointed or employed by the board after January 1, 1934, except as provided in that section, namely, after competitive examination. The reason given by the Attorney General for his ruling that the secretary of the board was not within that section was that the Act of November 29, 1933, P. L. (Special Session) 13, No. 3, which created the Liquor Control Board, expressly authorized the board to appoint a secretary, and that Act No. 4 was not to be construed as cancelling the authority so given.

Act No. 3 does not provide for the appointment by the board of an assistant secretary or other officer beside the secretary. The secretary is authorized to designate a regular clerk employed by the board to act when the secretary is absent, but that provision is of no significance here except as it may show an absence of any intent of the Legislature to provide a regular assistant under Act No. 3. Therefore, the principles of Formal Opinion No. 113 can not apply to the present question.

We have not overlooked the fact that in Formal Opinion No. 113 we recognized that Section 302 of Act No. 4 is part of an article entitled "Pennsylvania Liquor Stores," and said that the secretary of the board would have many duties which would have no relationship to the stores. However, that was simply an explanatory and subordinate reason which, in the absence of statutory authority contained in Act No. 3 for the appointment of a secretary, would not have been enough to warrant the result there reached. Therefore, it does not furnish a basis on which we could now say that an assistant secretary may be appointed without examination.

Therefore, we advise you that an assistant to the secretary of the board will have to qualify in accordance with the provisions of Section 302 of Act No. 4.

Very truly yours,

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

OPINION NO. 154

School districts—Bond issues—Pledged taxes—Act of May 18, 1933, P. L. 813.

All unpaid taxes which are made the basis of a bond issue under the Mansfield Act, when collected, must be paid into the emergency sinking fund of the district without deduction for collectors' commissions. The collector must be compensated out of other funds of the district.

Department of Justice,
Harrisburg, Pa., November 20, 1934.

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

Sir: You have asked us whether a school district which has issued bonds and pledged taxes under the Act of May 18, 1933, P. L. 813, commonly known as the Mansfield Act, may pay from such taxes when collected, the usual commission to the tax collector who collects them.

The Mansfield Act authorizes municipal subdivisions, including school districts, to borrow money on bonds running as long as ten years, to meet current expenses. The municipality is required to pledge uncollected taxes for payment of the bonds, and with respect to that pledge, the act provides as follows:

> "Section 3. Each ordinance or resolution authorizing the issuing of said bonds shall recite an amount of the uncollected taxes then due, at least equal to the amount of the proposed issue of bonds, which amount of uncollected taxes so recited shall become a trust fund for the redemption of said bonds and the payment of the interest and taxes, if any, thereon, and it shall be the duty of the secretary or clerk of the governing body to credit the emergency sinking fund with such taxes and of the treasurer of such municipality or quasi municipality to deposit in the emergency sinking fund, immediately upon receipt thereof, any and all said uncollected taxes, provided that the amount of said uncollected taxes received and deposited in the emergency sinking fund in any year may be deducted from the amount of the annual tax, levied for the year following, to be levied and collected for the redemption of said bonds and the payment of the interest and taxes, if any, thereon.
>
> "Section 4. Any person who shall, directly or indirectly, apply or use any of said uncollected taxes to or for any purposes other than to deposit the same in the emergency sinking fund shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not exceeding one thousand dollars ($1,000.00), or imprisoned for a term not exceeding one (1) year, or either or both, in the discretion of the court."

Your precise question, as we understand it, is whether the amount of pledged taxes which must be paid into the emergency sinking fund must be the gross amount collected or whether it may be tolled for the commissions of the collector who gathers them in.

Section 559 of the School Code of May 18, 1911, P. L. 309, requires every tax collector to account in full to the school board, for all taxes on his duplicate, less only such amounts as he may have been exonerated from collecting and such amounts as are assessed against real estate on which there is no personal property from which the tax could have been collected. The collector has no authority to deduct his compensation before paying the taxes over to the school board. This is made entirely clear by Section 554 of the School Code which directs that the compensation of tax collectors is to be paid "by proper orders drawn on the school treasurer, as other accounts are paid by any school district."

Thus, it is apparent that the taxes which the school district receives are the gross taxes without deduction of collectors' commissions. It is that gross amount which the act designates as a trust fund and which the treasurer must pay into the emergency sinking fund. There is no authority under which the treasurer could hold out and put into the general treasury enough to pay commissions,—and no authority to draw orders on the emergency sinking fund to pay such fees.

Therefore, we advise you that all unpaid taxes which are made the basis of a bond issue under the Mansfield Act, when collected, must be paid into the emergency sinking fund of the district without deduction for collectors' commissions. The collector must be compensated out of other funds of the district.

Very truly yours,

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

OPINION NO. 155

Teachers Colleges—Student organizations—Right to control certain activities and financial returns from such activities.

The principles stated in Formal Opinion No. 70, (Official Opinions of Attorney General, 1931-1932, p. 256) in reference to cooperative stores, to apply to extended activities conducted by student organizations.

Department of Justice,
Harrisburg, Pa., November 27, 1934.

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

Sir: By our Formal Opinion No. 70, dated October 31, 1932 (Ops. of Attorney General 1931-1932, p. 256), we advised you that student cooperative associations at State teachers colleges might legally operate stores for sale of books and other small articles needed or wanted by the students. You now inquire whether those student organizations may also be permitted to conduct and be responsible for student athletics, lectures, entertainments, publications and similar activities.

Your problem, as we understand it, is chiefly one of finances, and therefore, reduced to its simplest terms, the question is whether student organizations may be permitted to collect funds and control completely the finances of these activities, without turning the money into the treasury of the college.

It is our understanding that under informal opinion of the present Attorney General, addressed to your department on October 11, 1929, the colleges themselves have generally sponsored athletic contests and other student activities in much the same way that the normal schools were accustomed to do prior to the time they were taken over by the State. Under that system fees and admission charges are collected by the colleges and turned in to the State Treasury as required by The Fiscal Code, and the expenses are paid from the State appropriation. Nevertheless, we see no legal objection to separating these activities from the purely educational activities of the colleges and placing them in the hands of student organizations, subject, of course, to such conditions as the trustees of each institution may prescribe.

However, if such a plan is adopted, we are of the opinion that, as in the case of the cooperative stores, the financing of these activities should be entirely separated from the operation of the college itself. Moneys of the Commonwealth should not be used by or for the activities for which the student organizations are responsible, and the colleges should not collect funds for the organizations. Of course, the organization could have as an officer some member of the college staff, who could receive funds, but he should do so only as an officer of the student organization, and not as a representative of the college. We are also of the opinion that, as in the case of cooperative stores, the students' membership in, relationships with, and payment to the student organization should be in fact as well as in form entirely voluntary.

Under these conditions, we advise you that the activities to which you have referred may be conducted by an independent organization at the teachers colleges in much the same manner as cooperative stores were authorized by our Formal Opinion No. 70, and that the principles stated in that opinion should apply to the extended activities of the organizations under this opinion.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 156

Banks and banking—Bonds—Home Owners' Loan Corporation—Federal Farm Mortgage Corporation—United States Government obligations for investment —Trust Funds.

Bonds of Home Owners' Loan Corporation and Federal Farm Mortgage Corporation, guaranteed as to principal and interest by the United States are: (1) "Bonds or other interest-bearing obligations of the United States," as that phrase is used in the Banking Code; and (2) Legal investments for trust funds in this Commonwealth.

Department of Justice,
Harrisburg, Pa., November 28, 1934.

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

Sir: You have asked to be advised whether bonds of Home Owners' Loan Corporation and Federal Farm Mortgage Corporation, guaranteed as to interest and principal by the United States Government (I) come within the category of United States Government obligations designated in the Banking Code for investment and other purposes, and (II) are legal investments for trust funds in this Commonwealth.

The Home Owners' Loan Act of 1933, as amended by the Act of April 27, 1934, 12 USCA Sec. 1463c, authorized Home Owners' Loan Corporation to issue bonds in a prescribed amount. The Federal Farm Mortgage Corporation Act of January 31, 1934, 12 USCA Sec. 1020c, likewise authorized the Federal Farm Mortgage Corporation to issue bonds in a prescribed amount. Each statute contains the following provisions:

> "* * * Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation shall be unable to pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. * * *"

The statutes further provide that:

> "* * * All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. * * *"

Your inquiries will be stated and answered in turn as follows:

I

> Are bonds of Home Owners' Loan Corporation and Federal Farm Mortgage Corporation, guaranteed as to principal and interest by the United States Government, obligations of the government within the terms of the Banking Code?

Various sections of the Banking Code of May 15, 1933, P. L. 624, refer to United States Government obligations as the subject for investment of bank funds, acceptance as collateral, etc., as follows:

Section 908-C provides that the reserve fund of banks, bank and trust companies and private banks shall be invested in "bonds or other interest-bearing obligations of the United States."

Section 1006-A, limiting loans which a bank or a bank and trust company shall make to one corporation or person, provides that such restriction has no application to:

> "(1) Loans to the United States, or loans secured by not less than the face amount of bonds or other interest-bearing obligations of the United States, or bonds or other interest-bearing obligations for the payment of the principal and interest on which the faith and credit of the United States is pledged."

Section 1007, imposing restrictions on loans to directors, officers or employes of a bank or bank and trust company, provides that such restriction shall not operate with respect to loans secured by not less than a like amount of "bonds or other interest-bearing obligations of the United States."

Section 1108, providing for the segregation and designation of trust funds and the deposit of uninvested trust funds safeguarded by pledge of securities, provides that such pledge shall consist, inter alia, of "interest-bearing bonds or other obligations of the United States."

Section 1111 limits the purchase of assets from its commercial department by a bank and trust company with fiduciary funds and the exchange of assets of the commercial department for trust assets. The section provides that such limitation shall not apply in the case of "bonds or other interest-bearing obligations of the United States."

Section 1208-A, designating the authorized investments of savings banks not under special charter, includes:

> "(1) Bonds or other interest-bearing obligations of the United States, or those for the payment of the principal and interest on which the faith and credit of the United States is pledged, including the bonds or other interest-bearing obligations of the District of Columbia."

Bonds of the Home Owners' Loan Corporation and Federal Farm Mortgage Corporation issued under the provisions of the acts of Congress respectively creating these corporations are not, in the first instance, obligations of the United States. However, they are obligations of corporations created by Congress as agencies of the Federal government. Unquestionably they become obligations of the government, if the corporation issuing the bond fails to pay the principal and interest due thereon.

The bonds are backed by the credit of the Federal government. The Secretary of the Treasury is required by law to pay not only the interest due on the bonds, but as well the principal amount thereof in the event that the corporation itself fails to make such payment. The bonds are consequently at least secondary obligations of the United States.

Having reached this conclusion, we do not believe it necessary to discuss the distinction in the phraseology of the various sections of the act referred to between "obligations of the United States" and "obligations for the payment of the principal and interest of which the faith and credit of the United States is pledged."

In our opinion, therefore, bonds of Home Owners' Loan Corporation and of the Federal Farm Mortgage Corporation, the interest and principal of which are guaranteed by the United States Government, are "bonds or other interest-bearing obligations of the United States" within the meaning of that phrase as used in Sections 908-C, 1006-A, 1007, 1008, 1111 and 1208-A of the Banking Code.

II

Are bonds of Home Owners' Loan Corporation and Federal Farm Mortgage Corporation, guaranteed as to principal and interest by the Federal government, legal investments for trust funds in the Commonwealth?

Section 41 (a) 1 of the Fiduciaries Act of June 7, 1917, P. L. 447, as last amended by the Act of April 26, 1929, P. L. 817, provides, inter alia, that trust funds may be invested "in the stock or public debt of the United States."

At first blush it would seem that bonds of corporations such as the Home Owners' Loan Corporation or Federal Farm Mortgage Corporation, are not part of the stock or public debt of the United States. However, by virtue of the provisions in the acts creating these corporations whereby the United States Government guarantees payment of the interest and principal of the bonds, they become far more than mere obligations of the corporations issuing them. For the payment of the principal and interest on these bonds, the faith and credit of the United States is pledged. The question arises, does that pledge constitute the bonds a part of the "stock or public debt of the United States?"

In the opinion of the Attorney General of the United States of August 22, 1933 (Prentice-Hall Federal Bank Service, Section 7086), the validity of the Home Owners' Loan Corporation Act was sustained. The Attorney General, in passing upon the constitutionality of the provision of the act providing for the guaranty by the United States of interest due on bonds of the corporation, sustained the validity of the provision on two grounds. They are, first, that Article I, Section 8, clause 1 of the Federal Constitution authorizes Congress to levy taxes to "pay the debts" of the United States, and, second, that clause 2 of the same section authorizes Congress to "borrow money on the credit of the United States."

If in the opinion of the Attorney General of the United States the validity of the guarantee provision in the Home Owners' Loan Corporation Act is derived from the authority of Congress to pay debts of the United States, it may logically be assumed that the obligation of the United States to pay the principal and interest due on bonds of corporations created by the Federal government constitutes such obligations a part of the "public debt" within the provisions of the Fiduciaries Act.

Furthermore, in his opinion of September 14, 1934, the Attorney General advised the Secretary of the Treasury that no condition may be implied in any way limiting the guarantee of the Federal government stated by the respective statutes as full and unconditional.

Each bond of the respective corporations, issued pursuant to the provision guaranteeing payment of the principal thereof by the Federal government, bears on its face over the signature of the Secretary of the Treasury, these words: "This bond is fully and unconditionally guaranteed both as to interest and principal by the United States."

The Attorney General then proceeds to say:

> "The guaranty being stated by the statute as full and unconditional there is no occasion to consider whether a condition should be implied. The separable provision that the Secretary of the Treasury shall pay if the corporation is unable to pay upon demand is no part of the guaranty, but merely a provision for carrying it out in the only reasonably conceivable contingency that would require such action.
>
> "Considering the foregoing, it is my opinion that if either corporation should fail, upon demand by a bona fide and accredited holder, to pay either principal or interest when due, the United States would thereupon become obligated to make such payment and its obligation would not be conditioned upon the institution of any proceeding by the bondholder against the corporation."

Furthermore, the Home Owners' Loan Act of 1933, as amended by the Act of April 27, 1934, and the Federal Farm Mortgage Corporation

Act of January 31, 1934, both provide that, as above stated, redemptions of the bonds of these corporations by the Secretary of the Treasury shall be treated "as public-debt transactions of the United States."

In our opinion, in which we are supported by the Attorney General of the United States, both acts constitute declarations by Congress that it considers the obligations of the respective corporations carrying the guarantee of the Federal government, as part of the public debt of the United States.

Reference to Section 41 (a) 1 of the Fiduciaries Act evidences the intention of the Legislature that funds in the hands of a fiduciary should be invested only in securities of such character and type as to assure safety to the investment. The categories include, in addition to the stock or public debt of the United States, the public debt of the Commonwealth, the direct and general obligations of subdivisions thereof, first mortgages on real estate in Pennsylvania not exceeding in amount two-thirds of the fair value thereof, mortgage bonds likewise secured, and trust certificates backed by securities of the type in which trust funds may be invested, as stated.

In our opinion, the Act of Assembly is not violated by interpreting its provisions to comprehend in the category "stock or public debt of the United States," bonds issued by an agency of the United States and fully guaranteed as to interest and principal by the government of the United States. Accordingly, we advise you that bonds of Home Owners' Loan Corporation and Federal Farm Mortgage Corporation, the principal and interest of which are guaranteed by the government of the United States, are legal investments for trust funds in this Commonwealth.

Summary

Therefore, you are advised that bonds of Home Owners' Loan Corporation and Federal Farm Mortgage Corporation, guaranteed as to principal and interest by the United States are:

1. "Bonds or other interest-bearing obligations of the United States," as that phrase is used in the Banking Code; and

2. Legal investments for trust funds in this Commonwealth.

Very truly yours,

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

OPINION NO. 157

Beauty Culture—Examination of graduates of beauty schools—Act of May 3, 1933, P. L. 242.

The term "registered" as used in the Act of May 3, 1933, P. L. 242, and as applied to schools of beauty culture is equivalent to "licensed for operation," and the provision of Section 4 of the act which limits those who may take examinations to graduates of schools "registered" by the department, is unconstitutional and void. Consequently the department must admit to examinations under this act, any person who has received in a school of beauty culture the courses of study prescribed by the act (Section 6) without regard to the fact that the school is not "registered" by the department.

Department of Justice,

Harrisburg, Pa., December 10, 1934.

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

Sir: The Act of May 3, 1933, P. L. 242, No. 86 established a system of examination and licensing or "registration" of practitioners and teachers of beauty culture as therein defined, and of managers of beauty shops. Provision is made for the licensing or "registration" of certain classes of persons without examination. All other applicants are required to be examined. As a prerequisite to examination, with certain exceptions not important here, the applicant must have either served an apprenticeship in a beauty shop or completed certain work in a school of beauty culture.

You have asked us to construe the provisions of the act concerning the examination of graduates of beauty schools, and you inquire particularly whether graduates of schools located outside of Pennsylvania may be admitted to the examinations.

The portions of the act which are pertinent to your inquiry are the following:

> "Section 2. Practice of Beauty Culture without Registration Prohibited.—It shall be unlawful for any person to practice or teach beauty culture, or manage a beauty shop, or to use or maintain any place for the practice or teaching of beauty culture, for compensation, unless he or she shall have first obtained from the department a certificate of registration as provided in this act. Nothing contained in this act, however, shall apply to or affect any person who is now actually engaged in any such occupation, except as hereinafter provided.
>
> "Section 4. Eligibility Requirements for Examination.—No person shall be permitted by the department to take an examination to receive a certificate as an operator unless such person shall be at least sixteen years of age and has been registered as a student and has had training, as hereinafter provided in this act, in a beauty school duly

registered by the department, or unless such person shall have been registered and served as an apprentice at least two years as hereinafter provided in this act: * * * No person shall be permitted to take an examination for a certificate to teach beauty culture or act as manager of a beauty shop unless such person shall be at least eighteen years of age, and has had at least eighteen months' experience as an operator in a beauty shop or has had training in a duly registered school of beauty culture of fifteen hundred hours inclusive of the studies necessary to become an operator.

"Section 6. Requirements of a School of Beauty Culture.—No school of beauty culture shall be granted a certificate of registration unless it shall attach to its staff, as a consultant, a person licensed by this Commonwealth to practice medicine, and employ and maintain a sufficient number of competent teachers, registered as such, and shall possess apparatus and equipment sufficient for the proper and full teaching of all subjects of its curriculum, * * *."

Our problem arises out of the above provision of Section 4 which prescribed as a prerequisite for the examination, a course of training "in a beauty school registered by the department." The answer, so far as the act itself is concerned, must depend on the proper construction of the term "registered" as used in that phrase. Does it mean registered simply for purposes of recognition or being accredited, or does it mean registered in the technical sense of "licensed to operate?"

If the former meaning were correct, your department could no doubt under the act itself recognize, accredit or register a school outside the State and admit to your examinations persons who had received in such schools the training required by our act. But if we must adopt the second interpretation of the meaning of "registered," we must look farther for our answer.

In practically every other part of the act in question the terms "registered" and "registration" are clearly used in the sense of licensing. Section 2 makes it unlawful for any person to practice or teach beauty culture or to maintain any place for the practice or teaching of beauty culture without a certificate of "registration" issued by your department. The provisions of Section 6 concerning registration of schools were obviously designed to prescribe the conditions under which a school may operate in Pennsylvania. There is nowhere a hint of any intention to provide for any other kind of registration of a school.

Under these circumstances, we feel compelled to say that the language of Section 4 means that an applicant who desires to take an examination on the basis of training in a beauty school must show that she has completed the work specified in Section 6 in a school "registered" or licensed for operation by your department.

It is elemental that a law of this State providing for licensing of schools for operation can have no effect outside the State. Pennsylvania cannot license the operation of schools in other states. Therefore, the net result of the statutory language is to prohibit admission to an examination on the basis of prior beauty school training of any person who has not done the preparatory work in a Pennsylvania school.

However, we may not end our inquiry here. The act, as we are thus compelled to read it, imposes a most unusual restriction on the right of persons to engage in the business of creating or enhancing beauty. Therefore, we must test it in the light of constitutional guaranties of personal rights.

The Fourteenth Amendment to the Federal Constitution forbids the states "to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" or to "deprive any person of life, liberty, or property, without due process of law" or to "deny to any person within its jurisdiction the equal protection of the laws."

It is well settled that a state, without violating the constitutional provisions just quoted, may prescribe that only persons who possess reasonably necessary qualifications of learning and skill may carry on occupations or professions which affect the public: Graves *v.* Minnesota, 272 U. S. 425 (1926); Smith *v.* Texas, 233 U. S. 630 (1914); Dent *v.* West Virginia, 129 U. S. 114 (1899); Norwood *v.* Ward, 46 Fed. (2nd) 312 (1930); Marx *v.* Maybury, 36 Fed. (2nd) 397 (1929). However, the requirements and classifications set up by such acts must be reasonable and bear a reasonable relation to the public interest which the act is intended to serve: Smith *v.* Texas, supra; Norwood *v.* Ward, supra.

In Smith *v.* Texas, the Supreme Court of the United States held unconstitutional a State act which would have made it illegal for any person to act as conductor of a freight train who had not previously been a brakeman on a freight train for a prescribed period. The court said (pages 636, 638, 641):

> "1. Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who

are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

* * * * * * *

"* * * This and the other cases establish, beyond controversy, that, in the exercise of the police power, the state may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employee. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve, and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.

* * * * * * *

"3. So that the case distinctly raises the question as to whether a statute, in permitting certain competent men to serve, can lay down a test which absolutely prohibits other competent men from entering the same private employment. It would seem that to ask the question is to answer,—and the answer in no way denies the right of the state to require examinations to test the fitness and capacity of brakemen, firemen, engineers, and conductors to enter upon a service fraught with so much risk to themselves and to the public. But all men are entitled to the equal protection of the law in their right to work for the support of themselves and families. A statute which permits the brakeman to act,—because he is presumptively competent,—and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety, but denies to many the liberty of contract granted to brakemen, and operates to establish rules of promotion in a private employment."

The effect of the Pennsylvania Act which we are now considering is not unlike the statute considered and held invalid in Smith *v.* Texas. A person may be a graduate of a school of beauty culture of another state. The course of training in that school may comply with all the requirements of our act. And yet, simply because the school is located outside of Pennsylvania, he may not even take an examination to prove his fitness to become a registered operator in this State.

In our opinion such a result cannot be sustained. There is no possible relation between the qualifications of an applicant and the location of the school which he has attended. The provision which brings about this result is unreasonable and discriminatory, and therefore, violates rights guaranteed by the constitutional provisions to which we have referred.

Therefore, we advise you that as used in the Act of May 3, 1933, P. L. 242, No. 86, the term "registered" as applied to schools of beauty culture is equivalent to "licensed for operation," and the provision of Section 4 of the act which limits those who may take examinations to graduates of schools "registered" by your department is unconstitutional and void. Consequently you may, and in fact must, admit to examinations under this act, any person who has received in a school of beauty culture the courses of study prescribed by the act (Section 6) without regard to the fact that the school is not "registered" by your department.

Of course, in passing upon the credentials of any applicant, it will be permissible for you to require that he satisfy you that the school from which he comes is a bona fide school of beauty culture, but you may not require that it be registered or that it employ a Pennsylvania physician or Pennsylvania registered instructors.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 158

Taxation—Board of Finance and Revenue—Refund of additional transfer inheritance tax—Jurisdiction of the Board—Limitation as to filing petitions for refund—Federal estate tax.

Department of Justice,

Harrisburg, Pa., December 11, 1934.

Honorable Walter J. Kress, Secretary, Board of Finance and Revenue, Treasury Department, Harrisburg, Pennsylvania.

Sir: You have asked to be advised upon several questions involving refunds of additional transfer inheritance tax paid to the Commonwealth of Pennsylvania under the Act of May 7, 1927, P. L. 859, 72

PS Sec. 2303, and its amendments. The tax imposed under this act is in an amount equal to the difference between the total credit upon Federal estate tax allowable by the Federal law for taxes payable to the State governments and the total taxes actually paid or payable to the Commonwealth of Pennsylvania under inheritance tax laws.

Your questions all involve Section 503 of the Act of April 9, 1929, P. L. 343 (The Fiscal Code), 72 PS Sec. 503, as last amended by Section 1 of the Act of June 1, 1931, P. L. 318, which reads in part as follows:

> "The Board of Finance and Revenue shall have the power, and its duty shall be,
>
> "(a) To hear and determine any petition for the refund of taxes, license fees, penalties, fines, bonus, or other moneys alleged to have been paid to the Commonwealth as the result of an error of law or of fact, or of both law and fact, and, upon the allowance of any such petition, to refund such taxes, license fees, penalties, fines, bonus, or other moneys out of any appropriation or appropriations made for the purpose, or to credit the account of the person, association, corporation, body politic, or public officer entitled to the refund. All such petitions must be filed with the board within two years of the payment alleged to have been erroneously made, except.
>
> "(1) When the estate upon which any transfer inheritance tax has been erroneously paid shall have consisted in whole or in part of a partnership, or other interest of uncertain value, or shall have been involved in litigation by reason whereof there shall have been an overvaluation of that portion of the estate on which the tax has been assessed and paid, which overvaluation could not have been ascertained within said period of two years. In such case, the application for repayment shall be made to the Board of Finance and Revenue, within one year from the termination of such litigation, or ascertainment of such overvaluation."

We shall answer first your questions upon the general jurisdiction of the Board and second your questions upon the limitation of the time for filing petitions for refund. In answering the second group of questions we shall refer to the facts of specific cases to which you have directed our attention.

I. *The Jurisdiction of the Board*

A. Does the Board of Finance and Revenue have jursidiction to consider petitions for refund of additional transfer inheritance tax paid to the Commonwealth under the Act of May 7, 1927, P. L. 859, as amended?

Transfer inheritance tax upon the transfer of property passing from decedents is imposed by the Act of June 20, 1919, P. L. 521, 72 PS Sec. 2301, as amended. In order that the Commonwealth might receive the benefit of Federal Revenue Laws granting a credit on the Federal estate tax for transfer inheritance taxes paid to the State government, the Act of May 7, 1927, P. L. 859, as amended by the Act of May 16, 1929, P. L. 1782, 72 PS Sec. 2303, imposed an additional transfer inheritance tax upon the transfer of property taxable under the Act of June 20, 1919, P. L. 521, 72 PS Sec. 2301. This additional transfer inheritance tax is equal to the difference between the total credit allowable by the Federal law for tax payable to the State governments and the total taxes actually paid or payable to the Commonwealth and any other state or territory under the inheritance tax laws.

The additional transfer inheritance tax imposed by the terms of this act is clearly a tax within the meaning of Section 503 of The Fiscal Code. When such a tax has been paid to the Commonwealth as the result of an error of law or of fact, or of both law and fact, it is within the power and becomes the duty of the Board of Finance and Revenue to hear and determine a petition for the refund of such tax.

Therefore, you are advised that the Board of Finance and Revenue has jursidiction to consider petitions for refund of additional transfer inheritance taxes paid to the Commonwealth under the Act of May 7, 1927, P. L. 859, as amended.

B. Do the General Appropriation Acts of 1931 and 1933 give the Board of Finance and Revenue a jurisdiction independent of the specific provisions of The Fiscal Code?

The General Appropriation Act of 1931, No. 15A, makes an appropriation to the Board of Finance and Revenue for refunding transfer inheritance taxes as follows:

> "For refunding transfer inheritance taxes on estates of resident decedents paid in error or over-paid, the sum of four hundred seventy-five thousand dollars ($475,000)."

The General Appropriation Act of 1933, No. 300A, contains a similar appropriation in the sum of three hundred thousand dollars ($300,000).

As hereinafter stated, the jurisdiction of the Board of Finance and Revenue, under Section 503 of The Fiscal Code, is sufficiently broad to include all situations about which you now ask to be advised. Therefore, it will not be necessary to decide the question of independent jurisdiction under the appropriation acts.

C. What payments may be refunded in the exercise of the jurisdiction conferred by Section 503 of The Fiscal Code?

Section 503 of The Fiscal Code refers to payments "as the result of an error of law or fact, or of both law and fact." The appropriation acts referred to in our answer to the preceding question, refer to taxes "paid in error or overpaid." It has been suggested that if the appropriation acts were to be interpreted as conferring jurisdiction on the Board of Finance and Revenue the jurisdiction of the Board by reason of the word "overpaid" might be broader than that conferred by Section 503 of The Fiscal Code.

Without attempting to define all the possible applications of the words "error of law or of fact" we advise you that they are sufficiently broad to include all overpayments of additional transfer inheritance tax made for the purpose of securing the 80% credit on Federal estate tax. Since liability for additional transfer inheritance tax under the Act of May 7, 1927, P. L. 859, depends entirely upon liability for Federal estate tax, and since our statutes do not provide and could not competently provide a system by which the courts of this Commonwealth may pass upon the correctness of any determination of liability for Federal estate tax, it is our opinion that the plain intention of the Legislature is that any payment of additional transfer inheritance tax which later proves to have been an overpayment, by reason of subsequent final determination of Federal estate tax in an amount less than that originally determined, is to be considered a payment made in error of law or fact, or both law and fact, whether the diminution of liability for Federal estate tax results from the estate securing a reduction in the valuation of admitted assets, the exclusion of questioned assets or the inclusion of questioned credits.

Further evidence of the intention of the Legislature in this respect is found in Section 1 of the Act of May 16, 1929, P. L. 1782, which amended Section 1 of the Act of May 7, 1927, P. L. 859, by authorizing a *provisional* estimate for the payment of additional transfer inheritance taxes to the Commonwealth on account and final appraisement after the amount of Federal estate tax has been finally determined. Since the final appraisement may determine a liability either greater or less than that shown by the provisional appraisement it is evident that the Legislature must have intended that there be available to the estate some method of procuring a refund in cases where the final appraisement determined a liability less than that shown by the original appraisement. In our opinion Section 503 of The Fiscal Code gives the Board of Finance and Revenue jurisdiction to make refunds upon the happening of this event.

Therefore, you are advised that payments to the Commonwealth of additional transfer inheritance tax to take advantage of the 80% credit on Federal estate tax which upon subsequent determination of liability for Federal estate tax prove to have been overpayments are payments made in error of law or of fact, or of both law and fact within the meaning of Section 503 of The Fiscal Code.

II. *Limitation as to Filing Petitions for Refund*

A. Is the filing with the United States Board of Tax Appeals of a petition for a redetermination of Federal estate tax liability an involvement of the estate in litigation?

This is the first question involving the provisions of Section 503 of The Fiscal Code as to the limitation on the time for filing of petitions for refunds. We have already quoted the pertinent parts of Section 503.

This question arises in the estate of Alfred W. Fleisher. In this case a petition for refund of additional transfer inheritance tax is now pending before the Board of Finance and Revenue.

On September 3, 1931, the Commissioner of Internal Revenue made a deficiency assessment of Federal estate tax. On October 31, 1931, the executors petitioned the United States Board of Tax Appeals for a redetermination of liability raising a question of the value of assets admittedly forming a part of the taxable estate. On December 10, 1931, the executors made a payment to the Commonwealth of Pennsylvania, which payment included the additional transfer inheritance tax due the Commonwealth of Pennsylvania by reason of the deficiency assessment. This payment was made to take advantage of the 80% credit on the Federal estate tax, which is allowed only for taxes actually paid, thus avoiding double payment of the amount of the 80% credit. The executors now seek a refund of part of this payment.

On January 4, 1934, pursuant to stipulation entered into between counsel for the executors and counsel for the Commissioner of Internal Revenue, the Board of Tax Appeals entered an order to the effect that a considerable overpayment had been made. Since the amount of additional transfer inheritance tax to which the Commonwealth is entitled depends entirely upon the amount of Federal estate tax to which the Federal government is entitled, it is clear that the decision of the Board of Tax Appeals that there was an overpayment to the Federal government automatically decides that there was an overpayment to the Commonwealth of Pennsylvania.

On February 13, 1934, the executors filed their petition for refund with the Board of Finance and Revenue. The petition for refund was filed more than two years after the payment of the tax sought to be refunded.

The question before us is whether proceedings in this estate before the Board of Tax Appeals for the redetermination of tax liability are an involvement of the estate in litigation by reason whereof there was an overvaluation of that portion of the estate on which the tax was assessed and paid. If the proceedings in this estate were such an involvement in litigation the Board has jurisdiction to grant the refund, since the petition for refund was filed within one year from the determination of the proceedings. If the proceedings were not such an involvement in litigation the Board is without jurisdiction to grant the refund, since the petition for refund was not filed within two years from the date of the payment alleged to have been erroneously made.

We must first determine whether proceedings before the Board of Tax Appeals are litigation. Later we shall consider the meaning of the words, "by reason whereof there was an overvaluation of that portion of the estate on which the tax was assessed and paid, which overvaluation could not have been ascertained within said period of two years."

Litigate is thus defined in the Century Dictionary:

> "To make the subject of a suit at law; bring before a court of law for decision; prosecute or defend at law, as a right or claim."

Litigation is the act or process of litigating as so defined.

Litigation is thus defined in 38 Corpus Juris, at page 68:

> "A contest in a court of justice, for the purpose of enforcing a right; a judicial contest; a judicial controversy; a suit at law; the act or process of litigation."

The United States Board of Tax Appeals is an independent agency in the executive branch of the Government of the United States. The Board is nevertheless vested with judicial, as well as administrative functions, and in the exercise of its judicial functions it acts as a court in determining questions of law and fact in controversies submitted to it for decision.

At the time the instant case arose the jurisdiction and powers of the Board of Tax Appeals were regulated by the appropriate sections of the Revenue Act of 1926. Section 1000 of Chapter 27 of the Revenue Act of February 26, 1926, 44 Stat. 106, 26 U. S. C. A. 1216, provides:

> "The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926, or by subsequent laws."

Section 308, Chapter 27 of the Revenue Act of 1926 (February 26, 1926), 44 Stat. 75, 26 U. S. C. A. 1101, reads in part as follows:

> "If the commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the

> commissioner is authorized to send notice of such deficiency to the executor by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the executor may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * *''

Section 501, Chapter 277 of the Revenue Act of 1934 (May 10, 1934), 48 Stat. 755, extended the time for filing petitions to 90 days, and provided that neither legal holidays in the District of Columbia nor Sundays should be counted as the ninetieth day.

Practice and procedure before the Board of Tax Appeals follow well defined rules. If necessary, evidence is taken to aid in the determination of disputed questions of fact. The decision of the Board of Tax Appeals on questions of fact is prima facie correct on appeal to the Circuit Court of Appeals. Decisions of the Board are final except when reviewed by a higher court as provided by law. Section 1003 of Chapter 27 of the Revenue Act of 1926 (February 26, 1926), 44 Stat. 110, 26 U. S. C. A. 1226, provides that the Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board and that the judgment of any such court shall be final except that it shall be subject to review by the Supreme Court of the United States upon certiorari. The Courts of Appeals may also certify questions to the Supreme Court in cases in which they have been asked to review decisions of the Board of Tax Appeals.

The filing before the Board of Tax Appeals of a petition for redetermination of tax liability is an essential statutory step taken by a taxpayer to procure a final adjudication of the amount of his tax liability. It is the submission of a controversy to a tribunal competent to adjudicate the rights of the parties to the controversy. In our opinion it is litigation within the meaning of Section 503 of The Fiscal Code.

Therefore, you are advised that where additional transfer inheritance tax has been paid to the Commonwealth of Pennsylvania because of a deficiency assessment of Federal estate tax, the filing with the Board of Tax Appeals of a petition for redetermination of the Federal estate tax liability is an involvement of the estate in litigation and that a petition for refund of additional transfer inheritance tax paid to the Commonwealth under these circumstances is within the jurisdiction of the Board of Finance and Revenue if filed with the Board within one year from final determination of the tax liability by the Board of Tax Appeals or final determination by the court, if appealed.

B. Is the filing of a claim for refund of Federal estate tax with the Commissioner of Internal Revenue an involvement of the estate in litigation?

If we determine that such proceedings are an involvement in litigation we shall later consider the meaning of the words "by reason whereof there shall have been an overvaluation of that portion of the estate on which the tax has been assessed and paid, which overvaluation could not have been ascertained within said period of two years."

This question arises in the estate of William B. Wood. On April 22, 1931, the executors paid additional transfer inheritance tax to the Commonwealth of Pennsylvania. On February 17, 1933, the executors filed a claim for refund of Federal tax with the Commissioner of Internal Revenue. This claim was, therefore, made within two years from the date of payment of the tax sought to be refunded. On March 23, 1933, prior to any decision by the Commissioner, but nevertheless within two years from the date of payment of the additional transfer inheritance tax, the executors filed with the Board of Finance and Revenue their petition for refund of such tax, reciting the foregoing petition and claiming a refund in an amount exceeding that now sought. Since at the time of the filing of this latter petition the Commissioner of Internal Revenue had not yet disposed of the claim for refund filed with him, the Board of Finance and Revenue could not have awarded a refund to the estate on this petition. The executors, however, contend that this petition has the effect of suspending the running of the limitation contained in Section 503 of The Fiscal Code.

On January 20, 1934, the Commissioner of Internal Revenue issued a certificate of overassessment and awarded a refund of part of the amount claimed by the executors. On April 5, 1934, the executors filed their supplemental petition with the Board of Finance and Revenue reducing the amount claimed to conform to the ruling of the Commissioner of Internal Revenue. If the filing of the claim with the Commissioner of Internal Revenue was "litigation" within the meaning of Section 503 of The Fiscal Code, the supplemental petition was filed within one year from the termination of such litigation.

Since the amount of additional transfer inheritance tax to which the Commonwealth is entitled depends entirely upon the amount of Federal estate tax to which the Federal government is entitled, it is clear that the decision of the Commissioner of Internal Revenue that there was an overpayment to the Federal government automatically decides that there was an overpayment to the Commonwealth of Pennsylvania.

An affirmative ruling on either of two propositions will result in a decision favorable to the claimant. These propositions may be stated as follows:

> 1. The filing of the original petition for refund with the Board of Finance and Revenue suspends the running of the limitation contained in Section 503 of The Fiscal Code.

> 2. The filing of the claim for refund with the Commissioner of Internal Revenue operated to suspend the running of the limitation contained in Section 503 of The Fiscal Code.

If we affirm the second proposition it will not be necessary to determine the correctness of the first. If the second is true the filing of the supplemental petition based on the final determination of the disputed question by the Commissioner of Internal Revenue was within one year of the termination of the "litigation," and the Board of Finance and Revenue would have jurisdiction to entertain the supplemental petition without regard to the time of filing of the original petition.

Section 1111 of the Act of February 26, 1926 (The Revenue Act of 1926), Rev. Stat. Sec. 3220, 26 U. S. C. A. 149, as last amended by Section 3 of the Act of May 29, 1928, reads in part as follows:

> "Except as otherwise provided by law in the case of income, war-profits, excess profits, estate, and gift taxes, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; * * *"

The proceedings on a claim for refund possess many of the attributes of litigation. The claim as filed with the Commissioner is supported by the affidavit of the claimant. Hearings may be had and testimony taken in support of the claim. Questions of both fact and law are determined, and the decision of the Commissioner will be a final determination of the rights of the parties unless a suit is brought for the recovery of the taxes. Such a claim for refund may be allowed by the Commissioner of Internal Revenue and may never come before any court for determination or adjudication.

However, in determining whether such a claim is "litigation," as that word is used in Section 503 of The Fiscal Code, we feel that great weight must be given to another important statutory provision with reference to the filing of such claims. Section 31 of the Act of February 27, 1877, C. 69, 19 Stat. 248, Rev. Stat. Sec. 3226, 26 U. S. C. A. 156, as last amended by Section 1103 (a) of the Act of June 6, 1933, C. 209, 47 Stat. 286, reads as follows:

> "No suit or proceedings shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without

> authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

This act has two important effects on the time for the beginning of a suit to recover a tax:

> 1. A taxpayer must file a claim for refund before he begins such a suit.
>
> 2. Even if he files a claim he must postpone the institution of such a suit for a minimum of six months.

A taxpayer's suit to recover internal-revenue tax alleged to be erroneously or illegally assessed or collected is clearly litigation even in the most narrow and restricted sense of the word. If we were to hold that "litigation" as defined in Section 503 of The Fiscal Code applies in the present case only to a suit for the recovery of taxes our ruling would automatically result in a shortening of the statutory period. Since the taxpayer cannot bring his suit until after the expiration of six months from the filing of a claim for refund such ruling would compel a taxpayer who tried to comply with The Fiscal Code to file a claim for refund with the Federal government within eighteen months of the time of payment of the tax to the Commonwealth of Pennsylvania. We do not believe The Fiscal Code was intended to have any such effect.

It is our opinion, therefore, that the proceedings before the Commissioner of Internal Revenue on a claim for refund of Federal estate tax alleged to have been erroneously or illegally assessed or collected are "litigation" within the meaning of Section 503 of The Fiscal Code.

Since we have affirmed our second proposition it will not be necessary for us to pass upon the first.

Therefore, you are advised that where additional transfer inheritance tax has been paid to the Commonwealth of Pennsylvania because of an assessment of Federal estate tax the filing of a claim for refund with the Commissioner of Internal Revenue is an involvement of the estate in "litigation," and that a petition for refund of additional transfer inheritance tax paid the Commonwealth under these circumstances is within the jurisdiction of the Board of Finance and Revenue if filed with the Board within one year from the final determination of the tax liability by the Commissioner of Internal Revenue, or final determination by the courts of a suit brought for the recovery of the tax claimed to be refundable.

C. What is the meaning of the words "by reason whereof there shall have been an overvaluation of that portion of the estate on which the tax has been assessed and paid, which overvaluation could not have been ascertained within said period of two years?"

In Sections A and B of Part II we decided that two common forms of procedure for the reduction of the Federal estate tax liability were "involvements of the estate in litigation." In each part we stated that we would later consider the effect of the words "by reason whereof there shall have been an overvaluation of that portion of the estate on which the tax has been assessed and paid, which overvaluation could not have been ascertained within said period of two years." In both of the estates which were the subject of consideration in Sections A and B of Part II of this opinion the dispute between the taxpayer and the Commissioner of Internal Revenue was as to the correct value of certain property admitted to have been assets of the taxable estate. The Commissioner of Internal Revenue contended for one value. The taxpayers contended for a lower value. The tax was paid on the higher value. The involvement of the estate in litigation before the Board of Tax Appeals or the Commissioner of Internal Revenue postponed until the termination of such litigation the ascertainment of the correct amount of tax liability. A petition for refund, therefore, could not have been filed within the two-year period.

The correct amount of tax depends upon the value of the estate. We are of the opinion that the exception of Section 503 of The Fiscal Code must be interpreted to mean that any involvement in litigation which postpones until the termination of such litigation the ascertainment of the true value of the net taxable estate will suspend the running of the statutory period. If the true value of the net taxable estate depends upon the determination of the question involved in the petition for redetermination or the claim for refund the involvement in litigation satisfies the foregoing requirements. This includes proceedings which have for their purpose the determination of the true value of admitted assets, the determination of whether or not certain property is an asset of the estate, or the determination of the amount of deductible liabilities of the estate.

Therefore, you are advised that an involvement of the estate in litigation which postpones until the termination of such litigation the ascertainment of the true value of the net taxable estate is, as provided in the statute, an involvement in litigation by reason whereof there shall have been an overvaluation of that portion of the estate on which the tax has been assessed and paid which overvaluation could not have been ascertained within said period of two years.

D. Must litigation be begun within two years from the date of payment of the tax sought to be refunded in order to extend the time allowed for filing a petition for refund with the Board of Finance and Revenue?

This question arises in the Estate of George B. Gordon who died September 8, 1927. On August 21, 1929, his executor paid the tax of which he now seeks a refund. The two-year limit for filing a petition for refund with the Board of Finance and Revenue expired August 21, 1931. A claim for refund was filed with the Commissioner of Internal Revenue on October 9, 1931, more than two years after the payment to the Commonwealth of the tax of which he now seeks a refund. On May 19, 1933, within one year from the favorable decision of the Commissioner of Internal Revenue on the claim for refund filed with him, a petition for refund was filed with the Board of Finance and Revenue. This petition was filed nearly four years after the tax was paid.

We have previously advised you that the filing of a claim for refund with the Commissioner of Internal Revenue is "litigation" within the meaning of Section 503 of The Fiscal Code. The only question here involved is whether the "litigation" was begun in time to suspend the running of the period provided by the statute.

Where Federal estate tax has been determined against a particular estate in an amount higher than that justified by the law and the facts, and, by reason of such determination, the estate has overpaid both Federal and State taxes, the estate has two claims for refund, one against the Federal government and the other against the State government. During the pendency of proceedings to procure a refund of Federal estate tax, the estate is unable to proceed with its claim against the State for a refund of additional transfer inheritance tax, because the right to a refund from the State follows from the determination that there is a refund due the estate from the Federal government. The Fiscal Code recognizes this disability and provides in Section 503 that the time for filing a claim for refund with the Board of Finance and Revenue shall be extended during an involvement of the estate in litigation and for one year from the termination of such litigation.

The provision in Section 503 of The Fiscal Code is in the nature of a statute of limitation. It restricts the period within which the taxpayer may assert his right to a refund. The effect of a statute of limitations is to bar a remedy after a fixed period of time. It is our opinion that this principle applies to the provisions of Section 503 of The Fiscal Code and that the running of the statutory period bars the taxpayer's remedy. When the filing of a claim for refund with the Board of Finance and Revenue has once been barred by lapse of time, the subsequent filing of a claim for refund with the Commissioner of Internal Revenue does not operate to restore or revive the barred remedy.

An additional reason for concluding that the litigation must be begun within two years is found in the language of the section. The running of the statutory period is suspended "when the estate * * * shall have been involved in litigation." The use of the words "shall have been" indicates plainly that the Legislature intended that the involvement in litigation must have occurred before the limitation of the act became effective.

Therefore, you are advised that where the litigation relied upon as suspending the statutory period of limitation provided in Section 503 of The Fiscal Code was not begun or commenced within the statutory period of two years the Board of Finance and Revenue has no jurisdiction to entertain a petition for refund filed with the said Board more than two years after the payment of the tax sought to be refunded.

SUMMARY

I. *The Jurisdiction of the Board*

A. The Board of Finance and Revenue has jurisdiction to consider petitions for the refund of additional transfer inheritance tax paid to the State government under the provisions of the Act of May 7, 1927, P. L. 859, as amended.

B. The question of independent jurisdiction under the appropriation acts is not decided.

C. Payments to the Commonwealth of additional transfer inheritance tax to take advantage of the 80% credit on Federal estate tax upon determination of liability for Federal estate tax which prove to have been overpayments, by reason of subsequent redetermination of liability for Federal estate tax, are payments made in error of law or of fact, or of both law and fact within the meaning of Section 503 of The Fiscal Code, and the Board has jurisdiction to make refunds of such payments.

II. *Limitation as to Filing Petitions for Refund*

A. The filing with the United States Board of Tax Appeals of a petition for redetermination of Federal estate tax liability is an involvement of the estate in litigation extending the usual two-year period for filing a petition for refund with the Board of Finance and Revenue.

B. The filing of a claim for refund of Federal estate tax with the Commissioner of Internal Revenue is an involvement of the estate in litigation extending the usual two-year period for filing a petition for refund with the Board of Finance and Revenue.

C. An involvement of the estate in litigation which postpones until the termination of such litigation the ascertainment of the true value of the net taxable estate is an involvement in litigation by reason whereof there was an overvaluation of that portion of the estate on which the tax has been assessed and paid, which overvaluation could not have been ascertained within said period of two years.

D. Where an involvement of the estate in litigation is relied on as suspending the statutory period of limitation provided by Section 503 of The Fiscal Code, such litigation must be begun within two years after payment of the tax of which refund is sought.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES A. STRITE,

Assistant Deputy Attorney General.

OPINION NO. 159

Assistant County Superintendents—Appointment—Legality—Act of May 26, 1933, P. L. 1072.

Section 3 of the Act of May 26, 1933, P. L. 1072, definitely limits the number of assistant county superintendents which any county may have and has repealed prior legislation which authorized conventions of school directors to appoint additional assistant county superintendents. Any such additional assistants who were appointed after May 26, 1933, are not holding office legally.

The services of an additional county superintendent may be approximated under Section 1215 of the School Code if all the school districts enter into an agreement thereunder for the employment of such a supervisor as is authorized by that section.

Department of Justice,

Harrisburg, Pa., December 12, 1934.

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

Sir: You have asked us to advise you as to the proper construction of Section 3 of the Act of May 26, 1933, P. L. 1072, particularly with respect to its relation to prior legislation on the same subject.

Section 1126 of the School Code of May 18, 1911, P. L. 309, as amended by the Act of May 24, 1921, P. L. 1078, provides as follows:

> "Every county superintendent having more than one hundred and fifty and not more than three hundred and fifty teachers under his supervision shall have an assistant superintendent; every county superintendent having more than three hundred and fifty and not more than six hundred teachers under his supervision shall have two assistant superintendents; every county superintendent having more than six hundred and not more than eight hundred teachers under his supervision shall have three assistant superintendents; and for each additional four hundred teachers, or fraction thereof, under his supervision, a county superintendent shall have an additional assistant superintendent. *And the school directors of any county, at their convention for electing a county superintendent, may authorize the appointment of additional assistant superintendents to those herein provided for.*" (Italics ours)

Section 1130 of the School Code of 1911 and its supplements, provides as follows:

> "The minimum salary of each assistant county superintendent shall be eighteen hundred dollars ($1,800.00) per year, which shall be paid out of the State appropriation for public schools, in such payments and manner as the county superintendents are paid. Theh salaries of additional assistant county superintendents, whose appointments may be authorized as herein provided, shall be fixed by the convention of school directors which provides for their appointment, and, together with any additional salary granted by said convention, to any required assistant county superintendent, shall be paid from the school appropriation apportioned among the several school districts under the supervision of the county superintendent, before the same is distributed. The salaries of assistant county superintendents shall be paid monthly.
>
> "In addition to the said salary, each assistant county superintendent shall be entitled to receive annually a sum not to exceed five hundred dollars for the payment of actual and necessary expenses incurred in visiting schools within his district, in attending educational meetings, and in the performance of such other official duties as may be required by him by law. Payments shall be made monthly, on account of such expenses, to any such assistant county superintendent by requisition of the Superintendent of Public Instruction upon the Auditor General, upon the production to him of itemized vouchers in the usual manner."

The minimum salary provisions of Section 1130 were superseded by an amendment to Section 1210, paragraph 8 of the code, approved

May 7, 1929, P. L. 1587, which fixed the minimum annual salary of all assistant county superintendents at $3,000.00.

Section 3 of the Act of May 26, 1933, P. L. 1072, which gives rise to your immediate inquiry, provides as follows:

> "Every county superintendent having more than one hundred and fifty (150), and not more than five hundred and fifty (550) teachers, under his supervision shall have one assistant county superintendent. Every county superintendent having more than five hundred and fifty (550), but not more than one thousand and fifty (1050) teachers, under his supervision shall have two assistant county superintendents. Every county superintendent having more than one thousand and fifty (1050) teachers under his supervision shall have one additional assistant county superintendent for each additional five hundred teachers, or fraction thereof, but no county superintendent shall have more than five assistants. The assistant superintendents in office at the time this act takes effect shall continue in office until the expiration of their respective terms."

Your question is whether the Act of 1933 has made it impossible for conventions of school directors to elect additional county superintendents as was authorized by Section 1126 of the School Code. You say that in several counties, the directors' conventions have elected additional assistants since the effective date of the Act of 1933 in the belief that that act did not affect the provisions of Section 1126 of the code.

The problem is not without difficulty. If the Act of 1933 had been an amendment to the appropriate sections of the School Code, we could have determined more readily its effect on the existing provisions. However, it stands as an independent act. Among the purposes stated in the title are these:

> "* * * restricting the number of assistant county superintendents; and superseding any inconsistent acts and parts of acts."

Section 6 expressly provides that:

> "All acts and parts of acts inconsistent with the provisions of this act are hereby superseded for the period during which this act shall be in effect."

Thus we have an act of assembly with the avowed purpose of restricting the number of assistant county superintendents and of repealing any acts which would be inconsistent with the restrictions so imposed. Section 3 standing alone would not warrant the appointment of any additional assistants. On its face it appears to be complete in itself. It prescribes the number of assistants each county superintendent shall have and expressly limits the number to a maximum of five. Both the title and the body of the act show that it is distinctly an act fixing definite limitations, and in some cases necessitating reduction of the number of assistants. The last sentence of Section 3 clearly contemplates that the offices of some assistant superintendents would be abolished by the act at the end of the current terms of the incumbents.

Again we note the similarity between the general form of Section 3 of the Act of 1933 and Section 1126 of the School Code. The first parts of each of these sections are strikingly alike, and it is apparent that the draftsman of the latter section had the other one before him. However, the provision of Section 1126 of the School Code for the appointment of additional assistant superintendents was omitted from the new act, and in its place there were added sentences which emphasized the restrictive nature of the section.

We have not overlooked the fact that by Section 1130 of the School Code these additional assistant superintendents are compensated not directly by the State but by the school districts, although the salaries are deducted by your department and paid direct to the assistant superintendents. These salaries are taken from the appropriations which would otherwise be paid to the districts in question.

However, that fact cannot place these additional assistants in such a distinct class as would justify us in saying that they were not affected by the provisions of the Act of 1933. Irrespective of the source of their compensation, they are nevertheless assistant county superintendents. Their duties and their powers are the same as those of the required assistants.

Therefore, we are forced to conclude that the Act of 1933 has repealed the authority contained in Section 1126 of the School Code for conventions of school directors to appoint additional assistant county superintendents, and that any such additional assistants elected since the effective date of the Act of 1933, namely May 26, 1933, were elected without legal authority.

You have also asked us, in case our answer to your first question should be as we have stated it, whether Section 1215 of the School Code provides any possible way out of the difficulty experienced by the districts which have unwittingly elected an additional assistant superintendent.

Section 1215 provides as follows:

> "Two or more school districts may join in the employment of a supervising principal, or of a supervisor or teacher of drawing, music or other special subject, for

> part or all of the schools of such districts; such supervising principal, supervisor or special teacher to be employed, his compensation paid, and his duties prescribed, by the several districts employing him."

It is apparent that the school districts in a county which would ordinarily be under the supervision of an assistant county superintendent could agree under Section 1215, to employ as supervisor of a special subject or subjects the man who was formerly an assistant county superintendent and arrange to pay him from their several funds. Therefore, if the districts wish to have the work of the regular assistant superintendents supplemented, there would be no doubt of their right to join in the employment of a supervisor under Section 1215.

To summarize, it is our opinion that Section 3 of the Act of May 26, 1933, P. L. 1072 definitely limits the number of assistant county superintendents which any county may have and has repealed prior legislation which authorized conventions of school directors to appoint additional assistant county superintendents. Therefore, any such additional assistants who were appointed after May 26, 1933 are not holding office legally.

The services of an additional county superintendent may be approximated under Section 1215 of the School Code if all the school districts enter into an agreement thereunder for the employment of such a supervisor as is authorized by that Section.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRIS C. ARNOLD,
Deputy Attorney General.

OPINION NO. 160.

School districts—State subsidy—Forfeiture—Act of April 25, 1933, P. L. 69.

If the Superintendent of Public Instruction discovers that a school district has violated Section 8 of the Act of 1933, he may declare and enforce the forfeiture authorized by Section 9 in the school year following the violation. The forfeiture would have to be prior to the payment to the district of the reimbursement on account of that teacher's salary for the year in which the violation occurred.

Department of Justice,

Harrisburg, Pa., December 18, 1934.

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

Sir: You have asked us to advise you as to the time within which, under Section 9 of the Act of April 25, 1933, P. L. 69, you may declare a forfeiture of the State subsidy otherwise payable to a school district for violation of Section 8 of that act.

Sections 8 and 9 of the Act of April 25, 1933, P. L. 69 provide as follows:

> "Section 8. Prohibition Against Demanding, Requesting or Accepting Gifts or Donations.—During the period in which this act shall be in effect, it shall be unlawful for any board of school directors to demand, request or accept, directly or indirectly, any gift or donation from any teacher or supervisor within its employ.
>
> "Section 9. Forfeiture of Subsidies.—When, during the period during which this act shall be in effect, the Superintendent of Public Instruction shall be of the opinion that any school district shall have violated the provisions of this act by demanding, requesting or accepting any gift or donation from one or more teachers or supervisors, he shall, subject to the restrictions herein provided, have the power to declare forfeited, for the then current school year, any State subsidy which is to be paid to the district as a partial reimbursement of the salary of each such teacher or supervisor.
>
> * * * * * * * *
>
> "If after the hearing the Superintendent of Public Instruction shall be of the opinion that one or more of the violations set forth in the statement, which he shall have sent to the board as herein provided, did actually occur, he may, as herein provided, forfeit the subsidies to be paid to the district as a partial reimbursement for the salary of each teacher or supervisor, listed in such statement, from whom, in his opinion, the district or its representative shall have demanded, requested or accepted a gift or donation."

Your immediate question is whether you may declare a forfeit of the subsidy of a district under the above quoted provisions during a particular school year for violations of Section 8 which occurred during the preceding school year.

Payments of subsidies to the various school districts are made on the basis of reports filed with your department under paragraph 20 of Section 1210 of the School Code, as amended. These reports state in detail the names, classifications and other information concerning each teacher on whose account reimbursement is sought. Payments to the districts on the basis of these reports are made in the following year. That is, payments based on the report filed in the fall of 1934 will begin in the fall of 1935. With this circumstance in view, let us examine the statutory provisions above quoted.

The first paragraph of Section 9 of the Act of 1933 provides that you shall have authority, upon proof of violation of Section 8, to declare forfeited "for the current school year" any State subsidy which would otherwise be made as partial reimbursement on account of the salary "of each such teacher or supervisor [from whom a gift or donation was accepted]". The last paragraph of the same section repeats the provision that the forfeiture shall be as to the State subsidy applicable to the salary of the particular teacher with respect to whom the violation occurred.

We read these sections to mean that the forfeiture may be enforced only on account of the particular teacher and with respect to the school year in connection with which the gift or donation was demanded or accepted. In other words, if a school district should demand or accept a donation from a teacher or supervisor during the school year 1933-1934, the forfeiture would apply to the reimbursement of the district for the salary of that teacher during that school year. However, since the actual payment of the subsidy to the district on account of that teacher's salary would not occur until the following year, namely during the school year 1934-1935, we believe that the enforcement of the forfeiture likewise could be made during the latter period.

Therefore, we advise you that if you discover that a school district has violated Section 8 of the Act of 1933, you may declare and enforce the forfeiture authorized by Section 9 in the school year following the violation. Of course, it would have to be prior to the payment to the district of the reimbursement on account of that teacher's salary for the year in which the violation occurred.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRIS C. ARNOLD,
Deputy Attorney General.

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