Commonwealth of Pennsylvania

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

PENNSYLVANIA

FOR THE YEARS

1935 and 1936

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DEPARTMENT OF JUSTICE

1935-1936

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OFFICIAL OPINIONS, 1935-1936

OPINION NO. 161

State government—Officials—Right to compensation—Necessity for statutory authority—Director of State Planning Board—Voluntary assistance to State departments—Reception of salary from Federal Government—Constitution, article xii, sec. 2.

1. The employment of an agent by the State Planning Board, a body created by the Governor at the request of a Federal board, presumably to carry on in this Commonwealth activities sponsored throughout the nation by such Federal board, but having no sanction in Pennsylvania law, can create no obligation on the part of the State to compensate him for his services.

2. The fact that the work of an employe of a State board created by the Governor without sanction of statute is of help to several State departments does not authorize payment for his services from the appropriations for such departments where the departments had no part in his employment and his services were, so far as they were concerned, rendered voluntarily; and legislation authorizing such payment would be unconstitutional.

3. Article xii, sec. 2 of the State Constitution, providing that no person holding office under the United States shall at the same time hold a salaried office of this State, prohibits any payment from State funds to the director of the Pennsylvania State Planning Board who is receiving a salary as consultant for the National Resources Board.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., January 2, 1935.

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

Sir: You have asked us whether certain State departments may place on their pay rolls and pay salary to a man who is designated as director of the State Planning Board under the following circumstances:

At the request of the National Resources Board of the Federal Government, the Governor appointed a State Planning Board, consisting of the Secretaries of Welfare, Labor and Industry and Forests and Waters, the Superintendent of Public Instruction, the Budget Secretary, a member of the House of Representatives, the Executive Director of the State Emergency Relief Board, and two private citizens. He prescribed the duties of the board to be:

> "the preparation of a preliminary plan for Pennsylvania containing a program of public works for ten years or more, a plan for a coordinated transportation system, a general

classification of the State into areas of suitable land use, and other studies such as housing, power, government reorganization, and the like."

The creation of the board was not authorized by any Act of Assembly.

The man in question did some work for the board for a period of seventeen days prior to October 11. On that day the Federal Government appointed him to the position of consultant for the National Resources Board at a salary of twenty-five dollars a day, which he has received since that time. The State Planning Board has designated him as its director, but he will continue to draw his Federal salary.

You say that the board is of the opinion that the director should be paid from State funds for the seventeen days of work he did in Pennsylvania before October 11 and also that the State ought to pay him a salary of $125.00 a month in addition to his Federal salary. Your inquiry is whether such payments may be made.

In reply to our inquiry as to the nature of the duties of the director you say that he "is supervising the preparation of a report which the State Planning Board aims to deliver to the Governor * * *. This report deals with education, welfare, forests, water resources, industry, employment and other questions. In composing the section of the report on these various subjects and in making plans therefor, [he] works with the various [State] departments. It is considered that the plans that are being made are of considerable help to the various departments."

The director's work during the seventeen days prior to October 11 was of the same kind.

If the director may be paid from State funds, it is proposed to have him placed on the pay rolls of the Departments of Welfare, Public Instruction, Forests and Waters and Labor and Industry.

First, as to payment for this man's services prior to October 11.

You do not say whether, during the period prior to October 11 for which he wants the State to pay him, the director was in the pay of the Federal Government in any capacity. If he was, then what we shall have to say about payment of salary after that date will be equally applicable to salary for the preceding period. For the moment we shall assume that for the seventeen days immediately before October 11 he was not on any Federal pay roll.

As we have said, the State Planning Board was created by the Governor at the request of a Federal board, presumably to carry on in Pennsylvania activities sponsored throughout the nation by the Federal board. It has no sanction in the statutes of Pennsylvania, and therefore, it would have no authority in itself to expend State

funds for any purpose. Consequently, the mere employment of the director by the board could create no obligation on the State to pay him.

However, it is said that his work is considered to be of considerable help to several State departments, and on that basis it is suggested that he might be paid from departmental appropriations. The difficulty with that proposal is that he was not employed by those departments or by any department of the State Government. He was engaged by the Planning Board to work for it, in carrying out the purposes of the National Resources Board. He cannot now be paid by the State departments for past services which, so far as those departments were concerned, were rendered by him solely as a volunteer, while he was working for an extra-legal body which could not incur any obligation for the Commonwealth. Even the legislature could not now constitutionally pass an act authorizing payment for such past services: Constitution of Pennsylvania, Art. III, Sec. 11; *Shiffert* v. *Montgomery County,* (No. 1), 5 Pa. Dist. 568 (1896).

We now turn to the question of the payment of a salary to the director from State funds for services after October 11, 1934.

Irrespective of any other considerations which may bear on this question, the principles above stated as to services rendered prior to October 11, 1934, would operate to prevent the fixing of any salary retroactive to October 11. However, there are other obstacles which would make it illegal to pay this man any salary from State funds for any period after October 11, 1934, past or future, under existing circumstances.

Article XII, section 2 of the State Constitution provides:

> "No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible."

That section is self-executing; no act of the legislature is needed to make it effective: *DeTurk* v. *Commonwealth*, 129 Pa. 151 (1889).

The man here in question holds a Federal appointment for which he is paid a salary amounting to over $7,500.00 a year. There could be no doubt that he is thus holding and exercising an office or appointment of trust or profit. It is now proposed to pay him from State funds for acting as director of the State Planning Board. In our opinion that would be exercising an office in this State. The legal impossibility of paying a State salary under these circumstances, in view of Article XII, section 2 of the Constitution, is too apparent to require further comment.

Therefore, we advise you that under the circumstances stated earlier in this opinion, it would not be lawful to pay from State funds to the director of the State Planning Board any salary or compensation for services rendered while he holds an office or appointment of trust or profit under the United States. Nor would it be lawful to carry out the proposal of paying the director from certain State department appropriations for the period prior to the time he was put on the Federal pay roll, since he was not employed by those departments and was not intended to be their employe.

Very truly yours,

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

OPINION NO. 162

Taxation—Jurisdiction—State transfer inheritance tax—Estate of non-resident alien—Stock of domestic corporation—Acts of June 20, 1919 and June 22, 1931—Constitutionality—Due process—Discrimination—Fourteenth amendment—Franco-American Treaty of 1853—Federal abrogation of State rights—Tax treaty.

1. Neither the common law nor the due process clause of the fourteenth amendment prevent one of the States of the United States from imposing a transfer inheritance tax on shares of stock of a corporation domestic to that State, which form part of an estate of an alien dying resident in a foreign country, whether or not the shares are physically present within the territorial limits of the taxing sovereign.

2. The transfer inheritance tax imposed by section 1 of the Act of June 20, 1919, P. L. 521, as last amended by the Act of June 22, 1931, P. L. 690, sec. 2, is uniformly imposed upon the property of all persons subject to the jurisdiction of the Commonwealth of Pennsylvania, the only exclusions being based upon residence rather than nationality, and the statute is not therefore violative of the Franco-American Treaty of 1853, 10 Stat. at L. 1096, which guarantees French citizens all exemptions from State taxation accorded American citizens.

3. Not decided, whether the Federal Government, in the exercise of the treaty-making power granted it by the Federal Constitution, may abrogate or interfere with the right of the several States to levy and collect taxes from aliens.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., January 3, 1935.

Honorable Walter J. Kress, Secretary, Board of Finance and Revenue, Treasury Department, Harrisburg, Pennsylvania.

Sir: You ask to be advised whether the Board of Finance and Revenue may grant a petition for refund of transfer inheritance tax

paid the Commonwealth of Pennsylvania by the Estate of Marie Adelaide Reygondaud de Villebardet de Cantellauve.

At the time of her death the decedent was a citizen and resident of France. She owned shares of stock in a Pennsylvania corporation. The certificates for the shares were in the hands of a depositary in France. On March 10, 1933, the estate paid transfer inheritance tax on the value of these shares. On November 14, 1933, a petition for refund was filed with the Board of Finance and Revenue. The claim of the estate for refund was based upon the decision of the Supreme Court of the United States in the case of *First National Bank of Boston* v. *State of Maine,* 284 U. S. 312, 76 L. Ed. 313 (1932). The decision in that case was handed down subsequent to the payment of the tax in question.

On December 13, 1933, the Board of Finance and Revenue refused this petition.

On January 8, 1934, counsel for the estate requested a rehearing and alleged as an additional basis for the granting of a refund the terms of Article VII of the Franco-American Treaty of 1853.

You ask to be advised whether the Board of Finance and Revenue should make a refund in this case. Supplementing your written request, you ask to be advised whether the tax was properly collected in view of the decision in the case of *First National Bank of Boston* v. *Maine.* We shall answer this question before we discuss the effect of the treaty.

The first question may be stated as follows:

> Has one of the States of the United States the right to impose transfer inheritance tax on shares of stock of a corporation domestic to that State, which shares form part of the estate of an alien dying while a resident of a foreign country?

The tax imposed in this case is clearly within the provisions of Section 1 of the Act of June 20, 1919, P. L. 521, as last amended by the Act of June 22, 1931, P. L. 690, Section 2, 72 PS sec. 2301. No question of conflict of this section with any provision of the Constitution of the Commonwealth of Pennsylvania has been raised. The difficulty in answering the question comes entirely from certain decisions of the Supreme Court of the United States.

We must first decide if the tax in question is void because the Commonwealth lacks power over or jurisdiction of the property sought to be taxed.

Before the adoption of the fourteenth amendment to the Constitution of the United States, the Supreme Court of the United States had reached the conclusion that a tax imposed by a state was void unless that state had jurisdiction of the person or property sought to

be taxed, such taxing laws being invalid simply as ultra vires from the standpoint of territorial jurisdiction, and without reference to any specific prohibition laid upon the states by the Federal Constitution. *Willoughby,* Constitutional Law of the United States, p. 1902; *Fraenkel,* The Supreme Court and the Taxing Power of the States, 28 Ill. Law Rev. 612, 615. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 4 L. Ed. 579 (1819); *Hays* v. *The Pacific Mail Steamship Company,* 17 How. 596, 15 L. Ed. 254 (1855); *Northern Central Railway Company* v. *Jackson,* 7 Wall. 262, 19 L. Ed. 88 (1869); *City of St. Louis* v. *The Wiggins Ferry Company,* 11 Wall. 423, 20 L. Ed. 192 (1871); State Tax on Foreign Held Bonds, 15 Wall. 300, 21 L. Ed. 179 (1873).

In *First National Bank of Boston* v. *Maine,* supra., the Supreme Court of the United States held that it was a violation of the due process clause of the fourteenth amendment for a state to impose transfer inheritance tax on the shares of stock of a corporation domestic to the state imposing the tax, which shares were part of the estate of a decedent whose domicile was in another state. The facts in *First National Bank of Boston* v. *Maine* are the facts in this case, except that the decedent in the instant case was a citizen of France domiciled in France.

It may be argued that the decision in the Maine case was based on the fourteenth amendment, or that it was based on fundamental want of power or jurisdiction of the State to lay the tax in question. We shall later discuss the argument based on the fourteenth amendment.

It is true that the opinion in the Maine case speaks of "want of jurisdiction" and of giving "extraterritorial operation" to state laws.

We are of the opinion, however, that any contention based on the Maine case, apart from the fourteenth amendment, is not sustainable in view of the more recent case of *Burnet* v. *Brooks,* 288 U. S. 378, 77 L. Ed. 844 (1933), in which it was decided that federal estate tax may be imposed upon bonds of corporations domestic to the United States, which bonds were part of the estate of a non-resident alien decedent. The Supreme Court held that the power of the Federal Government to lay such tax was not limited by the due process clause of the fifth amendment to the Federal Constitution. There remained the question of sovereign power or jurisdiction to tax. In sustaining the power of the United States to lay the tax in question Mr. Chief Justice Hughes said in his opinion, at page 396:

> "* * * So far as our relation to other nations is concerned, and apart from any self-imposed constitutional restriction, we cannot fail to regard the property in question as being within the jurisdiction of the United States,—that is, it was property within the reach of the power which the United States by virtue of its sovereignty could exercise as against

other nations and their subjects without violating any established principle of international law. * * *''

Since the states of the United States are sovereign with respect to all persons and things, except as expressly or impliedly limited by the Federal Constitution, it seems clear that the principle of *Burnet* v. *Brooks* applies to the tax in question so far as we are concerned with sovereign power or jurisdiction.

As a possible ground for distinction between *Burnet* v. *Brooks* and the instant case, it might be argued that the rule of that case applies only to shares of stock, the certificates for which were physically present within the territorial limits of the taxing sovereign. It is true that the language of the opinion may justify this distinction. We believe, however, that the court did not intend to limit the doctrine of *Burnet* v. *Brooks* in any such fashion. Such a limitation would be inconsistent with the attitude of the court clearly expressed only a few years before in *Baldwin* v. *Missouri,* 281 U. S. 586, 74 L. Ed. 1056 (1930), to the effect that choses in action have a situs only at the domicile of their owner and not where the evidences of debt or ownership happen to be found. In reaching its conclusion in *Burnet* v. *Brooks* the Supreme Court of the United States relied upon the decision of the House of Lords in *Winans* v. *Attorney General* [1910] A. C. 27, where the bonds and certificates were physically situated in the taxing country. Shortly before the decision in *Burnet* v. *Brooks,* the Judicial Committee of the Privy Council applied the rule of *Winans* v. *Attorney General* to a case where the certificates were outside the taxing jurisdiction: *Erie Beach Company, Ltd.* v. *Attorney General for Ontario* [1930] A. C. 161; cf. *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan* et al., [1933] A. C. 378.

We are of the opinion that the supposed distinction is not a valid one. Therefore, we conclude that the tax imposed in the instant case is not invalid for want of power or jurisdiction to tax.

Next we must decide if the tax is unconstitutional because it violates the due process clause of the fourteenth amendment to the Constitution of the United States.

The fourteenth amendment to the Constitution of the United States was adopted in 1868 and reads in part as follows:

''* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *''

In *Blackstone* v. *Miller,* 188 U. S. 189, 47 L. Ed. 439, (1903), the Supreme Court of the United States held that a state could tax the transfer of debts due from its residents to a resident of another state passing under the will of the nonresident. In other words, the state could subject to transfer inheritance tax the intangible personal prop-

erty of a nonresident decedent. It was held that the imposition of such a tax by statute was not an abrogation of the privileges or immunities nor a deprivation of property without due process of law under the fourteenth amendment.

If *Blackstone* v. *Miller* were still the law there would be no question of the right of the state to levy the tax in question in the instant case. In *Farmers' Loan and Trust Company* v. *Minnesota,* 280 U. S. 204, 74 L. Ed. 371 (1930), the Supreme Court of the United States held that the imposition of a transfer inheritance tax by a state in respect of the obligations of the state or its municipalities owned by a decedent domiciled in another state violated the fourteenth amendment to the Federal Constitution. This case expressly overruled the case of *Blackstone* v. *Miller. Farmers' Loan and Trust Company* v. *Minnesota* was followed by *First National Bank of Boston* v. *Maine,* which we have summarized above in disposing of other arguments based on it.

In determining whether the rule of the Maine case applies to the instant case we shall now assume that the fourteenth amendment was the basis of the decision in that case. We are of the opinion, however, that the rule in that case will not apply to the instant case because the fourteenth amendment to the Federal Constitution does not protect the estate of a nonresident alien decedent against taxation by one of the states of the United States. Subsequent to the decision in the Maine case, the Supreme Court of the United States held in *Burnet* v. *Brooks,* supra., that Federal estate tax could be levied on intangible property of a nonresident alien decedent represented by securities physically present in the United States. In this case it was held that the due process clause of the fifth amendment to the Federal Constitution could not be invoked by the estate of a nonresident alien decedent to prevent the exaction of the Federal estate tax.

In *City Bank Farmers Trust Company* v. *Bowers,* 68 Fed. (2d) 909, Certiorari denied, 292 U. S. 644, 76 L. Ed. 1495, Judge Learned Hand of the Circuit Court of Appeals of the Second Circuit, discussing the due process clauses of the fifth and fourteenth amendments, said in his opinion at page 912:

> "* * * Furthermore, the question seems to us foreclosed by Burnet v. Brooks, 288 U. S. 378, 53 S. Ct. 457, 77 L. Ed. 844, 86 A. L. R. 747. The Supreme Court had very recently decided that no state might levy a succession tax upon choses in action at the domicile of the obligor. Farmers L. & T. Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371; Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056; Beidler v. South Carolina Tax Commission, 282 U. S. 1, 51 S. Ct. 54, 75 L. Ed. 131. In First National Bank v. Maine, 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313, this had

> been extended to shares of stock in a local corporation. This, as we read the opinions, was because the situs of such property was the domicile of the obligee; that put it beyond the jurisdiction of the state. Obviously, if this were a doctrine of universal application, it also applied to the United States. But that the court denied; the Fourteenth Amendment forbade the double taxation of citizens, but it did not protect nonresidents, who must rely only upon international arrangements between the United States and their sovereigns; for example, treaties, such as in this very case protect Frenchmen against discrimination by the states. * * *''

In *City Bank Farmers Trust Company* v. *Bowers* the due process clause of the fifth amendment was in issue, but the reasoning certainly applies to the due process clause of the fourteenth amendment. The only basis on which consistency may be found between the rulings of *First National Bank of Boston* v. *Maine* and *Burnet* v. *Brooks* is that the fourteenth amendment, while protecting the estates of citizens of the United States domiciled in states other than the taxing state does not protect the estates of nonresident alien decedents from taxation by one of the states of the United States.

Therefore, we are of the opinion that the imposition of the tax in question in this case was not in violation of the due process clause of the fourteenth amendment of the Federal Constitution.

The last question before us is whether the tax violates the terms of the Franco-American Treaty of 1853, 10 Stat. at L. 996. Article VII of that treaty reads in part as follows:

> ''In all the states of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously, or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed. * * *''

If the tax in question is discriminatory under the terms of the treaty, a grave question arises as to the power of the Federal Government, in the exercise of the treaty-making power granted by the Federal Constitution, to abrogate or interfere with the right of the states to levy and collect taxes. Provisions of treaties having this effect have been held to be within the scope of the treaty-making power of the Federal Government: *Ex Parte Heikich Terui,* 200 Pac. 954 (Calif. 1921). It is not necessary for us to pass upon this question since we are of the opinion that the tax in question is not discriminatory.

The question before us was passed upon by the Supreme court of California: *In Re McCreery's Estate,* 29 Pac. (2d) 186 (Calif. 1934). That case involved the *Hay-Pauncefote Treaty* now subsisting between the United States and Great Britain. The shares of stock in that case were in California on the date of decedent's death, but had no business situs therein. Referring to the case of *Burnet* v. *Brooks,* supra., Mr. Justice Preston said in the opinion at page 188:

> "That case disposes also of the further question raised by respondents that to tax the transfer is to violate the Hay-Pauncefote Treaty (31 Stat. 1939) now subsisting between the United States and Great Britain, in that it would require the payment of a tax by subjects of the latter country where, under similar circumstances, citizens of the former would not be liable for such a tax. The discrimination claimed is not present for the rule here announced applies to American citizens who are nonresidents of the United States and domiciled in Great Britain as well as to citizens there domiciled of Great Britain itself. * * *"

The discrimination contracted against in the treaties is discrimination based on nationality. The discrimination caused by the ruling in the Maine case is based on residence. The tax in question is uniformly imposed upon the property of all persons subject to the jurisdiction of the Commonwealth of Pennsylvania. By reason of the Maine case, applying the fourteenth amendment, some are excluded, but this exclusion involves no test of nationality. The right to collect the tax is unimpaired as to persons resident and domiciled outside the territorial limits of the United States. We follow the view expressed by the Supreme Court of California, and advise you that there is no violation of the terms of the treaty.

In conclusion, therefore, you are advised that the tax imposed in the instant case was properly collected; that the state has jurisdiction of the property taxed; that there is no violation of the fourteenth amendment; and no infraction of the *Franco-American Treaty* of 1853. The contention of the petitioners for refund is, therefore, demonstrated to be untenable.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES A. STRITE,

Assistant Deputy Attorney General.

OPINION NO. 163

Road law—Charges against State forest lands—Forfeiture by township—Failure to levy road tax.

A township in which State forest lands are situated does not forfeit its right to receive the fixed charges to which it is entitled on account of such lands under section 805 of the Act of May 24, 1923, P. L. 359, at last amended by the Act of June 9, 1931, P. L. 455, because it has determined to levy no road tax for the current year, unless it has further determined not to use the State money for the benefit of its roads.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., January 8, 1935.

Honorable Ernest E. Harwood, Executive Secretary, Board of Game Commissioners, Harrisburg, Pennsylvania.

Sir: You inform us that two townships of the second class in which are located lands acquired by your board formally determined to levy no road tax for the year 1934. You ask whether under those circumstances you should require fixed charges paid to those townships under section 805 of the Act of May 24, 1923, P. L. 359, as last amended by the Act of June 9, 1931, P. L. 455, to be refunded to your board.

The fixed charges which that section requires the Commonwealth to pay are, by reference, made the same as the charges which the Commonwealth pays on account of State forest lands under the Act of May 17, 1929, P. L. 1798. That act provides that all forest lands held by the State shall be exempt from local taxation, but shall be subject:

> "* * * to an annual charge of one cent per acre, for the benefit of the county in which said lands are located, two cents per acre for the benefit of the schools in the respective school districts in which such lands are located, and two cents per acre for the benefit of the roads in the township where such lands are located, which charge shall be payable by the Commonwealth. * * *"

We assume that the determination of the authorities of the townships in question not to levy a road tax for the year 1934 is the result of the operation of the Act of June 3, 1933, P. L. 1520. That act made certain appropriations from the Motor License Fund to be used by the Department of Highways for the maintenance and repair of roads in second class townships not otherwise maintained by the Commonwealth. The act further required the township authorities in fixing the tax rates for 1934 and 1935 to reduce the road taxes by an amount equal to the amount received under the provisions of the

act, as compared with the amount levied for road and street purposes in the year 1932.

That Act of 1933 did not take over township roads as State highways. It simply made available certain State moneys for use on township roads, in relief of the taxpayers of the townships.

In our opinion the mere fact that a township as the result of receiving assistance from the State in the shape of maintenance of its roads, has decided not to levy a road tax in a particular year is not sufficient to deprive the township of the fixed charges which it is entitled to receive on account of forest and game lands held by the Commonwealth. These fixed charges are not taxes: *County of Franklin* v. *McClean*, 93 Pa. Super. 165 (1928). Therefore, the Commonwealth would not be excused from making the payment on the ground that the Act of 1933 was intended to decrease the burdens of taxpayers.

The fact that the township has determined not to levy a tax does not mean that it will not use the moneys received from the Commonwealth as fixed charges for the benefit of the roads of the township. The State maintenance under the Act of 1933 does not necessarily include all the roads of any township, nor does it necessarily take care of every expense on roads so maintained. There are likely to be road expenses which the township itself must bear in spite of this aid.

In our opinion the only fact which would deprive the township of its right to have and retain the fixed charges would be a determination of the township authorities not to use the money for the benefit of the roads under any circumstances. That has not occurred in the cases which you have submitted to us.

Therefore, we advise you that, on the facts stated, the townships in question are entitled to retain the fixed charges paid to them on account of State game and forest lands, even though no road tax has been levied for the current year.

Very truly yours,

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

OPINION NO. 164

Social insurance—Old age pensions—Emergency Unemployment Relief Act of September 19, 1934—Agency for disbursement—State Emergency Relief Board—Department of Welfare—Old Age Assistance Acts of January 18, 1934.

The Act of September 19, 1934, P. L. (1935) 1401, is an emergency unemployment relief act, neither amendatory nor supplementary to the Old Age Assistance

Acts and related to them only in that it applies to the same class of persons; the provisions in the Old Age Assistance Acts of January 18, 1934, P. L. 282 and 285, for the distribution of benefits by the Department of Welfare have, therefore, no application to the later statute, and do not authorize the State Emergency Relief Board, upon which is imposed the duty of making disbursements under that act, to delegate the duty to the Department of Welfare.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., January 9, 1935.

Honorable Eric H. Biddle, Executive Director, State Emergency Relief Board, Harrisburg, Pennsylvania.

Sir: You have asked us whether the Act of September 19, 1934, P. L. (Special Session) 9, No. 8, requires the State Emergency Relief Board to make the disbursements of cash therein authorized to be paid to unemployed persons who are entitled to old age assistance, or whether the board may allot lump sums from time to time to the Department of Welfare, and permit that department to make the disbursements.

Among the purposes of the Act of September 19, 1934 as expressed in its title is the "making an appropriation to the State Emergency Relief Board for direct relief, *including* old age assistance." Section 1 makes the appropriation for "direct relief, work relief and for administrative expenses." Section 2 requires the State Emergency Relief Board to make allocations from the moneys appropriated, "among the several counties." Section 4 forbids payment of direct relief in cash except to unemployed persons entitled to old age assistance under the Act of January 18, 1934, P. L. 282. The section concludes with this clause:

> "* * * and the State Emergency Relief Board shall * * * pay to such eligible persons, as shall be designated by the Department of Welfare, such sums, monthly, as shall be needed to make payments to such persons."

You suggest that the Acts of January 18, 1934, P. L. 282 and P. L. 284 indicate an intention that the Department of Welfare shall administer the old age assistance system and that therefore, disbursements under the Act of September 19, 1934 should be made by that department.

That suggestion misapprehends the nature and purpose of the Act of September 19, 1934, and fails to take into account several of its clear directions.

The September act is an emergency unemployment relief act, not an old age assistance act. It is neither an amendment nor a supplement to the old age assistance act. Indeed, the only substantial refer-

ence to the old age assistance system is the provision which permits payments of direct relief to be made in cash to *unemployed* persons who would be entitled to assistance under the Act of January 18, 1934, P. L. 282, while forbidding such cash payments to others. A subordinate feature is the provision which authorizes the Department of Welfare to designate the persons who shall be entitled to receive these payments.

But the direction of the act is that the State Emergency Relief Board shall allocate the moneys among the several counties, and that it shall pay the money to the persons designated by the Department of Welfare.

We recently advised you (Informal Opinion No. 493), that the duty of the board to allocate funds among the counties could not be delegated and could not be performed by making lump allocations for the whole State. The same principles would operate to prevent the board from making a lump allocation for expenditure or disbursement by the Department of Welfare.

The direction that the board shall make the payments to persons who are qualified to receive direct relief in cash is equally mandatory. We cannot read it to mean that the Department of Welfare shall make the payments.

Therefore, we advise you that it is the duty of the State Emergency Relief Board, and not of the Department of Welfare, to disburse the funds payable in cash as direct relief under the Act of September 19, 1934, P. L, (1935) 1401.

Very truly yours,

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

OPINION NO. 165

State institutions—Purchase of paper, stationery and printing—Bids and awards. Secs. 507 and 2403 (b) of The Administrative Code; Article III. Sec. 12 of the Constitution.

State institutions are "departments of government" within the meaning of Article iii, Sec. 12, of the Constitution of 1874, providing that contracts for the purchase of stationery and other supplies for such departments must be made upon the basis of competitive bidding, and such institutions may not purchase stationery in any other manner, even though the purchases be subsequently confirmed by the Department of Property and Supplies.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., January 9, 1935.

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

Sir: You have called our attention to the practice of a number of State institutions, of making purchases of paper, stationery and printed material, such as school invitations, etc., without seeking bids and awarding the work to the lowest bidder. These purchases are usually small in amount. Some purport to have been made under the authority given by the Department of Property and Supplies under section 507 of The Administrative Code, to the institutions to make direct purchases of less than $10.00, although the bills disclose that they cover items on the general schedules, and thus appear at least, to be violations of that privilege (See our Formal Opinion No. 121). Other purchases were confirmed by the Department of Property and Supplies as though originally made through and by that department. Your question is whether such purchases by or for the institutions without public bidding are legal.

Article III, section 12 of the State Constitution provides:

> "All stationery, printing, paper and fuel used in the legislative and other departments of government shall be furnished, and the printing, binding and distributing of the laws, journals, department reports, and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees, shall be performed under contract to be given to the lowest responsible bidder below such maximum price and under such regulations as shall be prescribed by law; no member or officer of any department of the government shall be in any way interested in such contracts, and all such contracts shall be subject to the approval of the Governor, Auditor General and State Treasurer."

Section 2403 (b) of The Administrative Code requires the Department of Property and Supplies to award contracts in accordance with that constitutional provision.

The constitutional mandate is clear, and we see no way in which purchases of stationery, printing, etc., may be justified except as they are made in the prescribed manner, The suggestion has been made that the language of the Constitution does not apply to the State institutions, since it speaks of stationery, printing, paper and fuel used in the legislative and other "departments" of the government. But the State institutions are within State administrative departments. Some of them are operated directly by the departments and others are under the direction of boards of trustees which are within the admin-

istrative departments. We could not bring ourselves to draw any distinction such as that suggestion would necessitate.

Therefore, we advise you that purchases of paper, stationery and printing by or for State institutions may be made only by contract awarded to the lowest responsible bidder, and purchases made otherwise should not be approved, regardless of the circumstances.

Very truly yours,

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

OPINION NO. 166

Incompetent persons—Maintenance by county—Right to contribution from Commonwealth—Act of May 25, 1897—Interpretation—Ascertaining meaning of words—Ordinary usage—Contemporaneous executive construction—Legislative definition in other statutes "Insane"—Inclusion of feeble-minded, imbeciles, and idiots.

1. In determining the meaning of a word used in a statute, the court should take into consideration the popular meaning of the word at the time of enactment of the statute, contemporaneous executive construction, and legislative definition of the same word in other acts, especially if they pertain to the same subject matter.

2. The word "insane," as used in the Act of May 25, 1897, P. L. 83, has a special meaning clearly distinguishable from "feeble-minded," "imbecile," or "idiot," and the provisions of that act for payment by the Commonwealth of contributions at a specified rate for the support of indigent insane persons are inapplicable as to feeble-minded persons, imbeciles, or idiots.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., January 14, 1935.

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

Sir: We have your request to be advised whether the fiscal officers of the Commonwealth may lawfully approve for payment and pay the sum of $247,418.63 for the maintenance to March 1, 1934, of 647 indigent feeble-minded persons committed to the Philadelphia Institution for Feeble-Minded at Byberry. Philadelphia County seeks to offset this amount against the demand of the Department of Revenue for payment of moneys due to the Commonwealth.

This sum covers a charge for maintenance of inmates for various periods beginning subsequent to February 1925, when the institution

was opened. The charge is $2.00 per week for each such inmate while housed within the institution. The inmates are all minors. All have been found to be feeble-minded, and have been committed to the institution by the Municipal Court of Philadelphia in the exercise of its jurisdiction over juvenile dependent, delinquent and incorrigible children.

The fund from which such payment may be made, if at all, is the appropriation made by Act No. 45-A, approved June 1, 1933. The authorization for payment at the rate of $2.00 per week must be found, if at all, in the Act of May 25, 1897, P. L. 83, as amended by the Act of May 13, 1909, P. L. 533, 50 PS Sec. 625. The amending act is not material for the purpose of this inquiry. It increased the amount to be paid by the Commonwealth for each indigent insane person from $1.50 per week to $2.00 per week.

Preliminary to answering your question, we must decide the following questions:

1. Does the term "insane person" as used in the Act of 1897, P. L. 83, as amended, include feeble-minded persons?

2. Are the moneys appropriated by Act No. 45-A approved June 1, 1933, available for payments authorized by the Act of 1897, P. L. 83, as amended, (a) for feeble-minded persons, and (b) for maintenance charges for feeble-minded persons incurred prior to June 1, 1933?

From our examination of the statutes and the decisions of the courts of this State, we answer each of these questions in the negative. Therefore, the claim of Philadelphia County must be rejected.

Modern medical science distinguishes between insanity, imbecility, and mental defectives, sometimes distinguished further as morons, imbeciles, and idiots.

Century Dictionary, Revised Edition, states the following definitions:

imbecile

1. Without physical strength; feeble, impotent, helpless.
2. Mentally feeble fatuous; having the mental faculties undeveloped or greatly impaired.
3. Marked by mental feebleness or incapacity; indicating weakness of mind; inane; stupid.

imbecility

1. Weakness of either body or mind, but especially the latter.
2. Weakness of mind owing to defective development or to loss of faculty, as to incapacitate its subject for the ordinary duties of life, and for legal consent, choice or responsibility.

Century Dictionary, Revised Edition, does not state any definition for "moron."

The New Century Dictionary, 1927 Edition, defines "moron" to mean:

> A person of arrested intellectual development whose mentality corresponds to that of a normal child from 8 to 12 years old.

Century Dictionary, Revised Edition, defines "insane" to mean:

1. Unsound or deranged in mind; crazy.
2. Wild, insensate, senseless.
3. Crazed, lunatic, demented, maniacal.

The words of the Act of 1897 must be construed in the sense in which they were understood at the time of its enactment: 59 C. J. 1022, sec. 607 et seq. Popular construction by the general public over a long period of time should be considered: *U. S.* v. *Farrar,* 38 F. (2) 515, affd. 50 S. Ct. 425, 281 U. S. 624, 47 L. ed. 1078, 68 A. L. R. 892; *Eden Musee American Co.* v. *Bingham,* 108 N. Y. S. 200, 58 Misc. 644. Contemporaneous executive construction is also entitled to weight: *Grant, Hutcheson Co. et al.* v. *Pa. Securities Commission,* 301 Pa. 147 (1930); *Garr et al.* v. *Fuls et al.,* 286 Pa. 147 (1926); *Commonwealth* v. *Mann,* 168 Pa. 290 (1895), and interpretation by the executive department at the time the law was passed is strong evidence of intent: *N. Y. Life Ins. Co.* v. *Bowers,* 39 F. (2) 556, affd. 34 F. (2) 60, and cet. gr. 50 S. Ct. 464, 281 U. S. 718 74 L. ed. 1138; *Scott* v. *Comm. of Civil Service* (Mass.) 172 N. E. 218; *Musgrove* v. *B. & O. R. Co.* (Md.), 75 Atl. 245.

Legislative construction in one act of the meaning of certain words is entitled to consideration in construing the same words in another act, but is not conclusive, as the words may have been used in different senses: 59 C. J. 1035, sec. 612; *P. & E. R. Co.* v. *Catawissa R. R. Co.,* 53 Pa. 20 (1866); *Must Hatch Incubator Co. Inc.* v. *Patterson,* 32 F. (2) 714; *Chapin* v. *City of Lowell* (Mass.), 80 N. E. 618 (1907).

In *P. & E. R. Co.* v. *Catawissa R. R. Co.,* supra, the court, at page 60, said:

> "* * * words of a statute—if of common use—are to be taken in their natural, plain, obvious and ordinary signification. The legislative intent is to be sought for through this ordinary signification of common words; and if a contemporaneous construction of the same words by the legislature itself can be discovered, it is very high evidence of the sense in which the words are to be received; for contemporanea expositio est fortissima in lege."

In *Must Hatch Incubator Co., Inc.,* v. *Patterson* supra, the court, at page 716, said:

> "It is a rule of statutory construction that a legislative construction in one act of the meaning of a word is entitled

> to consideration in construing the same word in another act, and this rule is entitled to great weight where the two acts pertain to the same subject-matter. * * *''

When the Act of 1897, P. L. 83, was enacted, the civil status and custody of lunatics and habitual drunkards were regulated by the Act of June 13, 1836, P. L. 592, and the admission into and discharge from hospitals for the insane in the Commonwealth of insane persons was regulated by the Act of April 20, 1869, P. L. 78, as amended.

Section 67 of the Act of 1836 provided:

> ''The word 'lunatic' in this act, shall be construed to mean and include every person of unsound mind, whether he may have been such from his nativity, as idiots, or have become such from any cause whatever.''

The Act of 1869 did not define the term ''insane person.''

It is to be noted that the word ''lunatic'' was used by the legislature to include within the application of the Act of 1836, P. L. 605, both the insane person and the idiot.

In construing the word ''lunatic'' as used in the Act of 1836, P. L. 605, the courts have held (a) it does not include a person suffering from mere weakness of mind short of idiocy: *Com.* v. *Reeves,* 140 Pa. 258 (1891); Re Albro, 22 Pa. C. C. 70 (1898); Re Smith, 22 Pa. C. C. 487 (1899), affd. 12 Pa. Super, Ct. 649 (1900); *Hetrick's Case,* 23 Pa. C. C. 522 (1899). These cases clearly distinguish the feeble-minded from the insane and the idiot, and the insane from the idiot and the feeble-minded.

The Act of June 19, 1901, P. L. 575, amending the Act of June 25, 1895, P. L. 300, was enacted for the protection of the weak in mind: *Hoffman's Est.,* 209 Pa. 357 (1904). This act was later repealed and supplied by the Act of May 28, 1907, P. L. 292 (50 PS sec. 941).

The Act of 1895 applied to persons weak in mind, The Act of 1907 applies to insane persons, feeble-minded persons, and epileptics. These acts distinguish between the insane and the feeble-minded. They preceded the Act of 1909, P. L. 35, amending the Act of 1897, P. L. 83, the act now under consideration.

As early as 1835 the need for separate provision for the feeble-minded was recognized in this Commonwealth. The Act of April 7, 1853, P. L. 341, section 9, provided that the Commonwealth would contribute a substantial amount to Pennsylvania Training School for Idiots and Feeble-Minded Children to aid in the maintenance of its inmates. See again the Act of March 20, 1872, P. L. 27, extending its benefits to adults.

Pennhurst State School was established by the Act of May 15, 1903, P. L. 446 (50 PS sec. 472), for the reception, detention, care and

training of feeble-minded persons of both sexes, of Eastern Pennsylvania.

On April 21, 1897, the Commonwealth opened Polk State School for the reception of feeble-minded in Western Pennsylvania. It was authorized by the Act of June 3, 1893, P. L. 289 (50 PS sec. 491).

Laurelton State Village was created by the Act of July 25, 1913, P. L. 1319 (50 PS sec. 451), for the care and custody of feeble-minded women of childbearing age. It began operating in 1919. It was designed by statutory direction to "provide separate classification of the numerous groups embraced under the terms "idiotic," "imbecile," or "feeble-minded."

This brief sketch of historical background of the care and custody of feeble-minded persons in this Commonwealth is not intended to be complete. It nevertheless discloses that prior to the enactment of the Act of 1897, P. L. 83, the legislature of this Commonwealth clearly distinguished between the insane person and the feeble-minded, the latter group including the imbecile and the moron.

The Philadelphia Institution for Feeble-Minded at Byberry was opened for the reception of patients in or about February, 1925. Since February 1925, appropriations have been made by the General Assembly to pay for the care, treatment, removal, and maintenance of the indigent insane in county and poor district hospitals, as follows:

Act No. 89-A, approved April 10, 1925.
Act No. 300-A, approved May 6, 1925.
Act No. 5-A, approved March 31, 1927.
Act No. 86-A, approved May 4, 1927.
Act No. 21-A, approved April 26, 1929.
Act No. 34-A, approved April 26, 1929.
Act No. 36-A, approved June 22, 1931.
Act No. 45-A, approved June 1, 1933.

The Act of 1897, P. L. 83, and Appropriation Act No. 45-A of 1933 are in pari materia. When read together we find that the Commonwealth authorizes and undertakes to pay to the municipality maintaining a county or local hospital the sum of $2.00 per week for each indigent insane person therein who has been legally adjudged to be insane and committed to the institution, or who has been transferred to such institution from a State hospital for the insane.

Upon inquiry we are advised:

(a) That the Department of the Auditor General has not at any time approved a requisition for maintenance of feeble-minded persons to be paid from moneys appropriated for the maintenance of the insane under any of the acts enumerated above.

(b) That the moneys appropriated by these acts, except that appropriated by Act No. 45-A of 1933, have been expended for the

purpose designated in the act, or lapsed by statute. (It follows that if the amount now claimed by Philadelphia Institution for Feeble-Minded is a lawful claim, it may be liquidated only by money appropriated by Act No. 45-A of 1933.)

(c) That none of the inmates for whose maintenance Philadelphia County seeks compensation has been adjudged to be insane and transferred from a State hospital to Byberry. (We eliminate this class from consideration.)

(d) That each inmate for whom claim is made has been committed as a feeble-minded person to Byberry by the Municipal Court of Philadelphia County, in the exercise of its jurisdiction over juvenile dependents, delinquents and incorrigible children.

(e) That reports prescribed by Sections 1 and 2 of the Appropriation Act No. 45-A of 1933 have not been made since June 1, 1933, by the directors, trustees or manager of the Philadelphia Institution for Feeble-Minded or by the Commissioners of Philadelphia County, to the Department of Welfare; that similar reports prescribed by the appropriation acts for the biennial periods beginning and succeeding June 1, 1925, have never been made to the Department of Welfare.

This review leads us to the conclusions:

1. That popular understanding of the word "insane" clearly distinguishes it from feeble-minded, imbecile, or idiot.

2. That the Commonwealth, in the care, custody and treatment of the insane, feeble-minded, imbecile and idiot, has clearly distinguished by legislative enactments over a long period of years between the "insane" group on the one hand and the feeble-minded, imbecile and idiotic group on the other hand.

3. That the administrative officers of both the Commonwealth and Philadelphia County construed the Act of 1897 as amended and the appropriation acts enacted since the creation of Philadelphia Institution for Feeble-Minded as excluding feeble-minded persons from the application of these acts.

4. That Philadelphia Institution for Feeble-Minded was not established and has not been maintained by Philadelphia County or any municipality, borough, or township of this Commonwealth, for the maintenance, care and treatment of insane.

5. That "feeble-minded," "imbecile," or "idiots," is not included within the term "insane" as used in the Act of May 25, 1897, P. L. 83, as amended, or of Appropriation Act No. 45-A approved June 1, 1933.

6. That to construe the word "insane" as including feeble-minded persons, and thus making the Philadelphia Institution for Feeble-Minded an institution for the insane would be contrary to the manifest intention of the legislature and would not be according to the

common and approved usage of the language of the act, its long-accepted construction by the officers of the Commonwealth and county administering the act, contemporaneous legislative definition, or the rules of construction to which we have referred.

Therefore, we advise you that the fiscal officers of the Commonwealth may not lawfully approve for payment the claim of Philadelphia County for the sum of $247,418.63 by it expended for the maintenance of inmates committed as feeble-minded persons by the Municipal Court of Philadelphia County, Juvenile Division, to the Philadelphia Institution for Feeble-Minded at Byberry, either during the biennium beginning June 1, 1933, or in any previous biennium.

Yours very truly,

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

OPINION NO. 167

Taxation—Refunds by Board of Finance and Revenue—Refusal of application—Petition for review—Limitations—Procedure—Lack of funds for payment—Postponement of hearing—Credit on claimant's account.

1. The Board of Finance and Revenue may at any time entertain a petition for reconsideration of its prior action, on an application for refund on taxes or other moneys duly filed within the 2-year period prescribed by section 503 of The Fiscal Code of 1929, as amended by the Act of June 1, 1931, P. L. 318, but such reconsideration is entirely within the discretion of the board, and delay in presentation of the petition therefor may be taken into consideration in determining whether to grant the review sought.

2. It is the duty of the Board of Finance and Revenue to receive and docket petitions for refund of taxes without regard to availability of funds for the purpose, but the board may in its discretion place such petitions on a suspended docket and refuse to hear them until such time as an appropriation is available; in no such case should the board dismiss a petition on the sole ground that no appropriation is available to pay any refund.

3. Where a refund of taxes is sought as a credit on the claimant's account, the Board of Finance and Revenue should immediately proceed to hear and determine the petition without regard to the availability of moneys for payment of refunds.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., January 15, 1935.

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

Sir: You have submitted for our advice several questions concerning the powers and duties of the Board of Finance and Revenue with

respect to petitions for refunds of taxes and license fees. We shall dispose of them in one opinion, stating the questions and the circumstances out of which they arise as we proceed.

I.

On May 13, 1931, a corporation paid capital stock tax for the year 1930, and on May 12, 1933 it filed a petition for refund of part of the money so paid. On December 13, 1933 the Board of Finance and Revenue refused the refund.

The same corporation paid its 1931 capital stock tax, and on May 31, 1933 it filed a petition for refund of a portion of that tax, the grounds of the petition being similar to those on which the petition for refund of 1930 tax was based. On June 13, 1934 the board authorized the refund of 1931 taxes which the corporation sought.

On September 24, 1934 the corporation filed a third petition, asking the board to reconsider its refusal of the refund of 1930 taxes.

Your question is whether the board may entertain the last mentioned petition and allow a refund in view of the fact that the petition was filed more than two years after the tax was paid. If our answer to that question is in the affirmative, you inquire during what period petitions of this kind for reconsideration may be presented.

The only limitation on the time within which refund applications must be made to the Board of Finance and Revenue is contained in section 503 of The Fiscal Code, as amended by the Act of June 1, 1931, P. L. 318. It is there provided that all petitions must be filed with the board within two years of the payment alleged to have been erroneously made, except in certain circumstances which are not important here.

In the present case, the petition for refund of 1930 taxes was filed within the statutory period. Therefore, the petitioner did all that was required of it in order to bring itself within the limitation fixed by Section 503. We see no season why the board may not, under such circumstances, reconsider any action which it took on a properly filed petition, at any time that it may desire to do so. In our opinion, the fact that a petition for reconsideration comes more than two years after the payment was made rather than within the two year period is unimportant.

Therefore, we advise you that the Board of Finance and Revenue may, if it deems proper, entertain the petition to reconsider its former action, and upon such reconsideration, it may reverse its prior rejection of the claim and authorize the refund. Of course, any such reconsideration is a matter for the discretion of the board and it cannot be required to reconsider under any circumstances. We find in the law no limitation on the time within which such reconsideration may

be made, but, of course, any long delay in the application for a reconsideration might well be taken into account by the board in determining whether to entertain such a petition.

II.

Your next questions arise out of claims which have been presented for refunds of erroneous payments of liquor license and milk distributors' permit fees. The legislature has made no appropriation for refunds of this nature. Since the questions you ask are applicable to many types of refund applications, we shall discuss them in a general way, endeavoring to provide guides not only for the specific cases now before you, but also for others arising under similar conditions.

You ask what course the Board of Finance and Revenue may and should pursue where petitions for refunds are presented when there is no available appropriation from which payments could be made. Specifically you inquire:

(a) Whether the board should consider the claim at all, or should simply refuse it on the ground that no appropriation is available.

(b) Whether, under those circumstances, the board could legally allow a refund or grant a credit.

Section 503 of The Fiscal Code, as amended by the Act of June 1, 1931, P. L. 318, makes it the duty of the Board of Finance and Revenue:

> "To hear and determine *any* petition for the refund of taxes, license fees, * * * 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 allowance of any such petition, to refund such taxes, license fees, * * * or other moneys out of any appropriation or appropriations made for the purpose, or to credit the account of the person, * * * entitled to the refund. * * *" (Italics ours)

(a) If the first question above stated refers to a duty to accept, file and docket a petition, our answer is that it is the clear duty of the board to do so without regard to the availability of funds. The absence of an appropriation cannot affect the duty of the board to "hear and determine *any* petition" in which erroneous payment is alleged. Therefore, the board should not only receive, file and docket every petition which falls within its jurisdiction, but also hear and determine it at a proper time.

(b) The passage above quoted from The Fiscal Code contemplates three steps in the disposition of a petition for refund. First, the board must hear and consider; then allow or dismiss; and finally, "upon allowance," make the refund from available appropriations or credit the applicant's account. Absence of an appropriation would

definitely interfere only at the last step,—the actual making of a refund.

We have no hesitation in saying that your board, if it deems fit to do so, may, without any appropriation, consider a petition for refund and allow it,—that is, determine that the claimant is entitled to a refund if money is later made available for the purpose. In fact, a petition should not be dismissed simply because of lack of an appropriation.

However, in many instances, actual determination of peitions in advance of an appropriation would involve a great waste of time and energy. This is particularly true where the refunds sought are of a kind for which the legislature has never previously made any appropriation.

Therefore, the board would be entirely justified, in its discretion, in placing petitions on a suspended calendar until such time as money may be appropriated for the purpose. Thus the board's labors will be conserved while the claimant is protected against the running of the statutory limitation for filing refund petitions.

Our quotation from Section 503 of The Fiscal Code also makes it clear that absence of an appropriation is not intended to affect the allowance of credits on refund applications. Therefore, if credit instead of cash refund is asked, and if the applicant has an account which can be so credited, the board not only may, but should proceed to consider the petition, and upon its allowance, authorize the credit, without regard to the availability of an appropriation.

The question which you also ask as to the method to be pursued in effectuating credits is an administrative rather than a legal problem, concerning which we do not feel that we should attempt to give directions. Of course, we shall be glad to advise as to the legal propriety of any plan, if it becomes necessary to change the procedure now employed.

To summarize: The Board of Finance and Revenue may entertain a petition for the reconsideration of prior action of the board on an application for refund of taxes or other moneys even though the application for reconsideration comes more than two years after the money was paid to the Commonwealth. There is no limitation on the time within which such reconsideration may be had, but any such action is a matter entirely within the discretion of the board, and delay in presentation of the petition could be taken into consideration by the board in determining whether it would review its prior action.

It is the duty of the Board of Finance and Revenue to receive and docket petitions for refund without regard to the availability of an appropriation for the purpose.

The board may proceed at once to hear and determine the petition, even if no appropriation is available, and may make a determination that the applicant is entitled to a refund if and when money is thereafter provided by the legislature. A petition should not be dismissed simply because no appropriation is available.

If the board prefers, it may place such petitions on a suspended docket and take up consideration of them only after an appropriation has been made.

Refunds claimed may be credited to the accounts of claimants even if no appropriation is available for cash payments. In cases where a credit is asked for, and where there is such an account as can be so credited, the board ought to consider and determine the petition without awaiting an appropriation.

Very truly yours,

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

OPINION NO 168

Banks and banking—Trust estates—Participating interest in mortgage or mortgage pool—Transfer from trust to commercial department—Banking Code of 1933, Sec. 1109—Reinvestment in trust funds—Applicability of section 1111.

Transfer by a banking institution of a participating interest in a specific mortgage or a mortgage pool from its trust department to its commercial department in order to make distribution to a beneficiary, as authorized by section 1109 of the Banking Code of 1933, is not within the provisions of section 1111 of the code, which need not be followed in order to make the interest so transferred eligible for future trust investments.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., January 15, 1935.

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

Sir: You request to be advised whether a bank and trust company or a trust company, which issues participations in a single bond secured by a mortgage, or in a pool or fund of bonds secured by mortgages or of other securities, must comply with the requirements of section 1111 of the Banking Code with respect to such participations which have been or may be owned at some time by the commercial department.

Section 1111 of the Banking Code of May 15, 1933, P. L. 624, which became effective on July 3, 1933, has been the subject of numerous

interpretations by this department. Its general effect is that, with certain exceptions, no security once owned by the commercial department of a bank and trust company, a trust company, or a national bank exercising fiduciary powers, may be the subject of investment of trust funds, unless such security was earmarked for such investment at the time of its acquisition and was utilized for trust investment within one year after the date of acquisition.

In Informal Opinion No. 298, rendered December 12, 1933, we advised you that where a national bank having fiduciary powers had purchased a mortgage both with funds of the trust department and with funds of the commercial department, but had not earmarked for future trust investment that portion belonging to the commercial department, it could not thereafter transfer the commercial department's interest in the mortgage to the trust department for trust investment.

We did not consider or discuss in that opinion the provisions of section 1109 of the Banking Code. That section, referring to mortgage or security pools and participating interest in single bonds and mortgages for investment of funds held by fiduciaries, provides, in part, as follows:

> "Section 1109. Mortgage or Securities Pools for Investment of Fiduciary Funds.—A. 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. All the bonds secured by mortgages, and all the securities, which comprise such pool or fund, shall be of the class authorized as legal investments for funds held by fiduciaries. The bank and trust company or the trust company shall apportion fractional undivided interest in such pool or fund to estates of which it is fiduciary in the proportions in which their funds were used to purchase the bonds secured by mortgages, or the securities, which comprise such pool or fund. Interests in such pool or fund shall not be sold to any corporation or person, but shall be held solely by the bank and trust company, or the trust company, as fiduciary, and the equitable interest owned solely by the estates of which such bank and trust company or such trust company is fiduciary. Interests in such pool or fund may be transferred in distribution to any beneficiary, and, in order to make distribution, may be sold by such bank and trust company or trust company to another trust estate or estates of which it is fiduciary, or, by a bank and trust company, to its commercial department, which may in turn resell the same to another trust estate or estates of which it is fiduciary, but not to any other corporation or person.
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> * * * * *
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> "D. 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."

The question which now arises may be stated as follows: When, either prior to or since July 3, 1933, an institution acquired a mortgage or mortgage pool in its trust department and has since July 3, 1933, transferred or may hereafter transfer a participating interest therein from a trust estate to the commercial department for the purposes stated in section 1109, must the institution comply with the requirements of section 1111 with respect to that interest in order to make it eligible for future trust investment by retransfer to an estate in the trust department?

In our opinion section 1111 has no application to such transactions.

Section 1109 of the Banking Code constitutes a participation in a single bond secured by a mortgage or in a pool or fund of bonds secured by mortgages, or in pools of other securities a special type of investment for fiduciary funds. It provides that a participation in such a mortgage or in such a pool may be dealt with by the institution holding them only in its character as a fiduciary. Such participations may not be sold to the general public. When the commercial department advances its funds for the purpose of converting a participation held by a trust at the times such trust is terminated and the commercial department takes title to such participation, it is given specific authority by section 1109-A and D to use such participation thereafter for trust investment.

Accordingly, we advise you that if an institution transfers or has transferred a participating interest in a specific mortgage or a mortgage pool from an estate in its trust department to its commercial department for purposes covered by section 1109 of the Banking Code, that transaction is not within the provisions of section 1111, and the institution need not comply with the latter section in order to make the interest so transferred eligible for future trust investment.

Very truly yours,

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

OPINION NO. 169

Road law—Roads in game preserves—Payments to township supervisors—Game Code of May 24, 1923, as amended by the Act of June 9, 1931—Absorption of entire township—Payment to county commissioners—Upkeep of bridges in township—Inability to meet requisites to obtaining fund.

1. Bridges are distinguished from roads in the statutory law of this Commonwealth, and the fixed charges payable by the Commonwealth to township supervisors for the maintenance of township roads under the Game Code of May 24, 1923, P. L. 359, as amended by the Act of June 9, 1931, P. L. 455, may not therefore, upon the dissolution of a township, be paid to the commissioners of the county in which the township was situated for the maintennace of bridges within the territorial limits of the former township.

2. Where a township has ceased to exist as a unit of local government because of the absorption of its entire territory as a State game preserve, the fixed charges for the upkeep of township roads payable under the Game Code to the township supervisors cannot be paid to any other body, since there are no longer any township supervisors to whom the certification of acreage required by the Act of May 17, 1929, P. L. 1798, may be made or by whom the warrants required by that statute may be drawn.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., March 8, 1935.

Honorable Ernest E. Harwood, Executive Secretary, Board of Game Commissioners, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request of January 22, 1935 for an opinion on the question whether the Commonwealth (Board of Game Commissioners) may legally pay fixed charges to the county commissioners, to be used for maintaining bridges in territory formerly included in a township which is not now a part of any township.

We understand the facts that raise the inquiry are as follows:

Barclay Township, Bradford County has been discontinued as a unit of local government. The Game Commission, in the name of the Commonwealth, holds certain game lands. The check issued in payment of the fixed annual charge of two cents per acre for the benefit of the roads of the township issued for 1934 has been returned.

It further appears that all of the roads in the particular township are maintained by the Commonwealth. The County Commissioners of Bradford County are required, however, to maintain the bridges in Barclay Township, and in view of the fact that there is no longer a board of road supervisors ask that the two cents per acre annual charge be paid to them to be used for maintaining bridges in Barclay Township.

I am of the opinion that the request cannot be granted.

In a previous formal opinion issued by this department under date of January 8, 1935 (Opinion No. 163) by the then Deputy Attorney

General Harris C. Arnold, it was pointed out that the fixed charges imposed by the Game Code of 1923, as amended by the Act of June 9, 1931, P. L. 455, are in no sense a tax, but are voluntary payments made by the Commonwealth in lieu of taxes. See also *County of Franklin* v. *McClean,* 93 Pa. Super. 165 (1928).

In the opinion cited it is very properly said:

> "The fixed charges which that section requires the Commonwealth to pay are, by reference, made the same as the charges which the Commonwealth pays on account of State forest lands under the Act of May 17, 1929, P. L. 1798. That act provides that all forest lands held by the State shall be exempt from local taxation, but shall be subject:
>
> " '* * * to an annual charge of one cent per acre, for the benefit of the county in which said lands are located, two cents per acre for the benefit of the schools in the respective school districts in which such lands are located, and two cents per acre for the benefit of the roads in the township where such lands are located, which charge shall be payable by the Commonwealth. * * *' "

It will be observed that while the annual charge of one cent per acre is for the general benefit of the county, and the two cents per acre for the general benefit of the schools, the two cents per acre payable to the township is paid solely *for the benefit of the roads.* There is no authority in the act to use the two cents so directed to be paid for the benefit of the roads of the township for any other purpose.

While it may be said that the word "road" in its widest sense might include a bridge, it is not generally used in that sense in Pennsylvania. Thus, for example, the present Township Code, Act of May 1, 1933, P. L. 103, 53 PS Chap. 12, sec. 19093-101, as well as the Act of July 14, 1917, P. L. 840 which it replaces, distinguishes between roads and bridges, and treats of them separately in different articles. Moreover, in the case of *Sewer Street,* 8 Pa. C. C. 226-228, the court points out that what is called a street in a city is customarily called a road in the country.

Since the State now maintains the roads of the township and no further expenditures are necessary for the roads, it follows that the two cents per acre need no longer be paid. The act does not authorize payment to the county for the maintenance of the township bridges, however laudable that purpose may be.

Aside from this there is a further impelling reason why the two cents per acre for the use of the roads cannot be paid to the county commissioners as requested, viz., section 2 of the Act of May 17, 1929, P. L. 1798, which expressly provides that:

> "The Secretary of Forests and Waters shall certify to the respective counties, school districts, and townships throughout

the Commonwealth, in which such lands are located, the number of acres owned by the Commonwealth * * * in each * * * township, upon application of the treasurer or road supervisors of any of the said counties, school districts, or townships, and the charge against the same; * * * The State Treasurer shall, upon requisition of the Secretary of Forests and Waters, and the warrant of the Auditor General, pay to the several counties, school districts, and townships the amounts due the same from the Commonwealth, and derived under this act, *upon due application therefor made by the treasurers or road supervisors of the said counties, school districts and townships.*" (Italics ours)

Here, since the township is no longer in existence there are no road supervisors to whom certification of acreage can be made or by whom application can be made for warrant as required by this act.

You are, therefore, advised that the application of the Commissioners of Bradford County, requesting payment to them of the two cents per acre annual charge payable for the benefit of the roads of the township, should be refused.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 170

Alcohol beverages—Sales to members of National Guard—Prohibition of sales to Federal soldiers—Acts of Congress of February 2, 1901 and May 18, 1917—State Act of April 12, 1875—Application to licensees of Pennsylvania Liquor Control Board—Right of commanding officer to prohibit sales at National Guard encampments—Act of June 22, 1917—Regulations of Pennsylvania Liquor Control Board.

1. The Act of Congress of June 3, 1916, 39 Stat. at L. 166, unifying the State National Guard with the Federal army, did not destroy the former's status as a distinct State organization, and the Acts of Congress of February 2, 1901, 31 Stat. at L. 758, and of May 18, 1917, 40 Stat. at L. 82, prohibiting the sale of alcoholic beverages at post exchanges and canteens upon the premises used for military purposes by the United States, do not, therefore, apply to State military reservations while being used by the State National Guard.

2. It seems, that the Act of April 12, 1875, P. L. 48, relating to the sale of alcoholic beverages, has been repealed by implication by the Liquor Control Act of November 29, 1933, P. L. 15, and in any event section 1 of that act prohibiting the sale of alcoholic beverages within 3 miles of a soldiers' encampment does not, under section 5 of the act, apply to licensees of the Liquor Control Board.

3. Section 25 of the Act of June 22, 1917, P. L. 628, empowers a commanding officer of the National Guard to prohibit the sale of alcoholic beverages within 2

miles of the parade encampment, and such sales should be prohibited during summer encampments of the State National Guard upon Federal military reservations.

4. The present regulations of the Pennsylvania Liquor Control Board prohibit the sale of alcoholic beverages to members of the National Guard while in uniform, but such regulations may lawfully be amended or supplanted to permit such sales.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., May 21, 1935.

Honorable Frederick B. Kerr, The Adjutant General, Harrisburg, Pennsylvania.

Sir: We have your request to be advised with respect to the following questions:

1. Are the Acts of Congress that prohibit the sale of beer, wines and liquors in post exchanges and canteens, upon any premises used for military purposes by the United States in full force and effect, and, if so, are they applicable to the State military reservations at Indiantown Gap and Mt. Gretna when used by the Pennsylvania National Guard in their summer encampments?

2. Is it unlawful for licensees in Pennsylvania to sell intoxicating liquors to members of the National Guard while in uniform?

You inform us that the Pennsylvania Liquor Control Board has issued regulations, binding upon licensees, which prohibit the sale of any intoxicating liquors to members of the military forces while in uniform.

After a careful review of the Acts of Congress, we find that the acts of Congress and parts thereof that are pertinent to your inquiry are as follows:

The Act of Congress of February 2, 1901, c. 192, sec. 38, 31 Stat. 758, which reads, in part, as follows:

> "The sale of or dealing in beer, wine or any intoxicating liquors by any person in any post exchange or canteen or Army transport or upon any premises used for military purposes by the United States, is prohibited. The Secretary of War is hereby directed to carry the provisions of this section into full force and effect."

The Act of Congress of May 18, 1917, c. 15, sec. 12, 40 Stat. 82, which reads, in part, as follows:

> "That the President of the United States, as Commander in Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable: * * * It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided.

> Any person, corporation, partnership, or association violating the provisions of this section of the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both."

We have been unable to find any statutes specifically repealing the Act of Congress of February 2, 1901, above quoted, and we find that the War Department regards this act and the regulations thereunder, as promulgated by the Secretary of War, in full force and effect.

There can be no question as to the full force and effect of the Act of Congress of May 18, 1917, above quoted, for Circuit Judge Walker, speaking for the Circuit Court of Appeals of the Fifth District in *Laughter* v. *United States,* 261 Fed. 68 (1919), stated, in part, as follows:

> "Nothing in the terms of the act shows that the whole of it was intended to be effective only for the period of the war in which the country was engaged at the time the act was passed. * * * The authority of the President, as Commander-in-Chief of the Army, to make regulations governing the prohibition of alcoholic liquors in or near military camps, is conferred without limitation as to the time of its exercise. This being true, it is not necessary to determine whether the war in which the United States was engaged had or had not ended when the acts charged in the third and fourth counts were done, * * *."

Whether or not the Act of Congress of February 2, 1901, is applicable to the State military reservations at Indiantown Gap and Mt. Gretna depends upon whether or not the military reservations are being used *for military purposes by the United States* when the Pennsylvania National Guard is using the reservations for their summer training periods, which in turn depends upon whether the National Guard of Pennsylvania is, during those training periods, in the service of the United States, or whether while at their training camps at the reservations they retain their entity as the National Guard of Pennsylvania.

Prior to the National Defense Act, June 3, 1916, 39 Stat. at L. 166, and its several amendments, it is clear that the National Guard was a State organization then called the State Militia, organized primarily to suppress internal disturbances within the State.

Upon the enactment of the National Defense Act and its amendments by Congress, a very material change was wrought with respect to the National Guard of Pennsylvania. It effected a unification of the National Guard with the Federal army and strengthened it from the

standpoint of efficiency. It did not, however, destroy or weaken its character as a distinctive State organization. In times of peace the State retains precisely the same control over the National Guard as it did over the militia.

If Congress had intended to destroy the militia which has existed as a distinct organization since the origin of our government, it would have done so in express language and not by mere inference.

By the provisions of section 1 of the National Defense Act as amended June 4, 1920, 41 Stat. at L. 759, it is provided as follows:

> "That the Army of the United States shall consist of the Regular Army, *the National Guard while in the service of the United States,* and the organized Reserves, including the Officers' Reserve Corps and the Enlisted Reserve Corps." (Italics ours).

The Supreme Court of Wisconsin in passing on this question said in *State* v. *State Industrial Commission,* 186 Wis. 1, 202 N. W. 191, in part as follows:

> "* * * Nowhere in the act can be found a provision which in times of peace alters the control which the state has over the Guard. Had such an important and vital change been contemplated by Congress, affecting an institution having its origin at the very time of the inception of the government, and which had continued for more than a century, it would not have left the matter subject to mere inference; on the contrary, it would by its legislation have in express terms wiped out the very existence of the National Guard as a state institution, and expressly made it a part of the federal army. The loyalty that we owe to the government and the respect which is due to Congress, a representative body of our people, forbid the unwarranted and violent assumption that under the National Defense Act any such radical change had been contemplated, based upon mere inference. * * *"

The Supreme Court of Nebraska, in passing upon this question in the case of *Nebraska National Guard* v. *Morgan,* 112 Neb. 432, 199 N. W. 557 (1924), said:

> "While the Nebraska National Guard is subject to the call of the federal government and thereupon becomes a part of the national army, until so called it is essentially a state institution, subject to the call of the Governor as commander in chief for military service within the state in time of war, invasions, riots, rebellion, insurrection or reasonable apprehension thereof (Comp. St. 1922 Sec. 3322), and is a state governmental agency."

Under our present National Defense Act the National Guard is only a potential part of the United States Army in time of peace, and

the guard does not actually become a part of such army before it has been duly called into the service of the United States: 40 C. J. 669-670; *Bianco v. Austin,* 204 App. Div. 34, 197 NYS 328; *State* v. *State Industrial Comm.,* 186 Wis. 1, 202 NW 191; *Dig. Op. Judge Advocate-Gen.* (April, 1913) p. 17.

We find that Army Regulations 130-15, dated November 1, 1934, provides as follows:

> "Members of the National Guard of the United States shall not be in the active service of the United States except when ordered thereto in accordance with law and, in time of peace, they shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States, Territories, and the District of Columbia."

Certainly the above quoted army regulation is clear and explicit in its terms and it indicates clearly and precisely that in time of peace the guard shall be armed, administered, equipped and uniformed and trained not in their Federal status but in their status as the National Guard of the respective states.

When the National Guard of Pennsylvania is not in the service of the United States, the Governor has authority and is authorized and directed by section 5 of the National Guard Act of May 17, 1921, P. L. 869, as amended, which reads, in part, as follows:

> ". . . to alter, increase, divide, annex, consolidate, disband, organize, or reorganize any organization, department, corps, or staff, so as to conform, as far as practicable, to any organization, system, drill, instruction, corps or staff, uniform or equipment or period of enlistment, now or hereafter prescribed by the laws of the United States and the rules and regulations promulgated thereunder for the organization and regulation of the National Guard."

Clearly these provisions, along with the other parts of the National Guard Law, show that the National Guard is primarily and essentially a State organization.

In workmen's compensation cases the courts have uniformly held that the National Guard is a State organization except as it may be called into the Federal service so that a guardsman injured in connection with his duties in the National Guard of the State is an employe of the State within the compensation law: *Opinions of the Attorney General of Pennsylvania* (1925-1926), p. 330; *Baker* v. *State,* 200 N. Car. 236 (1931), 156 S. E. 917; *State* v. *Johnson,* 186 Wis. 59 (1925), 202 N. W. 191.

That part of the amendment of the National Defense Act of June 15, 1933, c. 87, 48 Stat. at L. 155,160, which is pertinent, reads, in part, as follows:

"Section 4. Officers of the National Guard of the United States, while not on active duty, shall *not,* by reason solely of their appointments, oaths, commissions, or status as such, or any duties or functions performed or pay or allowances received as such, *be held or deemed to be officers or employees of the United States,* or persons holding any office of trust or profit or discharging any official function under or in connection with any department of the Government of the United States.

"Section 5. The National Guard of the United States is hereby established. It shall be a *reserve component* of the *Army* of the United States and shall consist of those federally recognized National Guard units, and organizations, and all the officers, warrant officers, and enlisted members of the National Guard of the several States, Territories, and the District of Columbia, * * *: Provided, That the members of the National Guard of the United States shall not be in the active service of the United States except when ordered thereto in accordance with law, and, in time of peace, they shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States, Territories and the District of Columbia, * * *

* * * * *

"Section 18. When Congress shall have declared a national emergency and shall have authorized the use of armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, * * * order into the active military service of the United States, to serve therein for the period of the war or emergency, unless sooner relieved, any or all units and the members thereof of the National Guard of the United States, * * *" (Italics ours)

It is clear, after careful consideration is given to the acts of Congress, army regulations and laws above quoted, that the National Guard of Pennsylvania, when training in their summer encampments at the State military reservations located at Indiantown Gap and Mt. Gretna, do so in their capacity as a State organization and not as members of the Army of the United States.

They do not become members of the United States Army until Congress declares that a national emergency exists, and the President orders them into active military service of the United States.

In arriving at the above conclusion, we are not unmindful of the Act of April 12, 1875, P. L. 48, which reads, in part, as follows:

"Section 1. It shall not be lawful for any person or persons to erect, place or have any booth, stall, tent, carriage, boat, vessel, or any other place whatever for the purpose of selling, giving, or otherwise disposing of any spirituous, vinous or malt liquors, or cider, or any fermented liquors whatsoever, or any admixtures thereof, or any liquid com-

pounded or composed, in whole or part, of alcohol or any other intoxicating drink whatever, (except as hereinafter excepted), within three miles of the place of holding any soldiers' encampment or reunion in this state, during the time of holding such encampment or reunion.

* * * * *

"Section 5. The provisions of the first section of this act shall not apply to any person licensed to sell intoxicating liquors under the laws of this commonwealth, who may sell or dispose of the same at his or her usual place of business named in such license, and in accordance with law."

We also have given consideration to the Act of June 22, 1917, P. L. 628, which reads, in part, as follows:

"Section 25. The commanding officer of any troops in active service may place in arrest any officer or enlisted men who shall disobey the orders of his superior officer, or any person or persons who shall trespass on parade or camp grounds, or in any way or manner interrupt or molest the orderly discharge of duty of those in active service. He may also prohibit and prevent the sale of spirituous or malt liquors within two miles of such parade ground or encampment. He may abate as a nuisance all hucksters, auction sales, or gambling."

It is clear that section 1 of the Act of 1875 does not apply to any person holding a license issued by the Pennsylvania Liquor Control Board to sell intoxicating liquors in the Commonwealth because of the exemption contained in section 5 of this act. This is true even though the Act of 1875 is in full force and effect and there is grave doubt as to whether or not this act at the present time is in effect.

The Supreme Court of Pennsylvania in *Baker, et al.* v. *Kirschnek, et al.*, 317 Pa. 225, held that the Act of November 29, 1933, P. L. (Special Session) 15, which prohibits transactions in liquor in the State except by and under the control of the Liquor Control Board, repealed section 34 of the Act of March 11, 1850, P. L. 1851, 778. This was a local act prohibiting any person or persons from vending or selling spirituous or other intoxicating liquors within the limits of the Borough of Media, and is very analogous to the Act of April 12, 1875 quoted above. The court held that the Act of 1850 was repealed because it was inconsistent with the Act of 1933. For a like reason the Act of 1875 has been repealed.

It will be noted above that the Commanding Officer of the National Guard, under the Act of June 22, 1917, has the power to prohibit and prevent the selling of spirituous or malt liquors within two miles of the parade encampment.

You have not requested information concerning the status of the Essington Rifle Range and the Middletown Aviation Depot regarding the operation of canteens or post exchanges for the sale of intoxicating liquors. However, we respectfully suggest that inasmuch as these are Federal military reservations within the Commonwealth, the Commanding General of the National Guard of Pennsylvania should issue specific orders that no sale of intoxicating liquors be permitted under any circumstances during the summer encampments upon these Federal reservations.

Therefore, we are of the opinion, and you are advised:

1. That the acts of Congress that prohibit the sale of beer, wines and liquors at post exchanges and canteens upon the premises used for military purposes by the United States, are in full force and effect, but they are not applicable to the State military reservations at Indiantown Gap and Mt. Gretna when used by the Pennsylvania National Guard in their summer encampments.

2. That it is now unlawful for licensees in Pennsylvania to sell intoxicating liquors to members of the National Guard while in uniform because of the present regulations of the Pennsylvania Liquor Control Board. However, the Pennsylvania Liquor Control Board may lawfully amend its present regulations and permit the lawful sale by licensees in Pennsylvania to members of the National Guard while in uniform. If and when these regulations are amended or supplanted, it will be legal for licensees in the Commonwealth to sell intoxicating liquors to members of the National Guard of Pennsylvania while in uniform.

Very truly yours,
DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 171

Magistrates—Summary conviction—Review—Certiorari—Appeal—Necessity for special allowance—Constitution, Art. v, Sec. 14—Fish Law of May 2, 1925, Sec. 278—Right to waive hearing and enter bail for appeal.

1. A summary conviction before a magistrate can be reviewed only in one of two ways: (1) by certiorari to the court of common pleas, in which proceeding only the record of the magistrate is subject to review, and (2) by appeal to the court of quarter sessions, upon special allowance by a judge thereof, in which proceeding the case is heard de novo.

2. Section 278 of The Fish Law of May 2, 1925, P. L. 448, is to be construed as providing for an appeal from a summary conviction for violation of the statute only upon special allowance by a judge of the court of quarter sessions, since any other construction would render it unconstitutional as violative of Art. v, Sec. 14, of the Constitution, prohibiting the legislature from providing for an appeal from a summary conviction as a matter of right.

3. It is improper for a justice of the peace to allow defendants charged with violation of The Fish Law of 1925 to plead guilty, waive a hearing and appeal to the court of quarter sessions; but he should proceed to hear the case and discharge them if they are not guilty or fine them if they are guilty, in which latter contingency they may enter bail to apply for an appeal to the court of quarter sessions under section 278 of the act.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., May 21, 1935.

Honorable O. M. Deibler, Commissioner of Fisheries, Harrisburg, Pennsylvania.

Sir: We have your communication of recent date relative to J. H. Hall, Seneca, Pennsylvania, who arrested three men for snatching suckers. You state that when they were brought before the justice of the peace, they pled not guilty, waived a hearing, and appealed the case to court. You inquire as to this procedure.

I presume that the justice of the peace was confused with the provision of The Vehicle Code, which permits a waiver of hearing and appeal to court. There is no such provision in The Fish Law of 1925, section 278 of which reads as follows:

> "Sentence. Bail. Appeal. If convicted such person shall be sentenced to pay the fine provided in this act for such violation, together with the costs of suit. The person so convicted shall on failure to pay such fine be sentenced by such alderman, magistrate, or justice of the peace, to undergo imprisonment in the county jail of the county in which such conviction takes place * * *, unless specifically otherwise provided by this act, or unless the person so convicted shall give notice of an intention to procure a writ of certiorari or appeal, in which case such person shall be permitted to enter into good and sufficient recognizance to appear before such justice, alderman, or magistrate on or before the expiration of five days, if such appeal or certiorari is not taken by them, or on the final determination of the same if it be not sustained, for execution of sentence."

A summary conviction before a magistrate can be reviewed only in one of two ways:

1. By a writ of certiorari to the common pleas court. This writ issues as of right, but in this proceeding only the record of the magistrate is brought up and reviewed. From an inspection of the record

the regularity of the proceedings is passed upon and if the record is technically correct, the conviction is sustained. See *Commonwealth* v. *Congdon,* 74 Pa. Super. Ct. 286 (1920).

2. By an appeal, which, however, must be specially allowed by the judge of the court of quarter sessions.

The proceeding by which appeals are taken is regulated by the Act of April 17, 1876, P. L. 29, section 1, as finally amended by the Act of April 1, 1925, P. L. 98, section 1 (19 PS sec. 1189). This statute, as amended, provides:

> "In all cases of summary conviction in this Commonwealth, before a magistrate or court not of record, either party, even though any fine imposed has already been paid, may, within five days after such conviction, appeal to the court of quarter sessions of the county in which such magistrate shall reside or court not of record shall be held, *upon allowance of the said court of quarter sessions or any judge thereof, upon cause shown;* and either party may also appeal from the judgment of a magistrate or a court not of record, in a suit for a penalty, to the court of common pleas of the county in which said judgment shall be rendered, upon allowance of said court, or any judge thereof, upon cause shown: Provided, That pending the taking of an appeal by either party, or the allowance or refusal thereof by the court or judge, the fine, or penalty, and costs imposed by the magistrate, or court not of record, need not be paid if bail is entered with one or more sufficient sureties in double the amount of such fine, or penalty, and costs for the payment thereof, on the refusal of such appeal; or if allowed, on the final disposal of such appeal. If the defendant pays the fine or penalty and costs imposed and wishes to take an appeal under the provisions of this section he shall give bail in double the probable amount of costs that may accrue in the final disposition of the appeal." (Italics ours)

While the allowance of an appeal is distinctly a matter of discretion on the part of the court of quarter sessions or the judge thereof, after the appeal is once allowed a hearing of the parties on the merits of the case follows. The appeal is not a mere certiorari reviewing the record of the justice of the peace, but is a hearing de novo without a jury, and the court must render a distinct and unequivocal judgment upon the facts and the law applicable to the facts. *Commonwealth* v. *Congdon,* 74 Pa. Super. Ct. 286 (1920).

It follows, therefore, that the procedure of the justice of the peace in permitting the three men to waive a hearing and appeal was irregular. He should have refused to permit them to waive a hearing. He should have held a hearing and if they were not guilty, discharged them. If they were guilty, he should have imposed the fine. Then

if they desired to enter bail to apply for an appeal in the quarter sessions court within five days, they had that privilege.

If the court allowed the appeal, as above indicated, there would have been a rehearing. If the court declined to allow the appeal, the execution of the magistrate's judgment of conviction would necessarily follow.

In case it may be thought that the language quoted from The Fish Law of 1925, namely section 278, should be interpreted as allowing an appeal of right, I may say that it has been held that it is beyond the power of the legislature to change the mandate of the Constitution because of section 14 of article V thereof, which provides:

> "In all cases of summary conviction in this Commonwealth, or of judgment in suit for a penalty before a magistrate, or court not of record, either party may appeal to such court of record as may be prescribed by law, *upon allowance* of the appellate court or judge thereof upon cause shown." (Italics ours)

Thus, the previous Act of April 22, 1905, P. L. 284, purporting to regulate appeals from summary convictions before a magistrate, was held unconstitutional and in violation of section 14 of article V because it attempted to dispense with the constitutional requirement that an appeal from a summary conviction shall be only upon special allowance and upon cause shown. See *Commonwealth* v. *Weiler,* 31 C. C. 550, 15 Dist. 396; *Commonwealth* v. *Light,* 4 Just. 121; *Commonwealth* v. *Luckey,* 31 Pa. Super. Ct. 441.

It is a settled principle of construction that if a statute may be interpreted so as to avoid it being held unconstitutional, such interpretation should be adopted. Consequently, it is our opinion that the section of The Fish Law of 1925 quoted should be interpreted in conformity with the general practice governing appeals from summary convictions, namely, that they must only be on allowance.

Section 1204 of The Vehicle Code of 1929 is not to be considered as a guide. That act expressly provides for a waiver of hearing, entry of bail, and an appeal. Such provision is constitutional because there is no conviction before the justice of the peace.

The Fish Law of 1925 contains no such provision. Consequently, the procedure of the justice of the peace was improper and irregular. There was no warrant in law for him to permit a waiver of hearing and an appeal. Your fish warden should be instructed to see the magistrate and have him bring back the offenders and proceed with hearing according to law.

Very truly yours,
DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 172

Insurance—Issuance by fraternal benefit society—Benefit certificates providing for single or instalment payments at maturity—Designation as "endowment" certificates.

A fraternal benefit society, organized under the Act of May 20, 1921, P. L. 916, has power and authority to issue certificates providing for the payment of benefits which mature for payment to the member at not under 60 years of age in a single payment or in instalments, but it should not designate such certificates as "endowment" certificates, since the term is technically inaccurate.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., May 22, 1935.

Honorable Owen B. Hunt, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have requested our opinion relative to the power and authority of a fraternal benefit society, organized and existing under and in pursuance of the provisions of the Act of May 20, 1921, P. L. 916, to issue to members benefit certificates providing for the payment of benefits, which mature for payment to the members at not under sixty years of age, in single cash payments or in instalments, which certificates are called endowment certificates.

Our attention is called to our formal opinion dated February 28, 1928, addressed to one of your predecessors, the Honorable Matthew H. Taggart. That opinion had to do with the power and authority of a fraternal benefit society to issue to its members benefit certificates in the nature of twenty-year endowment certificates. The conclusion reached was as follows:

> "You are therefore advised that, in our opinion, the classes of benefit certificates which a fraternal benefit society organized and existing under the above Act of May 20, 1921, is authorized to issue are restricted to those classes enumerated in section 8 of the act; that the classes enumerated do not include endowment insurance; and that therefore such fraternal benefit society has no authority or power to issue a twenty-year endowment benefit certificate."

The pertinent sections of the Act of May 20, 1921, P. L. 916, are sections 5 and 8, which read as follows:

> "Section 5. Every such society shall provide for the payment of death benefits, and may provide for the erection of monuments to mark the graves of its deceased members. It may also provide for the payment of old age benefits which mature for payment to the member at not under sixty years of age, and for permanent and temporary disability payments. It may provide that a member, when permanently

disabled or upon attaining not less than sixty years of age, shall have the option to surrender his certificate upon payment of all or such portion of its face value as may be authorized under the constitution and laws.

"Any society may provide for the acceptance of liens against benefit certificates, with interest at not less than four per centum per annum, in lieu of cash payments, but the total of such liens against any benefit certificate shall not exceed its share of the accumulation thereunder. Any such society collecting a level rate of contribution under any of its benefit certificates, based upon any table of mortality allowed for valuation purposes in this act, may grant to members holding such certificates extended and paid up protection or such withdrawal equities as may be allowed under its constitution and laws, but no such grants or privileges shall exceed in value the portion of the accumulations to the credit of such certificate at the time such grant or privilege is allowed."

"Section 8. Every such society shall have power to issue whole life, old age, or whole life combined with old age, limited payment life, term, sick, or relief and dependent benefit certificates, and make the specified benefit payment in a single cash payment or in instalments or a term or life annuity. Every such certificate shall specify the amount of benefit furnished thereunder, and shall provide that the certificate, the charter or articles of incorporation, or, if a voluntary association, the articles of association, the constitution, and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the obligation of the society. * * *"

Section 8 of the act enumerates the classes of benefit certificates which a fraternal benefit society has power to issue. The intent of the section is to confer power to issue certificates which provide certain benefits and impose certain obligations. The societies do not have power to issue certificates conferring benefits that are not within the terms of the act.

Section 5 provides generally that such societies shall provide for the payment of death benefits. The provision for the payment of such benefits is to be made by issuing the benefit certificates described in section 8. Provision may be made for the payment of old age benefits which mature for payment to the member at not less than sixty years of age. The important stipulations have to do with the character and extent of benefits conferred. The name or description identifying the particular types of benefit certificates is not important.

A certificate which provides death benefits and which also provides for the payment of benefits which mature for payment to the member at not under sixty years of age, whether payable in a single cash payment or in instalments, or a term or life annuity, is authorized

by the act, regardless of the particular name that may be used by the society in designating or identifying the certificates providing these benefits. It is our opinion that if the benefits conferred by the benefit certificate issued are authorized by the act referred to, it is lawful for the society to issue them, although the type of certificate is called an endowment. The policy is not technically an endowment policy. It is an old age benefit certificate such as is authorized under the act. The use of the name "endowment" to designate policies such as this should be discouraged, because it is not accurate and may be misleading.

In arriving at this conclusion, we are aware of the fact that this department has heretofore advised one of your predecessors, Honorable Matthew H. Taggart, by formal opinion, that the classes of insurance enumerated in section 8 of the Act of May 20, 1921, do not include endowment insurance. At that time we were asked to advise your department as to the power and authority of a fraternal benefit society organized and existing under and in pursuance of the provisions of the Act of May 20, 1921, P. L. 916, to issue to its members benefit certificates in the nature of twenty-year endowment certificates. Twenty-year endowment certificates were the particular type of benefit certificates under consideration. We, therefore, limited our consideration to that particular class of insurance. It must be assumed, therefore, that the term "endowment" as used in our opinion, referred to this particular type of endowment certificate and not to all contracts of endowment insurance.

You are, therefore, advised that, in our opinion, a fraternal benefit society organized and existing under and in pursuance of the provisions of the Act of May 20, 1921, P. L. 916, has power and authority to issue to a member a benefit certificate providing for the payment of benefits, which mature for payment to the member at not under sixty years of age, in single payment or in installments, which certificates are called endowment certificates.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 173

Motor vehicles—Registration—Two-door coach—Alteration by owner for commercial purposes—Vehicle Code of 1929, Sec. 102.

A two-door coach, which has been altered by a cleaning and dyeing company for delivery purposes, the alterations consisting of removing the rear seats, in-

stalling a crossbar upon which suits may be hung, and painting the rear side windows must, under section 102 of the Vehicle Code of May 1, 1929, P. L. 905, be registered as a commercial motor vehicle for, although the manufacturer did not design the coach for carrying merchandise, the owner has clearly done so.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., May 23, 1935.

Honorable H. Edgar Barnes, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether passenger vehicles known as two-door coaches should be registered as commercial motor vehicles under the Vehicle Code after they have been altered by a cleaning and dyeing company for delivery purposes. The alterations consist of removing the rear seat, installing a crossbar upon which suits may be hung, and painting the rear side windows.

Section 102 of the Vehicle Code of 1929 defines "Commercial Motor Vehicle" as follows:

> "Any motor vehicle designed for carrying freight or merchandise: Provided, however, That a motor vehicle, originally designed for passenger transportation, with a removable box body, shall not be deemed a 'commercial motor vehicle' for the purpose of this act: * * *"

Under this definition it must be determined whether the coaches are "designed for carrying merchandise."

While it is true that the manufacturer did not design the coaches for carrying merchandise, the owner has clearly so designed them, intending to use them for business purposes. Consequently, these vehicles intended for the delivery of suits and altered in accordance with this intent, were "designed for carrying merchandise." Moreover, the definition of "commercial motor vehicle" specifically exempts those vehicles originally designed for passenger transportation, with a removable box-body. This specific exemption impliedly eliminates all other exceptions to the general definition.

Furthermore, our answer to this question is strengthened by the fact that the vehicles involved are used commercially, that is, they are used continuously for the carrying of merchandise in connection with a business. For this reason, they come within the spirit as well as within the letter of the definition of "commercial motor vehicle."

Accordingly, you are advised that vehicles altered in the manner you have described for delivery purposes should be registered as commercial motor vehicles under the Vehicle Code.

Very truly yours,
DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 174

Taxation—Foreign corporation—Operation within Commonwealth—Agency of United States—RFC Mortgage Company—Performance of governmental functions.

1. The RFC Mortgage Company is an agency of the United States since all of its capital stock is owned by the Reconstruction Finance Corporation, which is in turn an agency of the Government.

2. The fact that the United States utilizes a corporation to effect its purposes does not necessarily render the activity of the corporation nongovernmental or subject it to State taxation; nor, conversely, does the fact that a corporation is owned by the United States exempt it from taxation if its activities are in fact not governmental.

3. The RFC Mortgage Company, an agency of the United States Government, formed to make large amounts of money and credit available for the relief of its citizens during a period of economic depression by assisting in the rëestablishment of a normal mortgage market, is engaged in carrying out a wholly governmental function, and is, therefore, exempt from payment of the usual State taxes and bonuses imposed upon foreign corporations doing business in Pennsylvania.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., June 14, 1935.

Honorable David L. Lawrence, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request for an opinion as to whether The RFC Mortgage Company would be subject to the taxes imposed by the State of Pennsylvania upon foreign corporations doing business in this State.

You advise that The RFC Mortgage Company is a corporation organized and doing business under and by virtue of the laws of the State of Maryland. The total authorized capital stock of the company is $25,000,000, divided into 250,000 shares with a par value of $100 each, which the board of directors are authorized and empowered to issue from time to time. Stock of the par value of $10,000,000 has been purchased by and issued to the Reconstruction Finance Corporation, an agency of the United States Government, with the approval of the President, pursuant to section 5 (c) of the Reconstruction Finance Corporation Act, as amended January 31, 1935.

The purpose of The RFC Mortgage Company is set forth in its charter, as follows:

"*Third*—The purpose for which the Company is formed and the business to be carried on by it are as follows:

> "To lend money secured by mortgages, deeds of trust, or other instruments conveying, or constituting a lien upon real

> estate, or any interest therein, and upon personal property used in connection with the operation of such real estate on which a lien is taken; to carry on the general business of dealing in and lending upon mortgages on, and deeds of trust of, real estate, real estate mortgage bonds and securities, and all other securities of a similar nature; to borrow money for any of the purposes of the Company and to issue its secured or unsecured obligations therefor; to conduct its operations and business and to maintain branches or agencies in any or all states, territories, districts and portions of the United States; and to do and perform any and all acts and things necessary for or incidental to the operation of the business of a general mortgage loan corporation.

"The foregoing shall be construed both as purposes and powers, and it is expressly provided that the above enumeration of specific purposes and powers shall not be held to limit or restrict in any manner the purposes and powers conferred upon or enjoyed by the Company by virtue of the laws of the State of Maryland or any other State."

In view of the conclusions arrived at in this opinion, it is not necessary to examine the laws of this Commonwealth imposing tax on foreign corporations and to quote the specific pertinent provisions.

The Reconstruction Finance Corporation was organized January 22, 1932, by Act of Congress, title 15, section 81, USCA 60, 1934 Cumulative Annual Pocket Part.

Section 602 of the act provides that the capital stock is owned by the United States.

Section 610 provides in part as follows:

> "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. (Jan. 22, 1932, c. 8, 10, 47 Stat. 9.)"

Section 5 (c) of the act, as amended January 31, 1935, provides:

> "To assist in the reestablishment of a normal mortgage market, the Reconstruction Finance Corporation may, with the approval of the President, subscribe for or make loans upon the nonassessable stock of any class of any national mortgage association organized under Title III of the National Housing Act and of any mortgage loan company, trust company, savings and loan association, or other similar financial institution, now or hereafter incorporated under the laws of the United States, or of any State, or of the District of Columbia, the principal business of which institution is that

of making loans upon mortgages, deeds of trust, or other instruments conveying, or constituting a lien upon, real estate or any interest therein. In any case in which, under the laws of its incorporation, such financial institution is not permitted to issue nonassessable stock, the Reconstruction Finance Corporation is authorized, for the purposes of this section, to purchase the legally issued capital notes or debentures of such financial institutions. The total face amount of loans outstanding, nonassessable stock subscribed for, and capital notes and debentures purchased and held by the Reconstruction Finance Corporation, under this section, shall not exceed at any one time $100,000,000. Notwithstanding any other provision of law, the Reconstruction Finance Corporation may, under such rules and regulations as it may prescribe (which regulations shall include at least sixty days' notice of any proposed sale to the issuer or maker), sell, at public or private sale, the whole or any part of the stock, capital notes, or debentures acquired by the Corporation pursuant to this section, and the preferred stock, capital notes, or debentures acquired pursuant to any other provision of law. The amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this section."

The following questions necessarily arise:

I

Is The RFC Mortgage Company an agency of the United States?

II

Is The RFC Mortgage Company employed as an agency or instrumentality of the United States for the exercise of the constituted powers of the United States?

I

In the case of *United States of America and Reconstruction Finance Corporation, plaintiffs,* v. *John B. Lewis, et al.,* United States District Court for the Western District of Kentucky, No. 135459, decided April 8, 1935, the court, consisting of Honorable Charles H. Moorman, United States Circuit Judge, and United States District Court Judges Dawson and Henderson, held that the Reconstruction Finance Corporation is an agency of the United States Government and its property is the property of the United States, and the activities of the corporation are as much activities of the United States Government as if they were conducted by the Secretary of the Treasury or some other governmental official.

A similar conclusion has been reached by this department. See Formal Opinion No. 129, Official Opinions 1933-1934 p. 161, 20 D. & C. 370.

The RFC Mortgage Company is wholly owned by the Reconstruction Finance Corporation. It is, therefore, owned by the United States. The Reconstruction Finance Corporation as holder of all of the outstanding stock controls The RFC Mortgage Company. The latter is, therefore, controlled by the United States. We conclude that The RFC Mortgage Company is an agency and instrumentality of the United States.

Our conclusion is based upon the fact that the United States is the sole owner of the company. The immunity of The RFC Mortgage Company from taxation by the State of Pennsylvania which we conclude exists will continue only so long as the company is owned solely by the United States.

II

Does The RFC Mortgage Company exercise the constituted powers of the United States?

Corporations owned by the United States, some incorporated by Federal law and others incorporated under state laws, have been employed in carrying on the business of the government of the United States. It has been found that certain phases of the business of the government can be carried on more expeditiously by such corporations than by branches of the government itself. For example, we refer to United States Sugar Equalization Board, Inc., United States Grain Corporation, United States Housing Corporation, United States Spruce Production Corporation, War Finance Corporation, Home Owners' Loan Corporation, Reconstruction Finance Corporation, Commodity Credit Corporation, United States Shipping Board Emergency Fleet Corporation.

Such corporations have been held to be agencies of the United States Government and exercising governmental functions; *United States* v. *Coghlan,* 261 Fed. 425; *Clallam Co.* v. *United States,* 263 U. S. 342, 68 L. Ed. 328.

The fact that the United States utilizes a corporation to effect its purposes does not render the activity of the corporation nongovernmental. We cannot conclude, however, that the ownership of a corporation by the United States is conclusive that its activities are governmental. *Ohio* v. *Helvering,* 78 L. Ed. (Advanced Opinions) 911.

The functions of governments have greatly broadened in the past decade. A strict construction of the Federal Constitution as originally adopted would limit the activities of the government and its agencies

to those prescribed by the Constitution to carry out its expressed purposes. The rule of incidental and applied powers, however, has enabled our Federal Government as such to engage in fields of activity and to adopt agencies to accomplish purposes which would not come within the express provisions of the Constitution. Particularly has this been true during the past two periods of great national emergency, the World War and the present economic depression. During the World War the efficiency of the country as a war nation depended upon its entering directly into fields theretofore occupied solely by private industry. This was done through the agency of corporations wholly owned by the United States. Private corporations have not been able to cope with present economic emergencies. Particularly has this been true of activities involving the outlaying of capital. The Federal government has seen fit to make available large amounts of money and credit for the relief of the citizens of the country. The use of Federal funds for this purpose is, under the circumstances, a wholly governmental function. The means used must, therefore, be accepted as a governmental means. A corporation owned by the United States and performing such a part of the governmental activities must, therefore, be considered as a governmental agency performing a governmental function. Examples of corporations carrying out these purposes and functions under present conditions are the Reconstruction Finance Corporation and the Home Owners' Loan Corporation. There are many others of similar constitution and purpose.

The need for mortgage money has become so great that the money must be furnished by the Federal government. Home Owners' Loan Corporation has entered the limited field of refinancing defaulted mortgages. The Reconstruction Finance Corporation has to a limited extent entered the field of financing industry. Under the circumstances, these are proper governmental activities. The RFC Mortgage Company will enter the general mortgage field. It is a necessary supplement to the Reconstruction Finance Corporation and the Home Owners' Loan Corporation. It is a direct offspring of the Reconstruction Finance Corporation and is provided for by the amendment to the Reconstruction Finance Corporation Act. The purpose of the Federal Government entering this field is clearly stated by the first clause of section 5 (c) of the Reconstruction Finance Corporation Act, as amended, as follows: "To assist in the reestablishment of a normal mortgage market." It is our opinion, therefore, that The RFC Mortgage Company does exercise the constituted powers of the United States.

An instrumentality or agency of the United States, wholly owned by the United States, is not subject to taxation without consent or express legislation by Congress. *United States* v. *Coghlan,* supra; *Clallam Co.* v. *United States,* supra.

Congress has not passed any general act consenting that the agencies of the government used in carrying out the purposes of the government may be taxed by the states in which they may transact business. We do not find any Federal law which expressly consents to the taxing of The RFC Mortgage Company by the several states.

It is our opinion, therefore, and we so advise, that The RFC Mortgage Company may be authorized to do business in this State upon the paying of the filing fee of thirty dollars, without becoming subject to the payment of the usual taxes and bonuses imposed in Pennsylvania upon foreign corporations doing business in this State.

The conclusion reached in this opinion is in line with the position of the Commonwealth in the case of *Commonwealth, ex rel. Charles J. Margiotti, Attorney General,* v. *William J. Kyle, James L. O'Toole and Leo C. Mundy,* Collectors of Internal Revenue, in which the State is resisting an effort on the part of the Federal Government to tax Pennsylvania State Liquor Stores and the liquor owned by them. The Federal Government is insisting upon taxing what the State conceives to be a governmental agency carrying out a proper governmental function. The ultimate decision in that case will probably judicially determine the question dealt with in this opinion.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 175

Unguarded sluiceways—Injury to fish—Erection of new dam.

The Board of Fish Commissioners should serve notice on the owner of an unguarded sluiceway to install a proper screen or guard. If he fails to do so in thirty days, the board should request the water and Power Resources Board to withhold the permit to erect a new dam until applicant gives assurance that he will obey the law of the Commonwealth. If such assurance is not given, the permit should be denied.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., June 18, 1935.

Honorable O. M. Deibler, Commissioner of Fisheries, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request of recent date to be advised concerning the complaint made to your department of an unguarded sluiceway on Little Pine Creek near English Center. From the letter of complaint it appears that fish are being injured by the

turbine located in the turbine house to which the unguarded sluiceway leads.

You are advised that such failure to provide a proper guard is a violation of section 193 of the Fish Law of 1925, P. L. 448 (30 PS sec. 193) which provides:

> "Section 193. Placing Bar-racks. Any person owning or maintaining a raceway, flume, or inlet-pipe leading to a water-wheel, turbine pump, or canal, shall immediately upon receipt of a written order from the Board place and maintain a bar-rack of not less than one-half inch nor more than an inch and a half space between the bars in or near such raceway, flume, or inlet-pipe, sufficient to prevent fish from entering therein. Any person refusing or neglecting to comply with such order for a period of one month shall forfeit and pay the sum of one hundred dollars, which shall be recovered by civil suit and process in the name of the Commonwealth."

Section 194 of the Fish Law of 1925, P. L. 448 (30 PS sec. 194) provides that if, after said notice, the defendant does not obey the order, then the board is authorized to install the bar-rack and the cost thereof may be recovered against the owner or operator and if not promptly paid, by civil suit in the name of the Commonwealth.

In interpreting a similar provision under an earlier statute (Act of May 29, 1901, P. L. 302, section 13) Deputy Attorney General Fleitz said in re Fish Dams, 26 Pa. C. C. 214 (1902) at page 216:

> "* * * The language is so plain and unambiguous, the intention of the legislature to provide for such cases as this is so clear, and the method marked out for your board to pursue is so unmistakable as scarcely to call for comment. The large sums of money annually appropriated by the state to protect and propagate game and food fish in the waters of the commonwealth, and the laws passed to provide safeguards against their wanton destruction, as well as the energetic and thorough work of your board, should enlist the hearty co-operation of every citizen."

We concur in what was there so well said. Therefore, to lay the foundation for proper action it is first necessary for you to give written notice calling upon the owner or operator of this raceway or sluiceway, to install the bar-rack within thirty days, notifying him that his failure to do so will be followed by the imposition of penalty of one hundred dollars ($100.00) and that the board will proceed itself to erect the bar-rack and collect cost thereof from him in addition to the penalty.

The complaint submitted recites also that the owner of the dam has failed to provide a proper fishway or opening in the dam so as to permit the fish in the stream to migrate at all stages of the water.

We understand that since the complaint was submitted the dam

complained of has been carried away, but that an application is pending before the Water and Power Resources Board for a permit to reerect same. You inquire what steps you should take to guard against a repetition of the circumstances described.

Section 185 of the Fish Law of 1925, P. L. 448, as amended by the Act of April 22, 1929, P. L. 621, provides in part as follows:

> "Section 185. Devices to Enable Fish to Migrate to Be Erected at Dams.—Any person now or hereafter erecting or maintaining a dam in the waters of this Commonwealth, shall immediately, on a written order from the board, erect therein such chutes, slopes, fishways, gates, or other devices, as the board may deem necessary, to enable the fish to ascend and descend the waters at all seasons of the year, * * *"

This is a substantial reenactment of the act approved May 29, 1901, P. L. 302, section 13, which was interpreted by this department. (See Opinion of Deputy Attorney General Fleitz, 26 Pa. C. C. 214, 1902). Said act not only empowers, but makes it the duty of the Fish Commissioners to see that the law is carried out fully and in every respect.

If the old dam had not been carried away it would have clearly been the duty of the board to enforce the penalty provided in the act, and upon refusal persisted in, to enter upon the dam and erect or build a practical fishway.

If, therefore, the Board of Fish Commissioners could enforce the provisions of this act *after* the erection of the dam, it is both reasonable and logical to hold that the law can be invoked to prevent the erection of a dam, unless the plan or design submitted shows that provision will be made for a fishway if one be practical. The board could, if no other remedy existed, proceed by bill in equity to restrain such contemplated erection, but there is another remedy available which is just as efficacious.

No dam can be erected without a permit from the Water and Power Resources Board, formerly known as the Water Supply Commission, as provided in the Act of June 25, 1913, P. L. 555, section 4, which reads:

> "The commission shall have power to grant or withhold such consent or permit, or may incorporate in and make a part of said consent or permit such conditions, regulations, and restrictions as may be deemed by it advisable. It shall be unlawful to construct or begin the construction of any such water obstruction, or to make or begin any change or addition aforesaid, except in accordance with the terms, conditions, regulations, and restrictions of such consent or permit, and such rules and regulations, with regard to said constructions, changes, or additions, as may be prescribed by the commission."

Under this provision the Water and Power Resources Board may withhold the necessary consent or permit or may grant it upon con-

ditions. This department has ruled that the board has broad powers and has the authority to determine whether the proposed structure will injuriously affect public or vested private rights in the stream. (See Opinion of former Attorney General Schnader reported in 14 D. & C. 68). It may withhold consent and should impose restrictions whenever it appears that the interests of the Commonwealth would not otherwise be served. Clearly, it would not serve the interests of the Commonwealth to permit the erection of a dam which by reason of the omission of a fishway, would prevent the natural propagation of fish and therefore be illegal.

Section 501 of The Administrative Code requires such cooperation by the several departments and boards which, after all, are merely branches of activity of the same Commonwealth. This section reads:

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

The practical workings of this section of law are well illustrated in this case. Thus when the Water and Power Resources Board receives an application for a dam it should, among other things, request the Board of Fish Commissioners to make an immediate investigation to ascertain whether a fishway is necessary and practical, and to report such findings to the Water and Power Resources Board.

The Water and Power Resources Board should not award permits or consent to the erection of dams until the coordinate branch of the Commonwealth, namely, the Board of Fish Commissioners, has reported and its objections, if any, satisfied.

To summarize therefore:

1. The Board of Fish Commissioners should serve notice on the owner of the sluiceway to install a proper screen or guard. If he fails to do so in thirty days, to proceed as here outlined.

2. The Board of Fish Commissioners should request the Water and Power Resources Board to withhold the permit to erect a new dam until applicant gives assurance by submission of proper plans or otherwise that he will obey the law of the Commonwealth and provide an approved fishway in connection with the proposed dam. If such assurance is not given the permit should be denied.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 176

Taxation—Documentary stamp tax—Act of May 16, 1935, as amended by the Act of June 22, 1935—Nature of tax—Subject of taxation—Exemptions—Home owner's loan bonds—Act of Congress of June 13, 1933—"Loan"—State taxation of Federal instrumentality.

1. The documentary stamp tax imposed by the Act of May 16, 1935, P. L. 203, as amended by the Act of June 22, 1935, P. L. 439, although payable by the person executing and delivering the document, is nevertheless in practical effect a tax upon the document itself, since, under the provisions of section 8 of the statute, the document cannot be recorded unless the stamp is affixed.

2. The provision of the Home Owners' Loan Act of June 13, 1933, 48 Stat. at L. 128, exempting the Home Owners' Loan Corporation "and its loans" from State taxation, is sufficiently broad to exempt from such taxation any instrument or document evidencing such loans, for while the term "loan" usually indicates either a lending, that which is lent, or the permission to use that which is lent, it is also a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows.

3. The Home Owners' Loan Corporation is, by the express terms of the act creating it, an instrumentality of the United States, created to carry out a governmental function, and its securities are therefore exempt from State taxation.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., June 18, 1935.

Honorable H. Edgar Barnes, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your letter of June 11 requesting the opinion of this department as to the application of the provisions of The Documentary Stamp Tax Act of May 16, 1935, P. L. 203 (Act No. 90) to bonds secured by mortgages given to the Home Owners' Loan Corporation by borrowers of money from it.

Section 3 of the act provides as follows:

> "Section 3. Every person who makes, executes, issues, or delivers, any document, or in whose behalf any document is made, executed, issued, or delivered, shall be subject to pay for, and in respect to such document, or for or in respect of, the vellum parchment or paper upon which such document is written or printed, a State tax at the rate of five cents (5c) for each one hundred dollars ($100.00), or fraction thereof, of the value represented by such document payable at the time of making execution, issuance or delivery of such document."

The Home Owners' Loan Corporation Act of 1933, section 403, provides in part as follows:

> "* * * The bonds issued by the Corporation under this subsection 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 or any District, 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 loans and income, shall likewise be exempt from such taxation;* except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed. * * *'' (Italics ours)

The Home Owners' Loan Corporation, created by the act, is therein expressly declared to be ''an instrumentality of the United States.''

A somewhat similar question was discussed in a formal opinion of this department dated December 11, 1930, addressed to Honorable Charles Johnson, the then Secretary of Revenue. In this opinion the Secretary of Revenue was advised that mortgages given to a Federal land bank were not subject to the State tax imposed upon mortgages and deeds offered to be recorded in the offices of the Recorders of Deeds throughout the Commonwealth. This opinion cited and relied upon the case of *Federal Land Bank of New Orleans* v. *Crosland,* 261 U. S., 374; 67 L. Ed. 703 (1923). Therein it was stated that the tax in question, although collectible only from the lender, the Federal land bank, and then only when the mortgage in question was presented for recording, was, nevertheless, a ''tax upon the mortgage.''

The court pointed out that (p. 378):

> ''* * * The law of Alabama does make it practically necessary to record such deeds, because it overrides them if not recorded, in favor of any purchaser without notice. While it does so, it cannot say that it leaves the bank free to record or not. The bank has a choice, it is true, but so has one who acts under duress * * *''

The same observations might be made with regard to The Documentary Stamp Tax Act, although the tax is payable by the person executing and delivering the mortgage, it is, nevertheless, a tax upon the document and under the provisions of section 8 of the Act, the document cannot be recorded unless the stamp is affixed. In practical effect, therefore, the cases are analagous.

It has been suggested, however, that the case of *Federal Land Bank of New Orleans* v. *Crosland,* supra, is not applicable because the statute under consideration there expressly exempted ''mortgages executed to the Federal Land Banks,'' whereas no such express provision is contained in the Home Owners' Loan Corporation Act. The latter act, however, does exempt the corporation ''and its loans'' from State taxation.

A loan has been defined "as an advancement of money upon a contract or stipulation, expressed or implied, to repay at some future day." *Words and Phrases,* 1st ser. Vol. 5, p. 4196, citing *Brittin* v. *Freeman,* 17 N. J. Law, 191. While usually a loan is either a lending, that which is lent, or the permission to use that which is lent, it is also "a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows," 38 C. J., 216 citing In Re *Grand Union Company,* 219 Fed. 353. Therefore, it is our opinion that it was clearly the intention of Congress to exempt the instrument or document evidencing loans by the words exempting the loans themselves. The provision can admit no other consistent interpretation. A loan is an intangible thing and cannot of itself be exempt from taxation unless the consideration advanced and the instrumentality evidencing the loan are likewise exempt. We, therefore, conclude that The Documentary Stamp Tax Act can not require the affixing of stamps to documents given to the Home Owners' Loan Corporation evidencing indebtednesses to it.

The same conclusion results from the consideration of another aspect of this question. As stated above, the Home Owners' Loan Corporation is expressly declared to be an instrumentality of the United States.

An unbroken line of authorities, beginning with the famous case of *McCulloch* v. *The State of Maryland,* 4 Wheaton, 316, 4 L. ed. 579, (1819), have held that the State has no power to tax an instrumentality of the United States. In *McCulloch* v. *The State of Maryland* Chief Justice Marshall said:

> "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government the power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. * * *
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> * * * * * * *
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> "* * * The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.
>
> "The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation, *or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.* This is, we think, the un-

avoidable consequence of that supremacy which the constitution has declared." (Italics ours)

In *Jaybird Mining Company* v. *Weir*, 271 U. S. 609, 70 L. ed. 1112 (1926), it was held that the State of Oklahoma could not impose an ad valorem tax on ores mined under a lease given by the Secretary of the Interior of Indian lands. The court said:

> "It is elementary that the Federal government in all its activities is independent of state control. *This rule is broadly applied.* And without congressional consent no Federal agency or instrumentality can be taxed by state authority. 'With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since McCulloch v. Maryland, 4 Wheat. 316' * * *" (Italics ours)

In the recent case of *Panhandle Oil Company* v. *State of Mississippi*, 72 L. ed. 857, the Court went so far as to deny to the State of Mississippi the right to impose a tax upon the privilege of one of its citizens of selling gasoline to the Federal Government. The decision turned solely upon the proposition that the imposition of the tax would hamper or burden the activities of the Federal Government.

The Home Owners' Loan Corporation was created by an Act of Congress to carry out a declared policy of the Federal Government in the exercise of its constitutional powers. That the corporation performs a governmental function is clear. Its activities are not distinguishable in principle from those of the Federal Land Bank under consideration in *Federal Land Bank of New Orleans* v. *Crosland*, supra. Furthermore, we have recently advised the Secretary of the Commonwealth that the RFC Mortgage Company, which engages in similar activities, performs a governmental function. If the bonds, notes, and mortgages, which the corporation takes from those who borrow from it, are taxed, the operation of the corporation would manifestly be restricted and its ability to perform its function of relieving distressed home owners would obviously be curtailed.

The taking of evidences of indebtedness by the corporation from its borrowers is absolutely essential to the carrying on of its activities. If these evidences of indebtedness can be taxed at all by a State, even though the tax is payable by those persons who execute or issue them, the rate of tax could be established at a point so high that it would be prohibitive and would completely halt the activities of the corporation. Therefore, any taxation, similar to that under discussion, would, in the words of Chief Justice Marshall, clearly retard, impede and burden the operation of the law enacted by Congress.

Accordingly, we are of the opinion and so advise you that under the provisions of The Documentary Stamp Tax Act of May 16, 1935, P.

L. 203 (Act No. 90) the Commonwealth cannot require stamps to be affixed to bonds secured by mortgages given to the Home Owners' Loan Corporation by borrowers of money from it.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 177

Taxation—Documentary stamp tax—Act of May 6, 1935, as amended by the Act of June 22, 1935—Exemptions—Federal instrumentalities—Federal land banks—Federal Farm Mortgage Corporation—Federal intermediate credit banks—Central Bank for Coöperatives—Banks for cooperatives—Production credit corporations—Production associations—Regional agricultural credit corporations—Governor of the Farm Credit Administration.

1. Federal land banks, the Federal Farm Mortgage Corporation, Federal intermediate credit banks, the Central Bank for Cooperatives, banks for cooperative, production credit corporations, production associations, regional agricultural credit corporations, and the Govenor of tbe Farm Credit Administration, were all created by acts of Congress as agencies to carry out a declared policy of the Federal Government in the exercise of its constitutional power, namely, the extending of financial relief to agriculture in the form of loans from the Federal Government: for this reason they are instrumentalities of the United States and their securities are exempt from State taxation including taxes levied under the Documentary Stamp Act of May 16, 1935 (Act No. 90), as amended by the Act of June 22, 1935 (Act No. 185).

2. The provisions of the acts of Congress under which Federal land banks the Federal Farm Loan Corporation, and the Federal intermediate credit banks were created, exempting them and their loans from State taxation, are sufficiently broad to exempt from such taxation any instrument or document evidencing such loans.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., July 19, 1935.

Honorable H. Edgar Barnes, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your inquiry of recent date requesting the opinion of this department as to the application of the provisions of The Documentary Stamp Tax Act of May 16, 1935, P. L. 203 (Act No. 90) amended by Act of June 22, 1935, P. L. 442 (Act No. 185) to bonds and notes secured by mortgages, and deeds given to the following named corporations and persons:

Federal land banks
The Federal Farm Mortgage Corporation

Federal intermediate credit banks
The Central Bank for Cooperatives
Banks for cooperatives
Production credit corporations
Production associations
Regional agricultural credit corporations
The Governor of The Farm Credit Administration

Section 3 of The Documentary Stamp Tax Act provides as follows:

> "Section 3. Every person who makes, executes, issues, or delivers, any document, or in whose behalf any document is made, executed, issued, or delivered, shall be subject to pay for, and in respect to such document, or for or in respect of, the vellum parchment or paper upon which such document is written or printed, a State tax at the rate of five cents (5c) for each one hundred dollars ($100.00), or fraction thereof, of the value represented by such document payable at the time of making execution, issuance or delivery of such document."

Section 8 of the act provides that no taxable document can be recorded unless proper documentary stamps are affixed and a penalty is imposed upon any prothonotary or recorder of deeds if he accepts an unstamped but taxable document for recording.

The acts of Congress, under which the Federal land banks, The Federal Farm Mortgage Corporation and The Federal intermediate credit banks were created, contain specific provisions exempting all the property of these corporations from State taxation and also declaring mortgages issued to them to be instrumentalities of the Federal Government exempt from State taxation.

The effect of these provisions was discussed in a formal opinion of this department dated December 11, 1930, addressed to Honorable Charles Johnson, the then Secretary of Revenue. In that opinion we stated that mortgages given to a Federal land bank were not subject to the State tax imposed upon mortgages and deeds presented for recording in the offices of recorders of deeds throughout the Commonwealth. We relied on the case of *Federal Land Bank of New Orleans* v. *Crosland,* 261 U. S. 374.

There is no substantial difference between the tax under discussion in our former opinion and the tax imposed under the provisions of The Documentary Stamp Tax Act. In both cases the tax is upon the document and in both cases the document cannot be recorded unless either the tax is paid or the stamp is affixed. In practical effect the cases are analogous.

Our opinion of December 11, 1930 was referred to Formal Opinion No. 176 of 1935, addressed to you. In the latter opinion we discussed the effect of the tax exemption provisions of the act creating the Home Owners' Loan Corporation which we there said were substantially

similar to the tax exemption provisions relating to the Federal land banks. In the latter opinion we held that mortgages given to the Home Owners' Loan Corporation were exempt from the documentary stamp tax by virtue of the tax exemption provisions in question.

The acts creating the other corporations above named, and authorizing the Governor of The Federal Credit Administration to make loans, do not, however, contain specific tax exemption provisions such as those applicable in the cases of the corporations just discussed. That mortgages and deeds executed to *all* of the above named corporations and to the Governor of the Farm Credit Administration are not taxable documents under the provisions of The Documentary Stamp Tax Act, is evident from the consideration of a broader ground than that just discussed as specifically applicable only to the Federal land banks, the Federal Fire and Mortgage Corporation and the Federal intermediate credit banks. All of the agencies under discussion here are instrumentalities of the Federal Government performing a governmental function in carrying out the expressed policies of Congress. In Formal Opinion No. 176 of 1935 we made a detailed examination of the authorities bearing upon this question with regard to the Home Owners' Loan Corporation. None of the agencies under discussion are in principle distinguishable from that corporation and the reasoning of our former opinion is applicable here.

We believe that an examination of the somewhat dissimilar functions of the several agencies here under consideration will be helpful.

The Federal land banks were established under the Federal Loan Act of July 17, 1916, 39 Stat. at L. 360, for the purpose of making long term loans to farmers upon the security of first mortgages on farm real estate. The banks were qualified to be depositories of public money and may be employed as fiscal agents of the Federal Government. They have been judicially determined to be instrumentalities of the United States in *Smith* v. *Kansas City Title and Trust Company,* 255 U. S., *Federal Land Bank of Columbia* v. *Gaines,* 290 U. S. 247, and *Federal Land Bank of St. Louis* v. *Priddy,* decided April 29, 1935 by the U. S. S. C.

The Federal Farm Mortgage Corporation was created under the Federal Farm Mortgage Corporation Act, of January 31, 1934, 48 Stat. at L. 344, for the purpose of making loans to Federal land banks on the securities of consolidated farm loan bonds. In the course of its operations this corporation must necessarily acquire as collateral, or otherwise, mortgages originally given by farmers to secure loans made to them. Although this corporation has not been judicially held to be an agency of the Federal Government, it is not distinguishable in this respect from the Federal land banks; and the act under which

it was created expressly declares that all credit paper held and issued by it to be instrumentalities of the Government of the United States.

The Federal intermediate credit banks were organized under the Agriculture Credits Act of 1923, 42 Stat. at L. 1454, as supplemented by the Farm Credit Act of June 16, 1933, 48 Stat. at L. 257, for the purpose of discounting obligations of farmers which originally had been accepted by banks, agriculture credit corporations, and other lending institutions, and also for the purpose of lending money to farmers' cooperative credit institutions on the security of agricultural short term paper. These banks enjoy the same tax exemption as Federal land banks and they may be designated as fiscal agents of the Government. Since they possess all the characteristics which caused the Supreme Court of the United States to denominate Federal land banks instrumentalities of the Government, they also must be considered as instrumentalities of the United States.

The stock of all the foregoing agencies is owned entirely by the United States Government.

The Central Bank for Cooperatives, the banks for cooperatives, the production credit corporations and the production credit associations were all created under the provisions of the Farm Credit Act of 1933, supra.

This statute provides that all of these agencies may be designated as fiscal agencies of the United States. The Central Bank for Cooperatives and the banks for cooperatives were created to provide credit to farmers' cooperative associations. The production credit corporations and the production credit associations were established to meet the short term credit needs of agriculture and to make more readily available to it the facilities of the Federal intermediate credit banks with which these agencies may discount their loans. Obviously, all of these corporations may from time to time acquire mortgages or deeds as collateral or in satisfaction of loans made by them to farmers. Although borrowers from these corporations may, and actually have, acquired stock in them, the great majority of the stock is owned by the Government of the United States. They are expressly exempted from State taxation until the stock held by the United States has been retired. There can be no doubt that these corporations are engaged in performing a governmental function and are, at present, as much instrumentalities of the United States as are the Federal land banks concerning which judicial opinions to this effect have been rendered. It is, however, probable that if and when the stock held by the United States in them is retired, they will acquire another status. Since the happening of this contingency is remote it need not concern us here.

The regional agriculture credit corporations were incorporated under the provisions of an amendment to the Emergency Relief and

Construction Act of 1932. These corporations are now in the process of liquidation under the direct supervision of the Governor of the Farm Credit Administration. They were created for the purpose of extending credit to farmers and stockmen in areas where credit was not available from commercial sources. In the course of their liquidation it will be necessary, of course, for them to accept, from time to time, renewal mortgages and possibly deeds. The reasons for holding the corporations, heretofore considered, to be instrumentalities of the Federal Government are equally applicable in the case of regional agriculture credit corporations; and, in addition, this conclusion is compelled by the fact that these corporations are in actual liquidation under the direct control of officers of the Federal Government.

No extended discussion need be entered into with regard to the Governor of the Farm Credit Administration. Under the Act of Congress, approved February 20, 1935, 49 Stat. at L.—he is given authority to make emergency seed loans from a direct appropriation from the treasury of the United States. There can be no question but that in so doing he is performing a governmental function.

All of the agencies herein considered were created by acts of Congress to carry out a declared policy of the Federal Government in the exercise of its constitutional powers, namely, the extending of substantial financial relief to agriculture in the form of loans from the Federal Government. In this respect the activities of these agencies are not distinguishable in principle from those of the bank under consideration in *Federal Land Bank of New Orleans* v. *Crosland,* supra. Their activities are furthermore similar to those of the Home Owners' Loan Corporation discussed in Formal Opinion No. 176 of 1935, supra, which extends financial relief in the form of Federal loans to home owners. We have held that the Home Owners' Loan Corporation and the RFC Mortgage Corporation, which engages in similar activities, are performing governmental functions.

The taking of mortgages and deeds, are indispensable adjuncts to the operations of the agencies herein considered. If such mortgages and deeds are taxed under the provisions of The Documentary Stamp Tax Act, the operation of these agencies would, manifestly, be restricted and such taxation would hamper their ability to accomplish the purpose for which they were created. It is immaterial that the tax in its present form does not constitute a serious restriction. If mortgages and deeds given to these agencies can be taxed at all by a state, even though the tax is payable by those persons executing such mortgages and deeds, the rate of tax could be established at a point so high that it would be prohibitive and would entirely disenable these agencies to accomplish the purpose of the Congress. Re-

gardless of the amount of the tax it adds directly to the cost of the loan and, whatever its amount, the increased costs of credit resulting from its imposition might deter some persons from availing themselves of the benefits intended to be conferred upon them by Congress.

In the case of *McCulloch* v. *The State of Maryland,* 4 Wheat., 316, the principle was established that the several states have no power to tax the instrumentalities of the United States. In that case Chief Justice Marshall declared that no state has the power by taxation to "retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." Subsequent decisions have held that where this principle applies it is not affected by the extent of the interference resulting from the State taxation, *Indian Motorcycle Company* v. *The United States,* 283 U. S. 570, *Johnson* v. *Maryland,* 254 U. S. 51, *Gillespie* v. *Oklahoma,* 257 U. S. 501. In the latter case it was held that a State tax upon the net income derived by a lessee from leases of Indian land was void. The court stated that "* * * tax upon it provides for a direct hamper upon the effort of the United States to make the best terms that it can for its wards." Similarly in the *Indian Oil Company* v. *Oklahoma,* 240 U. S. 522, it was held that a tax upon leases of Indian oil lands was a tax upon the power of the Government to make them and could be used to destroy the exercises of that power.

In *Jaybird Mining Company* v. *Weir,* 271 U. S. 609, it was held that a state could not impose an ad valorem tax on ores mined under a lease of Indian lands given by the Secretary of Interior.

In the recent case of *Panhandle Oil Company* v. *The State of Mississippi,* 277 U. S. 218, the court went so far as to deny the right of a state to impose a tax upon a privilege, exercised by one of its citizens, of selling gasoline to the Federal Government.

In *Federal Land Bank of New Orleans* v. *Crosland,* supra, it was held to be immaterial whether the State tax was primarily payable by the United States or its instrumentalities, or the other party to the transaction, where the tax applied to mortgages given to the Federal Land Bank, an instrumentality of the United States. In that case, as here, the tax was required to be paid before the mortgage in question could be recorded and hence made effective to bind third parties. We discussed this decision in detail in our opinion of December 11, 1930, and in Formal Opinion No. 176 of 1935.

Accordingly, we are of the opinion, and so advise you, that if bonds and notes secured by mortgages, and deeds, given to the agencies here under consideration were taxable under The Documentary Stamp Tax Act, such taxation would greatly retard, impede and burden the operation of the laws enacted by Congress and for that reason would be

an unconstitutional exercise of the States' taxing power. You are, therefore, advised that the Commonwealth cannot require documentary tax stamps to be affixed to the bonds and notes secured by mortgages, or deeds, given to the following named agencies:

Federal land banks
The Federal Farm Mortgage Corporation
Federal intermediate credit banks
The Central Bank for Cooperatives
Banks for cooperatives
Production credit corporations
Production associations
Regional agricultural credit corporations
The Governor of The Farm Credit Administration

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 178

Courts—Supreme Court—Vacancy in membership—Nomination of appointee by Governor—Filling vacancy at election—General or municipal election—Constitution, Art. iv, Sec. 8, as amended, Art. v. Sec. 25, and Art. viii, Secs. 2 and 3, as amended.

1. Since the amendments of November 2, 1909, to Article VIII, Secs. 2 and 3, and Article IV, Sec. 8 of the Constitution, an appointee named by the Governor to fill a vacancy in the office of justice of the Supreme Court holds such office until the first Monday of January next succeeding the next municipal or general election, as the case may be, occurring 3 or more months after the occurrence of such vacancy, at which election such vacancy should be filled by the electorate; any apparent inconsistency with this determination in Article V, Sec. 25 of the Constitution must be attributed to an oversight at the time of the amendments of 1909.

2. The general policy of the State, as evidenced in the Constitution as a whole, is to have vacancies in an elective office filled at an election as soon as practicable after the vacancy occurs.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., July 30, 1935.

Honorable George H. Earle, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: You have asked to be advised how long a person appointed by you to fill a vacancy existing in the office of justice of the Supreme Court, resulting from the death of an incumbent more than three months prior to a municipal election, will hold such office, and at what election such vacancy is to be filled by the electors.

Article V, section 25 of the Constitution of Pennsylvania provides as follows:

> "Any vacancy happening by death, resignation or otherwise, in any court of record, shall be filled by appointment by the Governor, to continue till the first Monday of January next succeeding the first general election, which shall occur three or more months after the happening of such vacancy."

Standing alone, this provision would furnish a complete answer to your inquiry. However, there are other provisions of the Constitution which must be considered before finally determining this question.

Article VIII, section 2 of the Constitution, as amended November 2, 1909, provides that general elections shall always be held in even-numbered years. Prior thereto general elections were held annually.

Article VIII, section 3, as amended November 2, 1909, (In 1913 this section was also amended in another particular not applicable here), provides, inter alia:

> "All judges elected by the electors of the State at large may be elected *at either a general or municipal election, as circumstances may require.* All elections for judges of the courts for the several judicial districts, * * * shall be held on the municipal election day; namely, the Tuesday next following the first Monday of November in each odd-numbered year, * * *" (Italics ours)

Prior to the 1909 amendment, judges elected by the electors of the State at large could be elected only at the annual general election which took place in the fall.

Article IV, section 8, as amended November 2, 1909, provides, inter alia, as follows:

> "* * * he [the Governor] shall have power to fill any vacancy that may happen, * * * *in a judicial office*, or in any other elective office which he is or may be authorized to fill; * * * but in any such case of vacancy, in an elective office, a person shall be chosen to said office on the *next election day appropriate to such office according to the provisions of this Constitution,* unless the vacancy shall happen within two calendar months immediately preceding such election day, in which case the election for said office shall be held on the second succeeding election day appropriate to such office. * * *" (Italics ours)

Prior to the 1909 amendment, this section provided, with respect to electors filling vacancies, as follows:

> "* * * but in any such case of vacancy, in an elective office, a person shall be chosen to said office at the next *general* election, unless the vacancy shall happen within *three* calendar months immediately preceding such election, in which case

the election for said office shall be held at the second succeeding *general* election. * * *'' (Italics ours)

It is clear that, prior to 1909, there was no inconsistency between article V, section 25, and the foregoing provisions of the Constitution. General elections were held annually in the fall, and vacancies in elective offices were required to be filled by the people at the next succeeding general election, unless the vacancy occurred within three months of such election, in which case the people were required to fill the vacancy at the second succeeding general election.

The amendments of 1909 made several drastic changes in the Constitution. General elections were required to be held biennially in even-numbered years, and municipal elections (the former annual spring elections) were required to be held biennially in odd-numbered years. Judges of the Supreme and Superior Courts were permitted to be elected either at municipal or general elections, the effect being the same as before in that they could be elected annually.

Article IV, section 8 was amended to conform to these changes by requiring the electors to fill vacancies in elective offices at the next election day appropriate to such office according to the provisions of the Constitution, unless the vacancy should happen within two calendar months (instead of three calendar months as before) immediately preceding such election day, in which case the vacancy should be filled at the second succeeding election appropriate to such office. In making these various amendments to the Constitution, section 25 of article V, which theretofore had conformed to the other provisions of the Constitution, was apparently overlooked so that an apparent inconsistency appears in the Constitution.

As a result, we have the present situation under the Constitution. The judges of the Supreme and Superior Courts may be elected at either a general or municipal election, as circumstances may require. If a vacancy occurs, the Governor is authorized to fill the vacancy temporarily. To this point there is no inconsistency. There is an apparent inconsistency, however, with respect to the term of the Governor's appointee, inasmuch as under section 8 of article IV the electors apparently would be required to fill the vacancy at ''the next election day appropriate to such office according to the provisions of this Constitution,'' whereas, under section 25, of article V the electors would be required to fill such vacancy at the next general election. While the prior section specifies that where the vacancy occurs more than two months preceding the next appropriate election, the vacancy must be filled at such election, the latter section provides that where the vacancy occurs more than three months prior to a general election, the vacancy must be filled at such general election. The Supreme Court in *Buckley* v. *Holmes,* 259 Pa. 176 (1917), ruled that the three

month provision in the latter section governs with respect to the filling of vacancies in courts of record.

Accordingly, we are presented here with the question whether the term "general election," as used in section 25 of article V is still applicable, or whether the amendments made in 1909, which require vacancies in elective offices to be filled by the people at the next election appropriate to the office, and which permit judges of the Supreme and Superior Courts to be elected at a municipal or a general election, have modified or superseded section 25 of article V in this respect.

In approaching this subject we must bear in mind that the Constitution must be construed as a whole in order to ascertain both its intent and general purpose, and also the meaning of each part; that, as far as possible, each provision must be construed so as to harmonize with all others, yet with a view to giving the largest measure of force and effect to each and every provision that shall be consistent with a construction of the instrument as a whole; and, that if a literal interpretation of the language used in a constitutional provision would give it an effect in contravention of the real purpose and intent of the instrument as deduced from a consideration of all its parts, such intent must prevail over the literal meaning. (See 12 C. J., 702, 707, secs. 44 and 55).

Looking at the Constitution as a whole, it is apparent that the general policy of the instrument is to have vacancies in an elective office filled at an election as soon as practicable after the vacancy occurs. This is readily apparent from the provisions of the Constitution quoted above, which expressly require vacancies in elective offices to be filled by the people at the very next election where this may be done conveniently, and, particularly, by the amendment of 1909 to section 8, of article IV which enables the electors to fill vacancies at an election occurring two months instead of three months after the vacancy. Likewise, in framing section 25 of article V, the framers of the Constitution undoubtedly were actuated by this fundamental policy in requiring vacancies in courts of record to be filled at the next "general election" so long as the vacancy occurred more than three months prior to the date of the election. As we have already pointed out, at that time a general election was held every year, and this system was not changed until the adoption of the amendments of 1909. When the Constitution was amended in 1909 to provide that general elections may be held only in even-numbered years, it was also amended to permit the election of judges of the Supreme and Superior Courts at either municipal or general elections. Clearly, the intention of this amendment was to carry out the original

intention of the framers of the Constitution that vacancies in offices of the Superior and Supreme Courts might be filled annually.

To construe section 25, article V literally, to the effect that a vacancy in the court of record could be filled by the people only at a general election, as it is now understood, would, in many cases, as in the case under consideration, preclude the people from expressing their wish as to the person who should fill the vacancy for a much longer period of time than if this section was construed as having been modified or superseded by the 1909 amendments to section 8 of article IV, and section 5 of article VIII to the extent that vacancies in the Supreme and Superior Courts may be filled at either a municipal or a general election. Such a literal interpretation clearly would contravene the fundamental spirit and intent of the Constitution that vacancies in an elective office are to be filled at an election as soon as practicable after a vacancy occurs.

Reading section 8 of article IV, section 25 of article V, and section 3 of article VIII together, it is clear that the prime purpose of section 8 is to confer upon the Governor the power to fill temporarily vacancies in elective offices, including courts of record; that the prime purpose of section 25 of article V is to prescribe the term of the Governor's appointee to a court of record, namely, the first Monday of January after the people have elected their candidate to fill the vacancy, and that section 3 of article VIII prescribes the election at which the people may fill the vacancy, which in the case of the Supreme or the Superior Court may be the first municipal or general election, as the case may be, occurring more than three months after the vacancy. Prior to 1909 these sections were in harmony on this point, and must continue to be so construed in order to effectuate the fundamental policy of the Constitution to have vacancies in elective offices filled at an election as soon as practicable after the vacancy occurs. This construction may readily be adopted by construing the words "general election," used in section 25, article V, as meaning (paraphrasing the language of section 8 of article IV), the "election appropriate for electing judges according to the Constitution," which in the case of the Supreme or Superior Court would be either a municipal or general election, whichever first occurred more than three months after the vacancy.

In view of the foregoing, we are of the opinion that section 25 of article V, read together with the aforementioned provisions of the Constitution, as amended in 1909, must be construed to require a vacancy in the Supreme or Superior Court, occurring more than three months prior to a municipal election, to be filled by the people at such election.

In substantiation of our position, we point out that the Supreme

Court in *Buckley* v. *Holmes,* 259 Pa. 176 (1917), inferentially placed this construction upon section 25 of article V. In that case a judge of the Orphans' Court died less than three months, but more than two months prior to the municipal election of 1917. It was contended that the vacancy could be filled by the electorate at such municipal election under article IV, section 8, of the Constitution inasmuch as the vacancy had occurred more than two months prior to the date of the election. The Supreme Court in holding that the vacancy could not be filled by the electorate until the municipal election of 1919 in view of the three month provision in section 25 of article V, stated at page 188:

> "Judge Dallett died within three calendar months of the election to be held for judges this year, [municipal election of 1917] but more than two calendar months prior thereto. He was a judge of a court of record, and specific provision is made in section 25 of article V of the Constitution for the filling of that vacancy by appointment by the Governor of a person who shall hold office until the first Monday of January following the next election after this year for judges other than those elected by the electors of the State at large. That year will be 1919."

The court in speaking of section 25 of article V of the Constitution also stated at page 187:

> "This means that if the vacancy happens within three months preceding *the next election at which judges are elected,* the appointee shall hold his office until the first Monday of January following the second election for judges held after the death which caused the vacancy." (Italics ours)

The conclusion of the Supreme Court in the Buckley case, that the vacancy in the Orphans' Court could be filled only at a municipal election, is of particular value in the determination of the question under consideration. The court reached this conclusion despite the wording of section 25 of article V, that vacancies in a court of record should be filled at a "general election." In so doing, the court inferentially assumed that the amendment of 1909 to section 3, article VIII, which provided that Supreme and Superior Court judges should be elected either at municipal or general elections, and local judges should be elected only at municipal elections, modified or superseded section 25 of article V to the extent that a vacancy in the office of a local judge is now to be filled only at a municipal election instead of a general one. If this be true, it logically follows that the amendment of 1909 likewise modified or superseded section 25, article V, to the extent that vacancies in the Supreme and Superior Courts are to be filled at the first municipal or general election occurring more than three months after the happening of such vacancies.

Moreover, in practice it has been customary to fill vacancies in the Supreme Court or the Superior Court at municipal as well as general elections. Thus, in 1929 Judge Thomas J. Baldrige was elected at a municipal election to fill a vacancy in the Superior Court, and in 1931 Justice James B. Drew was elected at a municipal election to fill a vacancy in the Supreme Court.

Accordingly, you are advised that any person appointed by you as Justice of the Supreme Court to fill a vacancy in that office caused by the death of an incumbent, will hold such office until the first Monday of January next, succeeding the first municipal or general election, as the case may be, occurring three or more months after the happening of such vacancy, at which election such vacancy should be filled by the electorate.

Respectfully submitted,
DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 179

Courts—Supreme Court—Candidates to bee nominated by each political party—Constitution, Art. v. Sec. 16; Art. xiv, Sec. 7 as amended.

A political party may nominate only one candidate for the office of justice of the Supreme Court where two vacancies in said office are to be filled at the same election.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., July 30, 1935.

Honorable David L. Lawrence, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: You have requested to be advised concerning how many candidates may be nominated by each political party at the primary election for the office of justice of the Supreme Court when two existing vacancies are to be filled at the succeeding November election.

Article V, section 16 of the Constitution of Pennsylvania provides, in part, as follows:

> "Whenever two judges of the Supreme Court are to be chosen for the same term of service each voter shall vote for one only * * *; candidates highest in vote shall be declared elected."

This provision unequivocally restricts the voter from voting for more than one candidate in the situation where two judges of the Supreme Court are to be chosen for the same term. It does not differentiate

between those voters who cast their ballots at November elections and those who vote at primary elections.

In section 11 of the Primary Election Law of July 12, 1913, P. L. 719, the legislature provided that:

> "Primaries shall be conducted in conformity with the laws governing the conduct of general elections, in so far as the same are not modified by the provisions of this act or are not inconsistent with its terms: * * *"

A careful examination of the Primary Election Law does not reveal any provision which permits voters to vote for more than one judge of the Supreme Court where two are to be chosen. Therefore, the general laws governing the conduct of general elections, as represented by the above quoted section of the Constitution, are incorporated by reference into the Primary Election Law. Consequently, that law prohibits voters at primary elections from voting for more than one candidate whenever two judges of the Supreme Court are to be chosen at the subsequent November election.

Moreover, since the voters may not vote for more than one candidate, it follows that only one candidate may be nominated for each party at the regular primary election. This interpretation is in conformity with the manifest intention of the Constitution to accord minority representation upon the Supreme Court where more than one justice is to be elected at the same election.

The same intent is evidenced in the constitutional provision in article XIV, section 7, as amended, requiring minority representation among county commissioners as follows:

> "* * * in the election of said officers [county commissioners] each qualified elector shall vote for no more than two persons, and the three persons having the highest number of votes shall be elected; * * *"

The same provisions are contained in Article III, section 101 of the County Code of May 2, 1929, P. L. 1278.

Since the Act of April 10, 1867, P. L. 62, minority representation in the election of jury commissioners has also been required. Section 1 of that act provides:

> "* * * That each of said qualified electors shall vote for one person only as jury commissioner; and the two persons having the greatest number of votes, for jury commissioner, shall be duly elected jury commissioners for such county."

These provisions are supplemented by Article III, sections 291-293 of the County Code.

Likewise, the Constitution establishes limited voting in the election of Philadelphia magistrates in article V, section 12, and in the election of election inspectors in article VIII, section 14.

In *Commonwealth ex rel.* v. *Reeder,* 171 Pa. 505, 518 (1895), the Supreme Court of Pennsylvania said concerning the provisions in the Constitution establishing limited voting:

> "* * * But the limited voting plan was recognized and adopted in the constitution because it was deemed wise that as to offices non partisan in character, or which at least should be, *the minority party ought to have representation,* and this could only be attained by limited voting. * * *" (Italics ours)

In this case it was held that the provision in the Act of June 24, 1895, P. L. 212, establishing the Superior Court, that "* * * no elector may vote, either then or at any subsequent election, for more than six candidates upon one ballot for the said office," was constitutional, even though there were seven judges to be elected.

To permit each political party to nominate two candidates for justices of the Supreme Court, where only two are to be elected, would contravene the spirit of the Constitution, because it would present an opportunity for a strong majority political party to elect both of its nominees merely by dividing the votes of its electors between them. Thus, the minority party would be deprived of all representation in an office which the Supreme Court has characterized as "nonpartisan" in character, and the intent of the Constitution would be defeated.

Ever since the institution of the direct primary election system, it has been the practice of all political parties to nominate two candidates for the office of county commissioner and one candidate for the office of jury commissioner, even though there are three county commissioners and two jury commissioners to be elected. This practice has obviously been based on the principle that the number of nominees should be restricted by the number of votes to be cast by each voter, and this principle has received universal acquiescence and sanction.

Since the Constitution of 1874 there have been four instances where two judges of the Supreme Court were chosen at the same election. In 1919, Justices Alexander P. Simpson, Jr. and John W. Kephart were elected under the provisions of the Nonpartisan Ballot Law of July 24, 1913, P. L. 1001, now repealed. In *Winston* v. *Moore,* 244 Pa. 447 (1914), the Supreme Court upheld the constitutionality of the Nonpartisan Ballot Law, but it specifically refrained from deciding whether a primary election law came within the purview of the constitutional provisions. In 1900, when Justices S. Leslie Mestrezat and J. Hay Brown were elected to the Supreme Court, the election took place prior to the Primary Election Law of 1913. However, it

is noteworthy that while the nominations were made by the convention system, the two major political parties each nominated only one candidate. Similarly, each political party nominated only one candidate for justice of the Supreme Court in the election in 1888, when Justices J. Brewster McCollum and James T. Marshall were elected, and in the election of 1874, when Justices Edward M. Paxson and Warren J. Woodward were elected.

It has been the universal practice to nominate only so many candidates as are to be voted for by the individual elector. The practical interpretation of an ambiguous situation in the law by the administrative officials charged with its supervision is entitled to the highest respect, and if acted upon for a number of years, will not be disturbed except for very cogent and persuasive reasons. See *Commonwealth* v. *Mann,* 168 Pa. 290 (1895); *Garr* v. *Fuls,* 286 Pa. 137 (1926); *Commonwealth* v. *Quaker City Cab Co.,* 287 Pa. 161 (1926) (Reversed on another point in 277 U. S. 389, 1928); and *Reeves's Appeal,* 33 Pa. Super. Ct. 96 (1907).

Therefore, each political party should nominate only one candidate for the office of justice of the Supreme Court where two vacancies in such office are to be filled at the same election.

To determine this question in any other manner would operate to interfere with electors in voting a straight party ticket at any November election where two justices were to be elected to the Supreme Court, because only one vote could be cast for this particular office under article V, section 17 of the Constitution. Under the general provisions of section 27 of the Act of June 10, 1893, P. L. 419, as amended by section 4 of the Act of April 29, 1903; P. L. 338, a voter voting a straight party ticket would lose his vote as to the candidates for Supreme Court justice, because that act provides that:

> "If a voter has marked his ballot otherwise than as directed by this act, so that for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office; but the ballot shall be counted for all other offices for which the names of candidates have been properly marked."

While it cannot be stated that voters have a constitutional right to vote a straight party ticket in the November elections, nevertheless it would be most confusing to voters who customarily cast their ballots in that manner to require them to make a separate indication concerning the office of justice of the Supreme Court, either on the official ballot or by voting machine.

Therefore, we are of the opinion that a political party may nominate only one candidate for the office of justice of the Supreme Court where two vacancies in said office are to be filled at the same election.

Respectfully submitted,
DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 180

Waters—Ownership of stream beds—Navigable rivers—Obstruction—Artificial navigability—Public service lines across streams—Licensing—Compensation to State—Administrative Code, Sec. 514.

1. The Commonwealth holds title to the beds of navigable waters and to the air above them and may therefore impose such terms or conditions for the use thereof as it chooses, subject only to the superior right of the Federal Government to insist that navigation be not impeded.

2. It seems that the Commonwealth gains title to the beds of streams made navigable artificially, but does not lose title to the beds of once navigable streams upon their becoming non-navigable.

3. It is the right and duty of the Water and Power Resources Board, under section 514 of The Administrative Code of April 9, 1929, P. L. 177, to exact of a public service company which it has licensed to cross a navigable stream bed, either by a submerged pipe line or by overhead wires, compensation therefor in such amount as it may, with the approval of the Governor, prescribe.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., August 13, 1935.

Honorable Thomas C. Buchanan, Chairman, Water and Power Resources Board, Harrisburg, Pennsylvania.

Dear Mr. Buchanan: This department is in receipt of your request to be advised whether the Water and Power Resources Board has authority to impose a reasonable charge upon public service corporations in granting permits to cross the stream beds of the waters of this Commonwealth, either by submerged pipe lines in the river bed or by electric lines crossing overhead.

So far as the public waters of the Commonwealth are concerned, we are of the opinion that you not only have the authority but it is your duty to do so under section 514 of The Administrative Code for the reasons herewith set forth.

The waters of the Commonwealth, generally speaking, fall into two classes—public and private. Public waters include the principal rivers and such streams and lakes as are navigable in fact. The non-navigable waters are private streams. In the former, the river beds be-

long to the Commonwealth because, as pointed out in *Coovert* v. *O'Conner,* 8 Watts's Reports, 470:

> "All rivers, lakes and streams comprehended within the charter bounds of the province, passed to William Penn in the same manner as the soil. In grants of tracts of vacant lands by him or his successors, during the proprietary times, and by the Commonwealth since, streams not navigable, falling within the lines of a survey, were covered by it and belonged to the owner of the tract, * * *. When streams not navigable formed the boundary of such tract, the grantee acquired a title ad filum aquoe [that is to the middle of the stream]. The large rivers and principal streams, by nature navigable, belonged to the Commonwealth, as well where there was no tide, as where the tide ebbed and flowed, contrary to the principles of the common law, and of some of the states, in which, in all rivers and streams where the tide did not ebb and flow, the grant of land, with a boundary on the stream, extended ad filum aquoe: Carson v. Blazer, 2 Binn. 475; Shrunk v. Schuylkill Navigation Co., 14 S. & R. 71."

Again in *Conneaut Lake Ice Company* v. *Quigley,* 225 Pa. 605—611, the Supreme Court adopted with approval the following language of *Pewaukee* v. *Savoy,* 103 Wis. 271, viz:

> "* * * 'It is the settled law that submerged lands of lakes within the boundaries of the state belong to the state in trust for public use, substantially the same as submerged lands under navigable waters at common law. * * *' "

See also *Commonwealth* v. *Pennsylvania Railroad Co.,* 78 Superior Court 389, (1922), where, speaking of the Allegheny River, the Court, through Justice Trexler, said, page 392:

> "* * * The stream is a highway and is the property of the State, over which it has dominion. * * *"

It is true that in *Casselman River,* 40 Pa. C. C. 457, (1907), Judge Cunningham, then Deputy Attorney General, in a comprehensive opinion, points out a third class of rivers which he terms private navigable rivers, in which term he includes those rivers navigable in fact but the stream beds of which have been granted by the Commonwealth to private owners. It may now be questioned whether such class still exists in view of the very recent case of *Cleveland & Pittsburgh Railroad Company, et al.* v. *Pittsburgh Coal Company,* 317 Pa. 395, where it was held in the case of the Little Beaver River, though the plaintiff traced its title out of the Commonwealth by warrants *including the river bed,* and though the river had been made navigable thereafter only by reason of the damming of the Ohio River, into which it flowed, the defendant could not be restrained by the plain-

tiff from digging out the river bed, because its title must be regarded as having been divested for public use.

For further discussion of the relative rights of the Commonwealth and private owners, see opinion of former Deputy Attorney General Shull, Official Opinions of the Attorney General 1927-1928, page 205, and recent Informal Opinion No. 600 of this department, directed to Honorable O. M. Deibler, the Commissioner of Fisheries.

In view of these authorities, it will be seen that the Commonwealth may now claim title to stream beds of all water courses, not only naturally navigable, but such as have been made navigable by artificial means. The Commonwealth may also claim title to stream beds, which, though originally navigable years ago, have become non-navigable by reason of accumulated deposits, as for example streams in the mining regions rendered non-navigable by culm deposits. This because the ownership of the stream beds of such water courses must be determined according to the navigability of the stream at the time the lands bordering thereon were granted to private owners. In short, the Commonwealth can *gain* title to the beds of rivers made navigable artificially,but cannot lose title to the beds of rivers once navigable, no matter what their present status may be. In determining whether a particular stream had ever been navigable, we may regard this fact as proven prima facie in all cases where the State has by statute declared any stream to be a navigable stream or public highway.

What then are the powers and duties of the Water and Power Resources Board with respect to the waters of the Commonwealth?

By the various acts of assembly, the Water and Power Resources Board, formerly the Water Supply Commission, is given general jurisdiction over all of the waters of the Commonwealth, whether public or private, and has the power to supervise and regulate encroachments, dams or any act which may in any manner diminish the course, current or cross-section of any stream or body of water within the Commonwealth. This jurisdiction in this regard follows from the fact that no private owner owns the flowing water. The flowing water of the Commonwealth is prima facie the property of the State. Riparian owners, public or private, may have the use thereof, but may not remove it from the stream to a greater extent than necessary for domestic uses without the consent of the State, nor in navigable streams to the extent of impeding navigation.

Acting under this power, the Commonwealth has granted the Water and Power Resources Board plenary powers to safeguard and protect the interests of the Commonwealth in regard thereto. It is the appropriate department or agency of the Commonwealth to which is committed the supervision of the rivers, lakes and watercourses. See *Casselman River,* 40 Pa. C. C. 457; opinion of Special Deputy

Attorney General W. A. Schnader, Official Opinions of the Attorney General 1929-1930, page 271; and opinion of Deputy Attorney General Shull, Official Opinions of the Attorney General 1927-1928, page 205.

That the Commonwealth may require permission to be secured with conditions to be met before its property may be occupied and used by private parties for their own profit cannot be doubted. See *Bell Telephone Company of Pennsylvania* v. *Lewis,* 317 Pa. 387-393.

Under what circumstances then may rights to cross the public rivers be given?

This question is answered by section 514 of The Administrative Code, which reads as follows, Act of April 9, 1929, P. L. 177; P. S. 71, section 194:

> "Except as otherwise in this act expressly provided, a department, board, or commission, shall not sell or exchange any real estate belonging to the Commonwealth, or grant any easement, right of way, or other interest over or in such real estate, without specific authority from the General Assembly so to do, but a department, board or commission may, with the approval of the Governor, grant a license to any public service corporation to place upon, in, or over, land of the Commonwealth, any public service line, if such line will enable any State building or State institution to receive better service, or, if such line is necessary for the service of persons living adjacent to the Commonwealth's land upon, in, or over which it is proposed to run the line. Every such license shall be revocable upon six months' written notice by the Commonwealth, and upon such other proper terms and conditions as the department, board, or commission, with the approval of the Governor, shall prescribe, *and unless any such line is primarily for the benefit of a State building or State institution, the license shall provide for the payment to the Commonwealth of compensation for the use of its property in such amount as the department, board, or commission granting it shall, with the approval of the Governor, prescribe.*" (Italics ours)

The term "lands of the Commonwealth" in the section quoted includes, of course, submerged lands. See Century Dictionary Encyclopedia, which defines land in its broadest sense as the solid substance of the earth's surface; any part of the continuous surface of the solid materials constituting the body of the globe; as dry or submerged land, mountain or desert land. The word "land," therefore, is not to be limited to fast or dry land, but must be used in its general broad sense.

To summarize, therefore, title to stream beds of navigable waters is in the Commonwealth. It is the owner of the land over which the water flows. As such owner it may impose terms or conditions for the use thereof, subject only to the superior right of the Federal Gov-

ernment to insist that navigation shall not be impeded, which right was surrendered to the Federal Government in the Federal Constitution. Subject only to this limitation, the Commonwealth's title is as entensive as the fee simple title of any owner of the land, and the ownership extends not only to the river bed but to the air above the water that flows over the bed.

Section 514 prescribes the manner in which licenses may be granted to cross the Commonwealth's lands, reasonable interpretation of which would cover submerged lands as well as fast lands, and unless the public service line that crosses either on the stream bed or in the air over the same is primarily for the use of a State building or State institution, there is a plain mandate to impose compensation for the use of the Commonwealth's property.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 181

Retirement of tax anticipation notes—Creation of sinking fund therefor—Appropriations from general fund—Status thereof.

Section 4 of the Act of June 22, 1935 (No. 185), authorizes the Department of Revenue to create a sinking fund for the retirement of tax anticipation notes issued thereunder and to allocate for that purpose a portion of the current revenues of the Commonwealth accruing to the general fund during the biennium beginning June 1, 1935, by designating certain specific amounts to be set aside on certain specified dates; and sums thus allocated constitute claims upon moneys which have accrued to the general fund on the dates specified, having priority over all other claims payable therefrom.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., August 29, 1935.

Honorable George H. Earle, Governor; Honorable Charles A. Waters, State Treasurer; Honorable Frank E. Baldwin, Auditor General; Honorable Harry E. Kalodner, Secretary of Revenue, Harrisburg, Pennsylvania.

Gentlemen: We have your request to be advised concerning the effect of allocations of moneys in the General Fund made by the Department of Revenue to provide for the payment of tax anticipation notes which are to be issued under the provisions of the Act of May 22, 1935, P. L. 442, (Act No. 185).

The security upon which the notes, authorized by the act, shall be issued, the appropriation for their repayment and the authority of the Department of Revenue to provide for such repayment are set forth in section 4 of the act, the material portion of which is as follows:

> "Section 4. Any loans negotiated under the provisions of this act shall be secured by the current revenues levied and assessed for revenue purposes of every kind or character accruing to the General Fund of the State Treasury during the two fiscal years beginning June first, one thousand nine hundred thirty-five, and shall be paid out of such revenues, and so much of such revenues as may be necessary for the payment of the principal and interest of such loans are hereby specifically appropriated. The Department of Revenue shall allocate such revenues to said payments. * * *"

We understand that the Department of Revenue proposes to create a sinking fund for the purpose of repaying the notes at maturity and has allocated for such purpose certain of the current revenues of the Commonwealth accruing to the general fund during the biennium beginning June 1, 1935 by designating certain specific amounts to be set aside on certain specified dates in a total amount adequate to provide for the repayment of the notes. The department was fully authorized to make such allocations and to carry out the above proposal under the provisions of the section just quoted.

The effect of the allocations thus made is to constitute each sum so designated by the Department of Revenue a claim upon moneys which, on the date specified, have accrued to the general fund; to be paid out of, or set aside from, such fund before all other expenditures, expenses, debts and appropriations which are payable therefrom at that time. This conclusion necessarily follows from the provisions of the act itself. The current revenues *of every kind or character,* accruing to the general fund, are pledged for the repayment of the notes. This is coupled with the direction that the Department of Revenue shall allocate such revenues to such repayment. All of the current revenues having been thus unconditionally made available for the repayment of the notes, and the Department of Revenue having exercised the authority given to it by directing the specific setting aside of sufficient of the revenues for that purpose, obviously the pledge and repayment provided for by the legislature can only be made effective by considering the allocations absolutely payable in the manner, at the times, and in the amounts specified ahead of all other claims payable out of the general fund.

Since the legislature has provided for the repayment of the notes by directing the Department of Revenue to make allocations of the

current revenues, the prior payment of no other claim can be permitted to interfere with the allocations once made, i. e. to prevent the setting aside of any moneys in the manner specified, for otherwise the intention of the legislature, that the notes ultimately be repaid from the current revenues as allocated by the department, would not be carried out.

The fact that the proceeds of the notes are to be used to defray the current and other expenses of the State government confirms the validity of the conclusion just stated. Furthermore, the same fact removes all doubt as to the essential equity of the results thus obtained. The preamble of the act states, inter alia:

> "Whereas, in order that the obligations of the Commonwealth for current and other expenses may be met promptly, and in order that the State Government might not fail through lack of funds, it is necessary temporarily to obtain funds to defray the current and other expenses of the State government during the fiscal period aforesaid until the revenues that will subsequently accrue to the State Treasury during the aforesaid fiscal period are available for this purpose."

and section 3 provides:

> "Section 3. The proceeds derived from the negotiation of loans under the provisions of this act shall be paid into the General Fund of the State Treasury and shall be used for the payment of appropriations made from such fund to defray the current and other expenses of the State government for the biennium beginning June first, one thousand nine hundred thirty-five."

The Supreme Court of Pennsylvania in construing the act (*Kelley* v. *Baldwin* et al. decided June 29, 1935) states that the act "substitutes one creditor—the noteholder, for another—the person to whom the Commonwealth must pay" and "There is a mere exchange of one obligation for another."

Since the moneys derived from the sale of the notes are to be used for current and other expenses payable out of the general fund, and since such expenses could not have been met without the fund so derived, it necessarily follows that the allocations of money in the general fund, to provide for the payment of the notes, will be preferred to current and other expenses due at the times of the allocations.

In our study of this question we have considered the provisions of article IX, section 13, of the Constitution as construed by the Supreme Court in the case of *Commonwealth ex rel. Schnader* v. *Liveright,* 308 Pa. 35 (1932).

It is our opinion that nothing contained in this section of the Constitution or in the opinion of the court relative thereto affects the

validity of the conclusion we have stated above. In the Liveright case the court had before it an unbalanced biennial budget. It was accordingly necessary to consider the constitutional provisions in determining which of the appropriations making up the excessive total would have to be abated and which would have to be paid in full. For the biennium beginning June 1, 1935, no such condition exists; the total of all appropriations finally enacted and approved falls within the total of the estimated revenues.

Furthermore, in the Liveright case the legislature, in enacting the appropriation act there under consideration, did not declare or imply any intention to prefer the payment of the appropriation over all other claims against the current revenues of the Commonwealth although an intention was expressed there to prefer the appropriation in question over claims which did not constitute the current expenses of the State Government.

As we have stated above, in the act here under consideration, the current revenue *of every kind or character* are specifically pledged to repay the notes and must be allocated for that purpose. A clear and unmistakable intent has, therefore, been expressed by the legislature to give priority to such allocations over all other claims of every nature against the current revenues.

In conclusion we are of the opinion, and so advise you, that the allocations of moneys in the general fund made by the Department of Revenue to provide a sinking fund for the payment of the tax anticipation notes are payable into, and shall be set aside in, said sinking fund in the amounts and at the time specified, prior to all other expenditures, expenses, debts, and appropriations, including current expenses, payable from the General Fund.

Very truly yours,
DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 182

Municipalities—Occupancy of State property—Necessity for obtaining license from Department of Highways—Governmental or public service use—Liability for permit fees—Acts of May 31, 1911, May 21, 1931, June 26, 1931, and July 12, 1935.

1. Under section 17 of the Sproul Act of May 31, 1911, P. L. 468, municipalities must obtain permits for the occupancy of State bridges by governmental facilities such as storm or sanitary sewers, fire alarm signal systems, bridge lighting facilities, and light and power lines, and pay such permit fees for such occupancy

as the Department of Highways may require; but that department need not, in its discretion, charge any fees.

2. Municipalities must, under section 17 of the Sproul Act of 1911, P. L. 468, as amended by the Act of June 26, 1931, P. L. 38, and section 4 of the County Bridge Act of May 21, 1931, P. L. 147, obtain a license from the Department of Highways before occupying a State bridge with municipally owned public service facilities such as light and power lines and gas and water mains, and the Department of Highways should charge for any such occupancy occurring prior to September 1, 1935, the effective date of the amendment to section 514 of The Administrative Code of 1929, approved July 12, 1935, P. L. 792, the regular license fee imposed upon privately owned public service corporations for the same class of occupancy: it may not, under that amendment, charge a fee for any such occupancy occurring thereafter.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., September 18, 1935.

Honorable Warren Van Dyke, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether you may place municapilities in a separate classification and exempt them from the payment of fees for the occupancy of State bridges by municipally owned storm or sanitary sewers, fire alarm signal systems, bridge lighting facilities, light and power lines, and other public utilities.

There are three acts regulating the occupancy of State highways and bridges.

Section 17 of the Sproul Act of May 31, 1911, P. L. 468, as amended by the Act of June 26, 1931, P. L. 1388, reads in part as follows:

> "* * * No * * * gas pipe, water pipe, electric conduits, * * * electric light or power poles, * * * or any other obstructions, [shall] be erected upon or in any portion of a State highway * * *, except under such conditions, restrictions, and regulations, and subject to the payment of such fees for permits, as may be prescribed and required by the Department of Highways, * * *. *The Secretary of Highways shall also have authority to issue permits to any public utility company for the occupancy, by the facilities of such company, of any bridge under the control or jurisdiction of the Department of Highways.* * * *"

That part of the above act which we have italicized was added by the amendment of 1931.

The County Bridge Act of May 21, 1931, P. L. 147, as amended by Act of July 15, 1935, P. L. 1035, (No. 344), provided for the taking over of county or township bridges on State highways as State bridges Section 4 of that act provided as follows:

> "* * * The department shall also have authority to issue licenses for such length of time and for such fee, for the occupancy of any bridge by the facilities of any public service

company, as may be determined by the Secretary of Highways, with the approval of the Governor, under the provisions of existing laws. * * *''

Section 514 of The Administrative Code of April 9, 1929, P. L. 177, as last amended by Act of July 12, 1935, P. L. 792 (Act No. 296), provides, in part, as follows:

> ''(a) * * * a department * * * may, with the approval of the Governor, grant a license to any public service corporation to place upon, in, or over, any * * * bridge of or maintained by the Commonwealth, any public service line * * *. Every such license shall be revocable upon six months written notice by the Commonwealth, and upon such other proper terms and conditions as the department, * * * with the approval of the Governor, shall prescribe, and unless any such line is primarily for the benefit of a State building or State institution, the license shall provide for the payment to the Commonwealth of compensation for the use of its property in such amount as the department * * * granting it shall, with the approval of the Governor, prescribe.
>
> *''But nothing herein contained shall authorize the Commonwealth to impose and collect from any municipality or township any compensation for a license granted to such municipality or township for the running of a public service line over any such bridge.''*

The italicized portion was added by the amendment of 1935. Since this amendment does not contain an effective date, it will not become effective until September 1, 1935, under the provisions of the Act of May 17, 1929, P. L. 1808, as amended by Act of June 10, 1935, P. L. 293.

Your inquiry concerns the occupancy of State bridges by municipally owned storm or sanitary sewers, fire alarm signal systems, bridge lighting facilities, light and power facilities and gas and water lines. These facilities fall into two general classes. The first class includes those which are installed by the municipality for the protection of the health and safety of its inhabitants, and which are paid for out of the general funds of the municipality obtained from local taxes. For the purpose of this opinion, we shall label these ''governmental facilities,'' which include storm or sanitary sewers, fire alarm signal systems and bridge lighting facilities. The other class consists of those projects which furnish service to the residents of the borough of the same kind and nature as that furnished by public utility companies, and which service the individual residents pay for in proportion to the amount or quality used. We shall refer to these as ''public service facilities,'' which would include lines for the furnishing of light and power and gas and water.

We shall consider separately the effect of the three statutes above quoted upon the occupancy of State bridges by each class of facilities.

(a) *Public Service Facilities*

The amendment to section 514 of The Administrative Code of April 9, 1929, P. L. 177, contained in Act of July 12, 1935, P. L. 792 clearly eliminates the necessity of imposing and collecting license fees upon a municipality for the running of its public service lines over any State bridge. However, this amendment is in the form of a statutory condition, and must be construed strictly. Clearly, the legislature did not intend to remove the duty and authority of the Department of Highways to issue licenses for the occupancy of State bridges by municipalities or townships, but merely removed the authority to collect license fees. As a result, the Department of Highways continues to have the complete power to regulate the occupancy of those bridges under its jurisdiction by municipally owned public service lines.

Since the 1935 amendment of The Administrative Code does not become effective until September 1, 1935, it becomes necessary to decide whether municipalities may be charged for public service licenses in those cases pending.

Under existing law, a municipality, seeking to occupy a State bridge with its public service facilities, must secure the permission of the Department of Highways before it can occupy the structure. The Sproul Highway Act of 1911 places the State highways, including State bridges thereon, under the exclusive jurisdiction and control of the department. Under section 17 of that act, quoted above, prior to the 1931 amendment relating specifically to public service companies, no obstruction or occupancy of the highways was permitted, except under such conditions and on the payment of such fees as are prescribed by the department with the approval of the Governor. The legislature by the 1931 amendment clearly did not intend to take away from the department the power which it formerly had to regulate the occupancy of all State bridges by all persons and corporations, including municipalities.

Similarly, under the County Bridge Act, as amended, all county and township bridges are maintained by the department under the provisions of existing laws, which includes the power of the department to regulate the occupancy by public service facilities or lines of any other description.

From the foregoing, it is clear that a municipality must secure the permission of the department before occupying a bridge under its jurisdiction by facilities owned by the municipality. Whether the

department has the power to make a separate classification for the public service facilities of municipalities, in order to exempt them from the payment of license fees, depends upon the provisions of section 514 of The Administrative Code prior to the 1935 amendment. Although under section 514 the amount of the license fees is within the discretion of the department, reasonably exercised, subject to the approval of the Governor, nevertheless that section requires the department to charge fees for the occupancy of State bridges, unless the line is primarily for the benefit of State buildings or institutions. If the legislature had not placed this limitation in section 514, the department would undoubtedly have the power to relieve municipalities of the payment of such fees with the approval of the Governor. However, since the legislature has specifically provided for one exception to the requirement of the payment of fees, it impliedly excluded any further exemption from those fees. Furthermore, such exemption would be undesirable because it would unjustly discriminate between competing classes of public service lines.

Section 514 of The Administrative Code, quoted above, regulating the occupancy of State bridges, refers to the issuing of licenses for "any public service line" of the licensee "public service corporation." Similarly, the County Bridge Act provides for the issuing of licenses for the occupancy by "the facilities of any public service company," and section 17 of the Sproul Act authorizes the issuing of permits to "any public utility company" for the occupancy of a bridge by its facilities.

It, therefore, becomes necessary to determine whether public service lines owned by municipal corporations are included in the language of these acts.

We are not unmindful of the decision in *Barnes Laundry Co.* v. *Pittsburgh,* 266 Pa. 24 (1920), where it was decided that municipalities were not included generally in The Public Service Company Law of July 26, 1913, P. L. 1374, because the statute expressly eliminated them and that they could not therefore be brought in by implication as public service companies.

However, it has been held on several occasions by the Supreme Court that where a municipal corporation engages in an activity of a business nature which is generally engaged in by private corporations, it acts as such corporation and not in its governmental or sovereign capacity. In *American Aniline Products, Inc.* v. *Lock Haven,* 288 Pa. 420, 424 (1927), the Supreme Court said:

> "When a municipal corporation engages in an activity of a business rather than one of a governmental nature, such as the supply of light or water, which is generally engaged in by individuals or private corporations, it acts as such corpora-

> tion, and not in its sovereign capacity: Western Saving Society v. Phila., 31 Pa. 185. The relation to the public created by its ordinances are, in such cases, not legislative, but contractual. * * *''

And in *Barnes Laundry Co.* v. *Pittsburgh et al.*, supra, the Supreme Court said at page 36:

> "In reaching the conclusion that the legislature did not intend to subject municipal corporations, rendering the same character of service as public service companies, to like regulation with the latter, we have not overlooked our own authorities which hold that, when a city undertakes to supply water, it acts 'not by virtue of any right of sovereignty, but exercises merely the functions of a private corporation,' and must be so considered (see Com. v. Casey, 231 Pa. 170, 178, and authorities there mentioned, together with cases holding a like principle, from this and other jurisdictions, cited by appellant); * * *''

A brief reference to the three acts, above quoted, regulating the occupancy of State bridges, clearly indicates that the legislature did not intend to make any distinction between the public service activities of private corporations as compared with those of municipal corporations. We are of the opinion that a municipality which supplies gas, electricity or water is not engaging in a governmental function but in a private business, and, therefore, comes within the terms of these acts requiring licenses for public service lines.

(b) *Governmental Facilities*

Those provisions of the above quoted sections of the Sproul Act, the County Bridge Act and The Administrative Code, which refer to the occupancy of bridges by the facilities of public service companies, clearly are inapplicable to the so-called "governmental facilities," such as storm or sanitary sewers, fire alarm signal systems and bridge lighting facilities. As to these facilities, it cannot be said that the municipality is engaging in an activity of a business nature generally engaged in by private corporations. The purpose of these facilities is the protection of the general health and welfare of the community, which is unquestionably a governmental function. Clearly, the municipality is not acting in the capacity of a private corporation, unless the cost of operating such facilities is paid for by a pro rata assessment against the beneficiaries of the facilities, as is occasionally done in the case of sanitary sewers. However, if the facilities are not paid for out of general funds of the municipality, then we cease to regard them as governmental facilities, but place them, for the purpose of this opinion, in the category of public service facilities.

The provisions of section 17 of the Sproul Act clearly prevent the occupancy of the highways by any sort of lines or obstructions without first obtaining a permit from the Department of Highways. The reasoning heretofore set forth, showing that municipalities may not occupy the highways by their public service facilities without receiving a permit, is equally applicable to governmental facilities.

Therefore, we are of the opinion that the general provisions of section 17 of the Sproul Act require municipalities to obtain permits for the occupancy of State bridges by governmental facilities, and to pay such permit fees as the department may require. Of course, these facilities may be exempted entirely from such permit fees within the discretion of the Secretary of Highways.

To summarize, you are advised as follows:

1. All municipalities (including townships) must obtain a license from the Department of Highways before occupying a State bridge with municipally owned public service facilities, such as light and power lines and gas and water mains. If such occupancy occurs prior to September 1, 1935, the Department of Highways should charge the regular bridge occupancy license fee which is imposed upon privately owned public service corporations for the same class of occupancy. However, after September 1, 1935, the department is not authorized to collect a license fee from municipalities for the occupancy of State bridges by their public service facilities.

2. Such municipalities may be required by the Department of Highways to obtain a permit for the occupancy of State bridges by their governmental facilities, such as storm or sanitary sewers, fire alarm signal systems and bridge lighting facilities, subject to the payment of such permit fees as may be prescribed by the department.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 183

Taxation—Tax anticipation notes—Legal status.

The $50,000,000 notes of the Commonwealth series AT, represented by coupon certificates, constitute legal obligations payable by the Commonwealth from current revenues accruing to the general fund of the State Treasury during the two fiscal years beginning June 1, 1935 and are secured by the current revenues

levied and assessed for revenue purposes of every kind and character accruing to the general fund during the biennial session.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., September 30, 1935.

Honorable Charles A. Waters, State Treasurer, Harrisburg, Pennsylvania.

Sir: We have your letter of September 26 inquiring as to the legal status of the $50,000,000. Commonwealth of Pennsylvania tax anticipation notes, series AT, dated October 1, 1935 and maturing May 31, 1937.

We have examined the proceeding relative to the issuance by the Commonwealth of Pennsylvania of tax anticipation notes, series AT, to the amount of $50,000,000. This issue was authorized by the General Assembly of this Commonwealth by an act approved June 22, 1935, P. L. 442. With respect to the passage of this act we have satisfied ourselves, by an examination of the journals of both houses and the original records on file in the office of the Secretary of the Commonwealth, that said act was duly and properly enacted and approved by the Governor.

The constitutionality of the act has been approved by the Supreme Court of Pennsylvania in the case of *Joseph J. Kelley of the City of Philadelphia, plaintiff,* v. *Frank E. Baldwin, Auditor General of the Commonwealth of Pennsylvania, Charles A. Waters, State Treasurer of the Commonwealth of Pennsylvania, and Security Bank Note Company of Philadelphia, defendants,* Eastern District, Miscellaneous Docket No. 6, No. 144, decided June 29, 1935.

The act provides, inter alia, that the current revenues for the biennial fiscal period beginning June 1, 1935, accruing to the general fund of the State Treasury, are pledged for the payment of principal and interest of the notes, and that so much of said revenues as may be necessary are specifically appropriated for such payment, the Department of Revenue being authorized to allocate such revenues to said payment.

The act authorizes the Governor, the Auditor General, and the State Treasurer to determine the terms and conditions of the issue, rates of interest, and time of payment of interest, provided that the notes shall not mature later than May 31, 1937 and shall not bear interest in excess of 4½ percent per annum. The minutes of the meetings held by the Governor, the Auditor General and the State Treasurer, between August 13, 1935 and September 30, 1935, show that all proceedings taken relative to the issuance of the notes comply fully with the provisions of the act and are in due legal form; and

that all necessary action has been duly taken; that the said notes were duly offered at public sale on September 5, 1935 and a portion thereof awarded to bidders at par with interest at the rate of 1½ percent per annum and the portion of the said notes remaining unsold after said public sale was duly offered at private sale to various banks, trust companies and individuals at par with interest at the rate of 1½ percent per annum, and accruing interest; all of which securities sold to date were sold as offered to various banks, trust companies, and individuals after which such sales were approved by the Governor, the Auditor General and State Treasurer.

We have examined notes number one in the following denominations; $100,000., $25,000., $10,000., and $5,000., in coupon form and find that the same are duly and properly executed and conform with the form approved by the Governor, the Auditor General and the State Treasurer.

In conclusion we have no hesitation in advising you that the $50,000,000. notes of the Commonwealth of Pennsylvania, series AT, represented by coupon certificates, constitute legal obligations payable by the Commonwealth of Pennsylvania from current revenues accruing to the General Fund of the State Treasury of the Commonwealth of Pennsylvania during the two fiscal years beginning June 1, 1935 and are secured by the current revenues levied and assessed for revenue purposes of every kind and character accruing to the said general fund during said biennial period. As we advised the Governor, the Auditor General and the State Treasurer on August 29, 1935 in Formal Opinion No. 181, we are further of the opinion that the allocations of the moneys in the general fund, which are specifically set forth on the face of the notes, made by the Department of Revenue, and approved by the Governor, the Auditor General, and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking fund account, mentioned on the face of the notes, in the amounts and at the times specified, prior to all other expenditures, expenses, debts, and appropriations, including current expenses, payable from the general fund.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 184

Banks and banking—Investments—Bonds and mortgages—Limitations on aggregate amount—Applicability to bonds and mortgages insured by Federal Housing

Administrator—Resale of bonds—Holding mortgage and servicing obligation—Limitations on mortgages to one corporation or person—Insurance by Federal Housing Administrator prior to July 1, 1937—Insurance subsequent to that date—Banking Code of 1933, Secs. 1001, 1006, 1012, and 1013a.

1. The limitations on the aggregate amount which a banking institution may invest in bonds and mortgages imposed by section 1012 of the Banking Code of May 15, 1933, P. L. 624, as amended by the Act of June 11, 1935 (No. 140), are not applicable to bonds and mortgages which are insured by or for which a commitment to insure has been made by the Federal Housing Administrator pursuant to the provision of the National Housing Act of June 27, 1934, 48 Stat. at L. 1246, since such bonds and mortgages fall within the category of "investment securities" which are exempted from the limitations.

2. A banking institution may, under section 1001 of the Banking Code of 1933, receive a bond or bonds secured by a mortgage insured by or for which a commitment to insure has been made by the Federal Housing Administrator and sell one or all of such bonds to other institutions, corporations or individuals and continue to hold the mortgage, to collect the interest thereon, and otherwise to service the obligation: section 1013*a*, of the code, prohibiting the sale of fractional or undivided interests in a mortgage pool, does not apply to such transactions.

3. Section 1006*a* of the Banking Code of 1933, limiting the amount which a banking institution may lend to any one corporation or person does not apply to loans on mortgages insured by the Federal Housing Administrator prior to July 1, 1937, since under the National Housing Act, the holder of such a mortgage has the right to receive debentures guaranteed as to principal and interest by the United States Government and therefore specifically exempted from the limitations by subparagraph 1 of that section, but it will apply to mortgages insured subsequent to July 1, 1937.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., October 4, 1935.

Honorable Luther A. Harr, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: Your request for our advice relative to bonds secured by mortgages insured by the Federal Housing Administrator, raises the following specific questions:

I

Are the limitations on the aggregate amount which a bank or a bank and trust company may lend upon, or invest in, bonds and mortgages, as set forth in section 1012 of the Banking Code, as amended by Act of June 11, 1935, P. L. 306, applicable to bonds and mortgages which are insured by, or for which a commitment to insure has been made by, the Federal Housing Administrator pursuant to the provisions of the National Housing Act?

II

May an institution receive such a bond and mortgage or bonds and mortgage and sell one or all of such bonds to other institutions, corporations or individuals and continue to hold the mortgage securing said bond or bonds, and collect the interest thereon and otherwise service the obligation?

III

Are the limitations upon mortgages to one corporation or person as set forth in section 1006 of the act, applicable to bonds secured by mortgages insured, or for which a commitment to insure has been made by the Federal Housing Administrator?

Mortgages on real estate may be insured in accordance with the provisions of the National Housing Act of June 27, 1934. This act is divided under three titles. Title I has to do with housing renovation and modernization. Title II has to do with mutual mortgage insurance. Title III has to do with national mortgage associations. The matter pertinent to our present inquiry will be found under Title II, which provides for the insuring of mortgages. Under the provisions of this title, the Federal Housing Administrator is authorized to insure and to make commitments for insuring mortgages upon real estate. In the event of a default in an insured mortgage, the administrator issues debentures having a total face value equal to the value of the mortgage and a certificate of claim covering the amount due on the mortgage which has been insured, or for which a commitment to insure has been made, if and when the holder of the mortgage having acquired title to the property covered by the mortgage conveys the same to the administrator. These debentures bear interest at a rate to be determined by the administrator and are a liability of the insurance fund only, except that debentures issued in exchange for mortgages insured prior to July 1, 1937, shall be fully guaranteed as to principal and interest by the United States.

The principal characteristics of mortgages insured by the Federal Housing Administrator are as follows:

1. All insured mortgages must be written upon standard mortgage, bond and warrant forms supplied by the Federal Housing Administrator.

2. Individual mortgages must be secured upon urban residential property and may not exceed eighty per centum (80%) of the appraised value of the property, or a maximum of sixteen thousand dollars ($16,000) face amount.

3. Mortgages may be drawn for any period up to and including twenty (20) years, but must be entirely amortized over their life.

4. Mortgages to be eligible for insurance shall have, or be held by, a mortgagee approved by the administrator as responsible and able to service the mortgage properly.

There are two means contemplated under the National Housing Program for distributing the insured mortgages among financial institutions and investors. One is for banking institutions to take and hold the bonds and insured mortgages for their own account. The second contemplates that a banking institution will take the original mortgage loan, receiving a number of separate and distinct bonds split into convenient denominations for the purpose of selling these bonds to other banking institutions and investors. In the latter case the banking institution which originally takes the bonds and mortgage securing the same sells the bonds to other investors and continues to hold the mortgage and collect the interest and payment on account of principal for the benefit of the bondholders.

The office of the district director of the Federal Housing Administrator for the Philadelpia District advises that a market has developed for bonds secured by mortgages insured by, or for which a commitment to insure has been made by the Federal Housing Administrator among insurance companies and banks as well as individual investors. The Pennsylvania State Workmen's Insurance Fund and the State Employes' Retirement Fund have bought large amounts of these securities. The RFC Mortgage Company, which is a subsidiary of the Reconstruction Finance Corporation and authorized to do business in this State, has issued a statement that it will purchase insured mortgages which are liens upon newly erected homes.

The insured mortgages are available for use as collateral security for loans from Federal home loan banks to the extent of ninety per centum (90%) of their value. The Reconstruction Finance Corporation has announced that it will consider loans secured by insured mortgages up to ninety per centum (90%) of their value. The Federal reserve banks have been given authority by act of Congress to lend on the security of such obligations.

Title III of the National Housing Act authorizes the establishment of national mortgage associations for the purpose of purchasing and selling mortgages on real estate. It is not contemplated that such companies will be established because of the favorable market for bonds and mortgages insured by the Federal Housing Administrator now existing.

It is apparent that there is now an active market for bonds secured by mortgages insured under the provisions of the National Housing Act and that such bonds can be readily bought and sold on the market.

The Pennsylvania Banking Code of May 15, 1933 P. L. 624, has been amended in several respects by the Act of June 11, 1935, P. L.

306, to permit institutions governed by the act to apply for and secure insurance of mortgages as provided by the National Housing Act.

Section 1012 of the Pennsylvania Banking Code, as amended, provides:

> "Loans on and Investments in Bonds and Mortgages and Judgments of Record.—A. A bank or a bank and trust company shall have the power to lend on the security of, or invest in, bonds secured by mortgages upon real property, but it shall lend upon, or invest in, only such bonds and mortgages as (1) are first liens on unencumbered improved real property, including improved farm land, situated within the Commonwealth, and (2) do not exceed two-thirds of the actual value of such real property and (3) become due within ten years after the making of such loan or investment, unless amortized in equal annual installments over a period not exceeding fifteen years after the making of such loan or investment. Any building which is upon, and is included in the valuation of, such real property shall be insured against loss by fire, to the benefit of such bank or bank and trust company, by the borrower or mortgagor during the term of the bond, in a company which is authorized to do business in Pennsylvania and is approved by the bank or bank and trust company making the investment. It shall be lawful for a bank or bank and trust company to renew such policies, at the expense of the borrower or mortgagor, from year to year, or for a longer or a shorter period, not, however, exceeding the term of the obligation, in case he shall fail to do so. All necessary charges and expenses paid by such bank or bank and trust company for such renewals shall be paid by such borrower or mortgagor. In case such borrower or mortgagor shall refuse, upon demand, to pay such charges and expenses, they shall be added to the amount secured by the mortgage, and shall, together with interest from the date of the payment of such charges and expenses, constitute a lien upon the property so mortgaged. All expenses of searches, examinations, certificates of title, or appraisal of actual value, and all expenses of drawing and recording of papers, shall be paid by such mortgagor or borrower. The actual value of the real property shall be determined by two reputable persons, especially familiar with real property values in the vicinity of the particular property to be appraised, selected from or approved by the board of directors. They shall inspect the property, and shall state, in writing, that the actual value of the real property inspected, to the best of their judgment, is as stated. Such report shall be filed and preserved among the records of the bank or bank and trust company. The restrictions imposed by this section shall not apply to public utility, railroad, or industrial bonds, or other securities, commonly known as investment securities, although such bonds may be secured in whole or in part by a mortgage upon real property.

"B. A bank or bank and trust company shall have the power to lend on the security of, or invest in, judgments of record which are first liens on unemcumbered real property situated within the Commonwealth, to the amount of fifty per centum of the actual value of such property, under the same circumstances and subject to the same conditions as are established by this section in the case of loans on the security of, or investments in, bonds secured by mortgages upon real property.

"C. The aggregate amount of all loans and investments made by virtue of this section shall not at any time exceed twenty-five per centum of the unimpaired capital and twenty-five per centum of its unimpaired surplus, or fifty per centum of the total time deposits of such bank or bank and trust company, at the option of the bank or bank and trust company.

"D. The limitations, herein prescribed, in respect to the percentage of the actual value of the property upon which a bank or a bank and trust company may lend on the security of, or invest in, bonds secured by mortgages upon real property, the term for which such loan may be granted, shall not apply to bonds secured by mortgages which are insured by, or for which a commitment to insure has been made, by the Federal Housing Administrator pursuant to the provisions for mutual mortgage insurance in title two of the National Housing Act, for the purpose of financing the construction or purchase of dwellings and similar residential property, and the refinancing of mortgages."

The restrictions imposed by this section by its express terms do not apply to securities commonly known as investment securities. This exception from the provisions of the section which deals exclusively with bonds and mortgages and judgments secured by liens on real estate, indicates the thought of the framers of the act that such obligations may be classed as investment securities. The term "investment securities," although in common use, had a more or less technical significance. The words themselves indicate income-producing obligations, the fullfilment of which is made certain or sure. A bond and mortgage comes within such meaning. As commonly used, however, the term means securities which may be bought and sold on the market (See *Roboeham* v. *Prudential Insurance Company*, 64 N. J. Equity 673, at page 686). The word "market" has a variety of meanings. As used in this connection, however, it means the exchange of goods for money and implies the existence of a supply and demand. Since there is an existing supply and demand and market for the bonds secured by mortgages insured by the Federal Housing Administrator, such bonds may be classed as investment securities and banking institutions do not have to observe the limitations prescribed by section 1012 when investing therein.

Furthermore, the insuring of the mortgage gives to it a standing as security not possessed by the usual mortgage. The debentures issued in exchange for mortgages insured prior to July 1, 1937, are fully guaranteed as to principal and interest by the United States. All other insured mortgages are secured by the mutual mortgage insurance fund. Bonds secured by insured mortgages have the security of the credit of the United States, or of the mutual mortgage insurance fund, as the case may be, in addition to the lien upon real estate. This additional security and the rights incidental thereto place the bonds secured by such mortgages in a class not included within the limitations and restrictions set forth in section 1012.

The provisions of section 1012, except subsection D, were a part of the Banking Code of 1933 as originally enacted. Subsection D is added by the amending Act of June 11, 1935. Subsection A contains certain requirements as to bonds secured by mortgages upon real property. Subsection C contains limitations as to the aggregate amount of loans and investments made by virtue of this section (including bonds secured by mortgages on real estate and judgments of record) which may be made by an institution. As has been noted, these restrictions and limitations do not apply to bonds secured by mortgages insured by, or for which a commitment to insure has been made by, the Federal Housing Administrator, because they fall within the class of investment securities. The amendment of 1935 relates only to the requirements as to bonds and mortgages set forth in subsection A. This is not a conclusive admission by the legislature that the restrictions and limitations of the Act of 1933 originally covered such loans and investments that may be made by an institution as set forth in subsection C. The intention of the legislature being clear and express that these restrictions and limitations do not apply to the loans and investments under consideration, canons of construction applying inferences and presumptions as to what the intention of the legislature may have been cannot be resorted to in order to defeat the plain intent of the act.

II

Section 1001 of the Pennsylvania Banking Code of 1933, defining the powers of banks, bank and trust companies, and trust companies, provides that such institutions shall have power:

> "(4) To lend money either upon the security of real or personal property, or otherwise; to charge or to receive in advance interest therefor;"

This provision gives such institutions authority to lend money upon the security of a mortgage on real estate insured by the Federal

Housing Administrator. The evidence of the indebtedness created by the lending is the bond. The mortgage is security for the debt and is an incident thereto.

The section of the act above in part quoted further gives such institutions power:

> "(5) To discount, buy, sell, negotiate, or assign promissory notes, drafts, bills of exchange, trade and bank acceptances, stocks, bonds, or other evidences of debt;"

Here we have specific authority given to such institutions to buy and sell bonds and other evidences of debt. This would include bonds secured by mortgages insured by the Federal Housing Administrator.

No distinction can be drawn between bonds given to secure a loan made by the institution holding the same and bonds bought from some other holder.

Objection may be raised that section 1013-A prohibits an institution from selling one or a number of bonds received as security for a loan of money and secured by a single mortgage insured by the Federal Housing Administrator. Section 1013-A provides:

> "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."

This section prohibits only the sale of fractional or undivided interest in a pool or fund of bonds secured by mortgages or securities. The evil sought to be corrected by this provision is well known. The sale of one of a number of bonds secured by a single mortgage guaranteed by the Federal Housing Administrator is not the sale of a fractional, undivided interest in a pool or fund of bonds or securities. In the first place, the bonds in question would not constitute a pool or fund within the meaning of the act. Section 1109 of the act refers to the establishment of a pool or fund of bonds or other securities for trust investments. Such a pool or fund, however, is distinguished from a single bond or mortgage or a single security and this distinction, in our opinion, applies to a number of identical bonds which, together, evidence a single indebtedness. Furthermore, each bond constitutes a separate and distinct obligation. Except with relation to the mortgage securing the bonds, the rights of the holders thereof are distinct.

A further question in this connection arises. Does a bank without trust powers have the power to retain title to the mortgage securing bonds which have been sold and to collect and remit the interest and

instalments of principal payable under the terms of the mortgage, hold insurance policies, examine tax receipts, and otherwise service the mortgage? As has been observed banks do have express power to lend money and take bonds secured by mortgages on real estate as security therefor and to buy and sell such bonds. The debt evidenced by the bonds is the principal thing and the mortgage only incidental to it. Although the bank does not have express power to act as trustee of a mortgage held by it, when such power is essential, though incidental, to the power to buy and sell the bonds secured by the mortgage, it may be inferred or implied. Especially is this so where, as here, we have no express prohibition against the bank continuing to hold and service the mortgage.

In this connection our attention is directed to the requirement that the mortgages, in order to be eligible for insurance, shall have, or be held by, a mortgagee approved by the administrator as responsible and able to service the mortgage properly. This is both a reasonable and proper requirement. The proper servicing of the insured mortgage will without doubt reduce the risk of default and minimize the loss in the event of default. Banks are peculiarly fitted to render services such as are required in handling these mortgages. It is to be expected that the administrator will insist that the mortgages be held by banks or other institutions having similar experience, facilities and ability to service mortgages. To prohibit a bank from selling bonds and continuing to hold and service the mortgages securing them and to require it to assign all or a part of the mortgages to the assignee of the bond or bonds secured thereby would impede and possibly prohibit the sale of the bonds. Each transaction would necessarily be subject to the approval of the proposed assignee by the administrator. An express grant of an important power is not to be stricken down merely by some inferred prohibition. Incidental power will be implied rather than such prohibition.

Furthermore, it will be observed that when a bond secured by a mortgage or other security is assigned, the assignment carries with it a pro rata interest in the security. The assignor will hold the collateral subject to the interest of the holder of the bond. Whether the relationship is that of trustee and cestui que trust, principal and agent, or some other relationship will depend upon the agreement of the parties as expressed in their contract or implied from the transaction. In the case of the bonds secured by mortgages insured by the Federal Housing Administrator, it is generally understood that the bank holding the mortgage simply holds the mortgage insured to service it as agent for the bondholders and incidental to the business of dealing in the bonds.

The conclusion reached here is not in conflict with Formal Opinion No. 141 heretofore rendered to your department on June 15, 1934, by then Deputy Attorney General Harold D. Saylor. In that opinion we were considering the sale of participations in mortgages. We are now considering the sale of separate bonds secured by mortgages insured by the Federal Housing Administrator, or for which a commitment to insure has been made under the National Housing Act.

III

The limitation of section 1006-A must be considered. This section provides:

> "A. A bank or a bank and trust company shall not, directly or indirectly, lend to any corporation or person an amount which, including any extension of credit to such corporation or person by means of letters of credit or by acceptance of drafts for, or the discount or purchase of the notes, bills of exchange, or other commercial paper of, such corporation or person, shall exceed twenty-five per centum of the unimpaired capital and twenty-five per centum of the unimpaired surplus of the bank or bank and trust company. However, this restriction shall have no application whatsoever to the following:
>
> "(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.
>
> "(2) Loans to the Commonwealth of Pennsylvania, or any county or city thereof, or loans secured by bonds or other interest-bearing obligations of the Commonwealth, or of any county or city thereof, or bonds or other interest-bearing obligations for the payment of the principal and interest on which the faith and credit of the Commonwealth or any county or city thereof, is pledged."

It is apparent that since the mortgages insured prior to July 1, 1937, give to the holder thereof the right to receive debentures guaranteed as to principal and interest by the United States, the bonds that are secured by such a mortgage fall within the exception set forth in subparagraph 1, above quoted, because the full faith and credit of the United States is pledged for the payment of said obligations.

As to bonds not so secured, the limitation applies and a bank or a bank and trust company shall not hold at any time bonds of one person or corporation in excess of the amount permitted by section 1006. The restriction, however, applies only to the amount due on the bonds actually held by the institution in its own right and would have no

application to any bond bought or held for another or bonds which have been sold. Furthermore, debentures which have been received in exchange for defaulted mortgages should not be included in the total.

We, therefore, advise you as follows:

I

That the limitations on the aggregate amount of loans and investments that may be made by a bank or a bank and trust company as set forth in the Pennsylvania Banking Code, as amended, are not applicable to bonds and mortgages which are insured or for which a commitment to insure as been made by the Federal Housing Administrator, pursuant to the provisions of the National Housing Act.

II

That banks or bank and trust companies are permitted to receive a bond or bonds secured by a mortgage insured by, or for which a commitment to insure has been made by, the Federal Housing Administrator, and sell one or all of the bonds to other institutions, corporations or individuals and continue to hold the mortgage securing said bond or bonds, and to collect the interest thereon and otherwise service the obligation.

III

The limitations upon loans to one corporation or persons, as set forth in section 1006 of the Banking Code does not apply to bonds secured by mortgages insured prior to July 1, 1937. Bonds secured by mortgages insured subsequent to July 1, 1937, are within the limitations expressed in the section.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 185

Schools—Right to require oath of allegiance of teachers and pupils—Religious liberty.

1. School directors not only may but should require their teachers to take the oath of allegiance to the United States and to administer it to their pupils, such oath being germane to the requirement of section 1607 of the School Code of 1911, as amended, that there be taught in the public schools loyalty to the State and National Governments: any refusal by a teacher to comply with this requirement, even though based upon conscientious or religious scruples, should be followed by immediate dismissal.

2. The constitutional guarantee of freedom of religious worship does not permit any religious views to justify refusal to show respect for our National flag or the standards of our Nation.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., October 26, 1935.

Honorable Lester K. Ade, Superintendent of Public Instruction, Harrisburg, Pa.

Sir: We have your request to be advised whether boards of school directors can require their teachers to take the oath of allegiance to the United States; whether the teachers may be required to administer such oath to their pupils; and whether the pupils may be required to participate in such exercises.

We shall first refer to the sections of the School Code which are pertinent to your inquiry.

Section 1607 of the School Code (Act of May 18, 1911, P. L. 309), as last amended by the Act of May 29, 1931, P. L. 243 (24 PS Sec. 1551), provides that:

> "In every elementary public and private school, established and maintained in this Commonwealth, the following subjects shall be taught: * * * civics, *including loyalty to the State and National Government* * * *." (Italics ours)

Section 404 of the School Code, as amended by the Act of May 29, 1931, P. L. 243 (24 PS Sec. 338), provides:

> "The board of school directors in every school district in this Commonwealth may adopt and enforce such *reasonable rules and regulations as it may deem necessary and proper,* regarding the management of its school affairs and the conduct and deportment of all superintendents, teachers, and other appointees or employees during the time they are engaged in their duties to the district, *as well as regarding the conduct and deportment of all pupils attending the public schools in the district, during such time as they are under the supervision of the board of school directors and teachers,* including the time necessarily spent in coming to and returning from school." (Italics ours)

Section 629 of the School Code, as amended by the Act of May 20, 1921, P. L. 1011, provides:

> "The board of school directors in each district shall, when they are not otherwise provided, purchase a United States flag, flagstaff, and the necessary appliances therefor, and shall display said flag upon or near each public school building in clement weather during school hours and at such other times as the said board may determine.
>
> "All boards of education, all proprietors or principals of private schools, and all authorities in control of parochial schools or other educational institutions, shall display the

United States national flag, not less than three feet in length, within all school buildings under their control during each day such schools are in session. In all public schools, the board of school directors shall make all rules and necessary regulations for the care and keeping of such flags. The expense thereof shall be paid by the school district."

The questions presented involve the duty of every citizen to manifest his loyalty to our flag and our nation. It should not be necessary for American citizens to be reminded daily of the privileges and the freedom that they enjoy under our flag. The spirit of loyalty should burn constantly in the heart of every real American. However, it is most fitting that our thoughts and our emotions toward our national emblem be expressed by the oath of allegiance.

Every person who claims the right to American citizenship owes a devotion and a loyalty to the principles for which our flag stands. It is the emblem of equality, of liberty, and of justice. It represents a great people and a free people whose national integrity is unimpeachable. Under our government our citizens enjoy a greater measure of freedom than the citizens of any other country in the world. They should appreciate the privileges and rights that can be received only in America. That gratitude should be evidenced by a deep devotion to the principles for which our nation stands. Any person who is not imbued with that devotion is unworthy of American citizenship and the privileges it bestows.

Under the provisions of the sections quoted above, it was manifestly the intention of the legislature to prescribe courses of study or exercises in our schools inspiring patriotism and respect for our national emblem.

There is no place where the true ideals of loyalty and patriotism can be better instilled into our youth than in the schools. It is there that characters are formed and molded. It is there that they learn the principles of our government and the true meaning of Americanism. Loyalty and patriotism should be part of our schools' daily curriculum. By taking the oath of allegiance and participation in exercises showing respect to our flag, that spirit of loyalty which should be characteristic of American citizenry will be fostered and nourished. Our school children respectfully look up to their teachers for instruction and guidance. The examples which they receive from their teachers make an indelible impression upon their minds, and they carry those impressions with them throughout their lives. Any act or expression on the part of a teacher which shows disloyalty will certainly have a demoralizing effect upon the pupils' sense of civic responsibility, and tend to lessen the reverence in which the pupils

hold our nation. Any person holding such views is unfit to train our youth.

Our attention has been called to the fact that this fundamental duty of patriotism and respect to the flag is sought to be avoided on the ground of the constitutional guarantee contained in Article I, section 3 of the Pennsylvania Constitution that:

> "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences * * *."

This section of the Constitution has never been construed in such a way as to give any individual or group of individuals the right to show disrespect for our flag. The Supreme Court of Pennsylvania, in the case of *Specht* v. *The Commonwealth,* 8 Pa. 312 (1848), said, inter alia, as follows:

> "* * * conscientious doctrines and practices can claim no immunity from the operation of general laws made for the government and to promote the welfare of the whole people. * * * the right of conscience * * * 'is simply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever, or to support any religion; and to do, or forbear to do, any act for conscience' sake, the doing or forebearing of which is not prejudicial to the public weal' * * *."

In City of Wilkes-Barre v. *Joseph Garabed,* 11 Pa. Super. Ct. 355 (1899), Judge Orlady stated:

> "* * * Religious liberty does not include the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system. While there is no legal authority to constrain belief, no one can lawfully stretch his own liberty of action so as to interfere with that of his neighbors, or violate peace and good order. The whole criminal law would be practically superseded if, under pretext of liberty of conscience, the commission of crime is made a religious dogma: In re Frazee, 63 Mich. 396. It is not necessary to cite any further authorities in support of so plain a proposition."

Regardless of one's religious views, there can be no justification for any refusal to respect the standard of our nation. In our land religious freedom is guaranteed to all. A person is entitled to his creed and to his beliefs. However, when disloyalty to our country is part of any creed, it constitutes a defiance to the Constitution which guarantees that creed's existence. In our nation, the state and the church are separate and distinct. Loyalty to one should not interfere with loyalty to the other.

Section 1208 of the School Code provides for the dismissal by a board of school directors of any principal or teacher because of immorality, incompetency, intemperance, cruelty, negligence, or for the violation of any of the provisions of the School Code.

You are, therefore, advised that, not only can boards of school directors require their teachers to take the oath of allegiance to the United States and administer it to their pupils, but it is the duty of such boards to require this manifestation of loyalty to our country. You are further advised that any refusal by a teacher to comply with this requirement, whether such refusal be based upon conscientious or religious scruples, or upon any other reason, should be followed by immediate dismissal.

Refusal by any pupil who owes allegiance to our national government to participate in the exercises described above should be considered an act of insubordination and treated as any other refusal to obey the lawful regulations of our schools.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 186

Taxation—Personal property tax for State purposes—Exemptions—Shares of foreign corporations subject to franchise tax—Acts of May 16, 1935, and June 22, 1935—Amendments prior to passage—Legislative intent.

1. Shares of stock of foreign corporations theretofore exempt from the 4 mills personal property tax, because the issuing corporations were liable to or relieved from the capital stock tax, are not subject to the 1 mill personal property tax for State purposes imposed by the Act of June 22, 1935 P. L. 414, if the issuing corporations are liable to or are relieved from the payment of the franchise tax imposed by the Act of May 16, 1935 P. L. 184.

2. Historically Pennsylvania has sought to tax either the capital stock of a corporation or the shares of the owner but never both, and this traditional policy cannot be changed without clear, unambiguous and affirmative language by the legislature: it cannot be implied from the fact that the legislature amended the Act of June 22, 1935 P. L. 414, prior to passage by the omission of the words "franchise tax," since this change was made not for the purpose of imposing a personal property tax on the shares of foreign corporations liable to pay a franchise tax but to make the exempting language of that act conform with that of the Act of June 17, 1913, P. L. 507.

3. The legislative purpose in passing the Act of May 16, 1935 P. L. 184, was to impose a tax on foreign corporations more nearly comparable in amount to the tax imposed upon the capital stock of domestic corporations than was the case theretofore.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., November 19, 1935.

Honorable Harry E. Kalodner, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the shares of stock of foreign corporations, heretofore exempt from the four mill personal property tax because the issuing corporations were subject to, or relieved from, the capital stock tax, have now been made subject to the one mill personal property tax for State purposes imposed by the Act of June 22, 1935, P. L. 414.

This question arises because the Act of May 16, 1935, P. L. 184, substituted a franchise tax on foreign corporations in lieu of the capital stock tax on such corporations, whereas the Act of June 22, 1935 P. L. 414 followed the language of the four mill personal property tax act (the Act of June 17, 1913, P. L. 507, as amended) in excepting from the tax the shares of stock issued by corporations liable to, or relieved from, tax on capital stock. Each act subjects to tax all shares of stock owned by resident individuals, and then in identical language provides: (Act of 1913, section 1; Act of June 22, 1935, P. L. 414, section 3)

> "* * * except shares of stock in any bank, corporation, or limited partnership that may be liable to a tax on its shares or its capital stock for State purposes under the laws of this Commonwealth, or relieved from the payment of tax on its shares of capital stock for State purposes by the laws of the Commonwealth * * *."

Under this exception, before the enactment of the Act of May 16, 1935, shares of stock of foreign corporations owned by resident individuals were exempted from the four mill tax; and the exemption has been held to apply to the full value of such shares regardless of the fact that the issuing corporation may have been liable for capital stock tax on only a small portion of the value of its entire capital stock. *DuPuy* v. *Johns,* 261 Pa. 40 (1918).

The exception recognizes a long standing and equitable policy of the legislature to avoid double taxation. Historically, Pennsylvania has sought to tax either the capital stock to the corporation or the shares to the owner but never both. *Commonwealth* v. *Fall Brook Coal Co.,* 156 Pa. 488 (1893). In *Commonwealth* v. *Shenango Furnace Company,* 268 Pa. 283, 285 (1920), the court said:

> "Since 1868 it has been the legislative policy to relieve from the personal property tax the shares of stock of corporations liable for a tax on their capital stock. * * * The policy arose out of the recognized identity of the capital stock and the shares composing it as one and the same subject, so that the taxation of the one is the taxation of the other and that to tax both would amount to double taxation * * *."

We believe that the legislature did not intend to remove, or alter the scope of, this historic and equitable exemption contained in the separate Acts of 1913 and June 22, 1935, when, by amendments to the Capital Stock Tax Act of June 1, 1889, P. L. 420, it substituted a franchise tax for the existing capital stock tax on foreign corporations. We are of the opinion that this traditional policy of Pennsylvania against double taxation could not be changed without clear, unambiguous and affirmative language by the legislature.

It has, however, been suggested that such an intention may be implied from the changes made by the legislature in House Bill 925 (which became Act No. 182) between its introduction and its final passage.

House Bill 925 originally included the words "franchise tax" in the provision designating the types of corporations whose stocks were to be exempt from personal property tax in the hands of resident owners. This language, as we will later show, was not strictly necessary, but was included for greater clarity. These words were, however, deleted two days before the adjournment of the session (House Bill 925, Printer's No. 1616, as rereported from the Committee on Finance in the Senate on June 19, 1935). This change was not made for the purpose of imposing a personal property tax on the shares of foreign corporations liable to pay a franchise tax but for an entirely different and sufficient reason.

On June 19, 1935, the Act of 1913, which imposes the four mill personal property tax for county purposes, was not before the legislature and, therefore, its exempting language could not have been amended during the last two days of the session to accord with the exempting language contained in House Bill 925 *prior* to June 19, 1935.

Until the amendments of June 19, House Bill 925 imposed a *six* mills personal property tax and provided for the *collection* of the entire six mills by the *State*. Under such a plan the imposition and exemption language in House Bill 925 would have covered the *whole personal property tax field*. When, on June 19, 1935, House Bill 925 was amended so as to impose only a one mill State tax and to permit the State to collect such tax, two complete and independent collection agencies were established, or rather, the former county agency was retained, without change, to collect the old county four mills tax under the Act of 1913, which was to remain in effect, and the State was named the agency to collect the new State personal property tax of one mill. Since this change came so late in the session, it was not possible to make the exempting language of section 1 of the Act of 1913 accord with the exempting language in House Bill 925, so the

converse procedure was followed, and the exempting language in House Bill 925, was made to accord with the exempting language of section 1 of the Act of 1913. Inasmuch as the one mill tax and the four mills tax are on exactly the same classes of property, and had precisely the same incidents and characteristics, it will readily be seen that it would have been ridiculous and of questionable constitutionality to have had the exempting language read differently under each act. Likewise, it will be appreciated that, in view of the fixed date for adjournment on June 21, it would have been procedurally impossible on June 19 to have introduced and caused to be passed a bill to amend section 1 of the Act of 1913 in such manner as to have brought the exempting language in that section into accord with the exempting language in House Bill 925 as it read prior to the amendment on June 19th.

That the intention of the legislature was not to impose the personal property tax upon shares of stock of corporations liable to pay the franchise tax is supported by other changes which were made in the exempting language under consideration while House Bill 925 was before the legislature. This language, as it stood until the bill was amended on June 19, 1935, provided for only a proportionate exemption of shares from personal property tax. Such exemption was to be in the same ratio and to the proportionate extent that the corporation, whose shares they were, was subject to or relieved from the payment of a capital stock tax in Pennsylvania. It was decided to be proper to retain the full exemption traditionally accorded such shares, and hence the change was made on June 19 by way of an amendment to the bill. This reestablishment of the exemption as it had previously existed showed conclusively an intention on the part of the legislature not to alter it at all.

Furthermore, it is clear that the legislature, in enacting the franchise tax, intended to adopt a tax admittedly of a different species than the tax for which it was substituted but still of the same genus, in that the tax is measured in part by the value of the capital stock. The franchise tax is an excise tax, whereas the Pennsylvania capital stock tax is a property tax; but the franchise tax uses the value of the capital stock of foreign corporations to determine the amount of tax. *This, we believe, is sufficient to bring the franchise tax within the excepting language above quoted.*

This conclusion is inescapable when we consider the provisions of the Act of May 16, 1935, P. L. 184.

A new tax is ordinarily imposed in a separate act, not as an amendment to an existing act imposing a tax of a wholly different character.

The fact that the Act of May 16, 1935, imposing the franchise tax, is an amendment to the Capital Stock Tax Act of 1889, itself, suggests that the legislature considered the franchise tax to be a tax measured in part by the value of the capital stock. In this connection, the wording of the title of Act of 1935 is significant. It provides:

> "To further amend sections twenty and twenty-one of the act, approved the first day of June, one thousand eight hundred and eighty-nine (Pamphlet Laws, four hundred twenty) * * * *by substituting a franchise tax on foreign corporations in lieu of the capital stock tax on such corporations* * * *." (Italics ours)

It is obvious that the legislature, by enacting the franchise tax, intended to impose a tax on foreign corporations more nearly comparable in amount to the tax imposed upon the capital stock of domestic corporations than was the case heretofore.

In addition, the mere substitution of a franchise tax for the capital stock tax, effected by the Act of May 16, 1935, cannot possibly result in the extension of the personal property tax to subject a wholly new class of property to taxation. That act does not give the slightest notice of a purpose to change the personal property tax exemption contained in the Act of June 17, 1913, P. L. 507, which is likewise carried into the Act of June 22, 1935, (No. 182). If the Act of May 16, 1935 (No. 86), were intended to result in the imposition of a personal property tax upon the shares of stock of foreign corporations, the taxpayers should have been given notice of it by an appropriate amendment to the Act of 1913 with an appropriate title and a corresponding reference in Act of June 22, 1935. It is not legally possible to extend a tax act to a whole new class of subjects by mere implication or inference, particularly where that class, as we have indicated, has been traditionally exempt in the past for the purpose of avoiding double taxation. The legislative intent so to extend the act must be unequivocal, and clearly expressed.

The equitable aspects of the question under consideration are, of course, obvious. Under the franchise tax, most foreign corporations will pay a proportionately larger tax than heretofore. What they will pay will be commensurate with the tax paid by domestic corporations. This was the result the legislature sought to obtain. Many foreign corporations have not a dollar invested outside of Pennsylvania. Such corporations will pay a franchise tax approximating in amount the capital stock tax payable by similarly situated domestic corporations. It is inconceivable that the Act of May 16, 1935, is to be invoked as a reason for also imposing an additional tax on the full value of the shares of the stock of such foreign corporations in

the hands of the holders when no such tax is imposed on the holders of the stock of the domestic corporations. The legislature never intended any such discriminatory and unfair consequences. As to those foreign corporations having capital invested elsewhere, the same discrimination would result. It would be less obvious, but not less actual.

We are, therefore, of the opinion, and advise you, that the shares of stock of foreign corporations are not subject to the one mill personal property tax imposed by the Act of June 22, 1935 (No. 182) if the issuing corporations are liable to or are relieved from the payment of the franchise tax imposed by the Act of May 16, 1935 (No. 86).

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 187

Bids and bidders—Award of contracts—Lowest responsible bidder—Tied bids—Drawing lots—"Responsible"—Administrative Code of 1929, Sec. 2409—Award of contract by Secretary of Property and Supplies—Discretion of Auditor General and State Treasurer in approving award.

1. Where two or more bidders have submitted equally low bids for a State contract, the Secretary of Property and Supplies may not arbitrarily select one as the lowest responsible bidder by lot or otherwise: under such circumstances he may either reject all bids and readvertise or may, in the exercise of his discretion, determine that one of the bidders is the lowest responsible one.

2. The term "responsible," as used in section 2409 of the Administrative Code of 1929, providing for the award of State contracts "to the lowest responsible bidder," means not only financially able to respond in damages for breach of contract, but possessed of the judgment, skill, ability, capacity, and integrity requisite and necessary to perform the contract according to its terms.

3. When the Secretary of Property and Supplies, in the exercise of his sound and honest discretion, has awarded a State contract to the one of several bidders who have submitted equally low bids who is, in his judgment, the lowest responsible bidder, it is mandatory upon the Auditor General and State Treasurer to approve the award.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., December 16, 1935.

Honorable Arthur Colegrove, Secretary of Property and Supplies, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether there is anything in the existing law to prevent your department from stopping the practice of awarding contracts by drawing lots; also, whether there is anything to prevent your department from awarding to any bidder a contract on which all low bids are tied. You state that it has been

the practice where the bids are tied to make awards by the drawing of lots. You also ask to be advised what procedure you shall follow in case the Auditor General and State Treasurer refuse to approve awards made by your department.

Section 2409 of The Administrative Code of 1929, P. L. 177, provides, in part, as follows:

> "The department shall, * * * award the contracts to the *lowest responsible* bidder, * * *." (Italics ours)

It is clear from that section of The Administrative Code quoted above that there is no warrant in the law for the practice of drawing lots in cases where there are tied bids. For the same reason, the law does not permit the Secretary of Property and Supplies to award arbitrarily the contract to any one of the equally low bidders, since neither can be said to be the lowest bidder. You may of course reject all bids and readvertise.

However, the secretary may exercise his sound discretion so far as the responsibility of the bidder is concerned, and, if he finds one of the equally low bidders meets the requirement of being responsible, and the others do not, he may award the contract on that ground, for the law authorizes the award not merely to the lowest bidder, but to the *lowest responsible bidder*. The secretary, under this authority, has a wide discretion to pass upon the question of responsibility so long as his judgment is honestly exercised.

Mr. Justice Gordon, speaking for the Court, in *Commonwealth* v. *Mitchell,* 82 Pa., at page 349, said, in part, as follows:

> "The facts, as above stated, having been found in favor of the relators, we next have to consider the Act of Assembly under which this case arises. It reads thus: 'All stationery, printing, paper and fuel used in the councils and in other departments of the city government, and all work and materials required by the city, shall be furnished and the printing and all other kinds of work to be done for the city, shall be performed under contract to be given to the lowest responsible bidder, under such regulations as shall be prescribed by ordinance.' (Act 23d May 1874, Pamph. L. 230.) Now the court below, though they found, under the evidence, that the relators were responsible in all points in which the city had a right to inquire, yet they held that the word 'responsible,' as employed in the act, when applied to contracts, requiring for their execution, not only pecuniary ability, but also judgment and skill, imposes, not merely a ministerial duty upon the city authorities, such as would result did their powers extend no further than to ascertain whose was the lowest bid, and the pecuniary responsibility of the bidder and his sureties, but also duties and powers which are deliberative and

discretionary. In this we concur with the court below. For it is scarcely open to doubt, but that the word under consideration, as it is used in the statute, means something more than pecuniary ability. In a contract, such as the one in controversy, the work must be promptly, faithfully and well done—it must, or ought to be conscientious work; to do such work requires prompt, skilful and faithful men. A dishonest contractor may impose work upon the city, in spite of the utmost caution of the superintending engineer, apparently good, and even capable of bearing its duty for a time, which in the end may prove to be a total failure and worse than useless. * * *''

See *Findley* v. *City of Pittsburgh,* 82 Pa. 351, in which the Court reiterated the opinion of *Commonwealth* v. *Mitchell.* See also *Douglass* v. *Commonwealth,* 108 Pa. 559, where Chief Justice Mercur said, in part, at page 563:

''The Act of 23d May, 1874, directing contracts to be awarded to the 'lowest responsible bidder' has twice been before us for construction. In each it was held that the word 'responsible,' as used in the Act, applies not to pecuniary ability only, but also to judgment and skill. The duties thereby imposed on the city authorities are not merely ministerial, limited to ascertaining whose bid was the lowest, and the pecuniary responsibility of the bidder and his sureties. The act calls for an exercise of duties and powers which are deliberate and discretionary. If the authorities act in good faith, although erroneously or indiscreetly, mandamus will not lie to compel them to modify or change their discretion; Commonwealth v. Mitchell, 1 Norris, 343; Findley v. City of Pittsburgh, Id., 351.''

Responsible means not merely financially able to respond in damages for breach of contract. We find responsible bidder to be defined as follows:

''* * * one who is not only financially responsible, but who is possessed of the judgment, skill, ability, capacity and integrity requisite and necessary to perform the contract according to its terms. * * *'' 54 C. J. 727.

That portion of The Administrative Code of 1929, P. L. 177 that authorizes the approval of contracts by the Governor, Auditor General and State Treasurer, reads, in part, as follows:

''Section 2403. Standards and Purchases.—The Department of Property and Supplies shall have the power, and its duty shall be:

* * * * *

''(b) To enter into contracts for supplying all stationery, printing, paper, and fuel, used in the legislative and other departments of the Government * * *. All such contracts

shall be awarded to the lowest responsible bidder below such maximum price, and under such regulations as are prescribed by this act, and shall be subject to the approval of the Governor, the Auditor General, and the State Treasurer."

"Section 2406. Publications.—The Department of Property and Supplies shall have the power, and its duty shall be:

* * * * *

"(d) To enter into contracts for furnishing all printing used in the legislative and other departments of the government, * * * which contracts shall be given to the lowest responsible bidder below such maximum price and under such regulations as are prescribed by this act, and shall be subject to the approval of the Governor, Auditor General, and State Treasurer;"

"Section 2409. Method of Awarding Contracts for Stationery, Paper, Fuel, Repairs, Furnishings and Supplies.—The Department of Property and Supplies shall, on or before the first day of February in each year, notify the Governor, the several administrative departments, the independent administrative, departmental administrative, and advisory boards and commissions, the chief clerks of the Senate and House of Representatives, and the proper officers of the judicial department, respectively, to furnish lists of all furniture and furnishings, stationery, supplies, repairs, alterations, improvements, fuel, and all other articles that may be needed by their respective departments, boards, or commissions, or the Senate, or the House of Representatives, for the fiscal year beginning the first day of June next following, excepting only perishable foodstuffs and fuel for State institutions and repairs or alternations which are not to be made by the Department of Property and Supplies.

* * * * *

"All contracts awarded shall be severally void unless first approved by the Governor, the Auditor General, and the State Treasurer, and when so approved, together with all checks or bonds given for their faithful performance, be filed with the department, which shall keep a record of the same and shall, within twenty days after the award, certify copies of all said contracts to the Auditor General."

"Section 2410. Method of Awarding Contracts for Public Printing and Binding.—All contracts for public printing and binding shall be for terms of not less than one or more than four years.

* * * * *

"* * * Provided, however, That the department shall have the right to reject any or all bids, and, when all bids shall be so refused, the department shall advertise again for proposals, giving at least ten (10) days' notice thereof by advertisement, and said proposals shall be opened, awarded, and approved in like manner as hereinbefore provided: And pro-

vided further, That all contracts awarded shall be severally void, unless first approved by the Governor, the Auditor General, and the State Treasurer."

It is clear from the law quoted above that, if and when the Secretary of Property and Supplies exercises his discretion and passes upon the responsibility of the bidders who are tied, and makes his award to one of the bidders who is tied, it is mandatory upon the Auditor General and the State Treasurer to approve the award.

In conclusion, we advise you that, where the bidders have submitted equally low bids, the Secretary of Property and Supplies may not award to any one of the equally low bidders, as the lowest bidder, by lot, and may not arbitrarily select one of the bidders as the lowest responsible bidder. As stated above, he may reject all bids and readvertise, or he may, in the exercise of his discretion, pass on the question of responsibility. When he has done so and exercises a sound, honest discretion and awards to the bidder, who, in his judgment is the lowest responsible bidder, it is mandatory upon the Auditor General and State Treasurer to approve the award. Upon refusal to sign, mandamus is the remedy.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 188

Unemployment relief—Cash advancements—Necessity for compliance with section 1504 of The Fiscal Code—Bond of disbursing officer—Discretion of Governor, Auditor General, and State Treasurer—Appropriation Act 21-A of the 1935 general session.

Section 1504 of The Fiscal Code of 1929 providing for the making of advancements from appropriations, under certain circumstances, up to the amount of the bond of the officer having control of disbursements from the funds advanced, was intended to apply only to the ordinary and customary expenses of conducting the affairs of a particular State board, department or commission, and does not apply to the appropriation of $60,000,000 from the general fund to the State Emergency Relief Board under Act 21-A of the 1935 general session of the legislature, since payments made to the State Emergency Relief Board before bills have been incurred are not advancements but merely transfers of money to facilitate prompt payment of relief: under section 2 of Act 21-A, the Governor, the Auditor General, and the State Treasurer may determine the system of requisitioning and accounting under which payments from the appropriation shall be made, and may fix the bond of the disbursing officer in such sum as, in their opinion, will safeguard the Commonwealth's interests.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., December 18, 1935.

Honorable Charles A. Waters, State Treasurer, Harrisburg, Pennsylvania.

Sir: We are in receipt of your letter of December 2 relative to the procedure to be followed in the granting of cash relief in Philadelphia and Allegheny Counties out of the State appropriation for unemployment relief.

You wish to be advised whether or not, under the law providing for the disbursement of relief money, it will be proper for the Governor, the Auditor General, and the State Treasurer to provide a system of disbursement which may, of necessity, not strictly adhere to your present requirements, particularly the requirements in existence in the case of advancement requisitions and the amount of the bonds now required in such cases.

Section 1504 of the Act of April 9, 1929, P. L. 343, known as The Fiscal Code, provides for the making of advancements out of appropriations and we assume that it is because of the provisions of this act that you inquire as to the procedure to be followed in the advancing of money to the State Emergency Relief Board and the amount of bond to be furnished by the disbursing officer.

The above cited section of The Fiscal Code provides, in part, as as follows:

> "Whenever an appropriation shall have been made to any department, board, or commission of the State Government, * * * which is intended for expenses of such a nature as to make it impracticable for such department, board, commission, * * * to file with the Department of the Auditor General itemized receipts or vouchers prior to the payment of such expenses, upon requisition and warrant in the usual way, such department, board, commission, * * * may make requisition upon the Auditor General, from time to time, for such sum or sums of the appropriation as may be necessary to meet such expenses, and the Auditor General, after submission of such requisition to and approval thereof by the Governor, shall draw his warrant upon the State Treasurer for such sum or sums, to be paid out of the appropriation, as in the discretion of the Governor may be necessary, but the advancement shall never in any case exceed the amount of the bond of the officer or individual having control of the disbursements from the funds advanced."

Your inquiry refers to the appropriation made from the General Fund to the State Emergency Relief Board of the sum of $60,000,000 as provided for in Act No. 21-A of the 1935 session of the legislature. Section 2 of said act provides:

> "The State Emergency Relief Board shall make allocations from time to time out of the monies appropriated to it among

> the several counties of this Commonwealth for work relief and direct relief on the basis of need and payments shall be made under such system of requisitioning and accounting as the Governor, Auditor General and State Treasurer shall determine."

We are of the opinion that the above cited sections of The Fiscal Code do not apply to the appropriation made to the State Emergency Relief Board by Act No. 21-A. Payments to be made to the State Emergency Relief Board before bills have been incurred are not advancements out of this appropriation but are merely transfers of money to facilitate the payment of relief to recipients thereof without imposing upon them the great hardships occasioned by unnecessary and prolonged delays. Advancements as contemplated by the legislature in The Fiscal Code no doubt mean advancements for the ordinary and customary expenses of conducting the affairs of the particular board, department or commission to which such advancements are made and which expenses could, with a partial degree of certainty, be approximated. The legislature in 1929 did not conceive that the people of Pennsylvania would be faced by a long period of unemployment and its resultant hunger and distress and that thereupon the State of Pennsylvania would find it necessary in the exercise of its governmental functions to appropriate and disburse money for its worthy and needy citizens. It cannot be contended, therefore, that the legislature in 1929 meant to construe payments to relief recipients to be within the meaning of advancements out of the appropriations as used in said section of The Fiscal Code.

Furthermore, in section 2 of Act No. 21-A, quoted above, we have an expression of intention on the part of the legislature of 1935 that payments out of the appropriation made by said act should be made as efficiently and as promptly as possible. The legislature evidenced this intention by stating that payments (from the appropriation) shall be made under such system of requisitioning and accounting as the Governor, the Auditor General, and the State Treasurer shall determine. This legislature realized that because of changing conditions it was impossible to determine from week to week the amount that would be necessary to take care of the needy citizens of this State and that to impose upon the expenditure of the appropriation the same formality that had been imposed by The Fiscal Code would result in great hardship and additional work for your department and the Department of the Auditor General. It would also result in delay in the payment of relief to the needy.

The legislature no doubt considered the amount of the bond which would have to be given by the disbursing officer, if the provisions of The Fiscal Code, to wit:

> "* * * the advancement shall never in any case exceed the amount of the bond of the officer or individual having control of the disbursements from the funds advanced."

apply to this appropriation. To prevent a breakdown of the system of disbursement of funds to those on relief and to prevent delay in the distribution of relief, the legislature knew that it is necessary that large sums of money be placed at the disposal of the disbursing officer. If this were not done, the needy would be the sufferers of the breakdown of the system or the delay in distribution. The premium on a bond in an amount equal to the sum of money turned over at any one time to the disbursing officer would be prohibitive. Payment for such premium would be made out of the funds appropriated for relief by Act No. 21-A. Consequently, the amount of money available for relief would be decreased in a corresponding amount. One of the great problems facing the State at the present time is the raising of sufficient money to take care of its needy citizens. The legislature realized this situation and by providing:

> "* * * payments shall be made under such system of requisitioning and accounting as the Governor, Auditor General, and State Treasurer shall determine."

evidenced its intention that the appropriation should not be reduced by the payment of premiums on an excessive bond and should not be governed by the above quoted provisions of The Fiscal Code.

Therefore we are of the opinion, and so advise you, that the procedure to be followed as to advancements and the bonds of the individuals having control of the disbursement from the funds advanced as set forth in Section 1504 of The Fiscal Code do not apply to the appropriation made to the State Emergency Relief Board by Act No. 21-A of the 1935 session of the legislature. The Governor, the Auditor General, and you, as State Treasurer, have the right to determine the system of requisitioning and accounting under which payments from the appropriation shall be made and have the right to fix the bond of the disbursing officer in such amount as you deem sufficient to safeguard the money of the Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 189

Taxation—Personal property tax—Act of June 22, 1935, Secs. 3 and 19—Subjects of taxation—Evidences of indebtedness of municipal subdivisions.

Scrip, bonds, certificates and evidences of indebtedness issued or assumed by, or upon which interest is paid by, any county, city, borough, township, school district or incorporated district of the Commonwealth are not, under the express terms of section 19 of the Act of June 22, 1935, P. L. 414, subject to the State tax of 1 mill upon certain personal property imposed thereby, and they are likewise exempt from the similar tax imposed by section 3 of the act upon public loans since they are taxable for State purposes under section 17 of the Act of June 17, 1913, P. L. 507, as amended.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., December 20, 1935.

Honorable Harry E. Kalodner, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether scrip, bonds, certificates, and evidences of indebtedness issued, or assumed by, or upon which interest is paid by, any county, city, borough, township, school district or incorporated district of this Commonwealth are subject to tax under the provisions of the Act of June 22, 1935, P. L. 414.

You indicate that you do not consider such obligations taxable under section 19 of the act. We agree with this conclusion. The act imposes a State tax of one mill upon certain personal property. Its language follows closely that of the Act of June 17, 1913, P. L. 507, as amended. There are, however, significant differences of wording in the two acts which justify the above conclusion. The material portion of Section 19 of the 1935 Act reads:

> "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 are hereby made taxable for the year one thousand nine hundred and thirty-six and annually thereafter for State purposes, at the rate of one mill on each dollar of the nominal value thereof, which tax shall be in addition to the tax imposed for State purposes by section seventeen of the act, approved the seventeenth day of June, one thousand nine hundred and thirteen (Pamphlet Laws, five hundred seven) and its amendments or supplements * * *."

No tax, therefore, is imposed upon the obligations in question by the express terms of this section. That the legislative intent was *not* to do so is clearly indicated by the corresponding language of the 1913 Act which *does* impose a tax upon such obligations. Section 17 of the 1913 Act, in part, provides:

> "That all scrip, bonds, certificates, and evidences of indebtedness issued, and all scrip, bonds, certificates, and evidences of in-

debtedness 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 * * *." (Italics ours)

In our opinion the omission of the words italicized above from the otherwise similar provisions of the 1935 act admits of no other conclusion.

We will now consider whether the obligations under discussion are taxable under Section 3 of the Act of 1935. This section provides in part:

"All personal property of the classes hereinafter enumerated, * * * is hereby made taxable, annually, for State purposes, at the rate of one mill on each dollar of the value thereof, * * * that is to say * * * all public loans whatsoever, except those issued by this Commonwealth or the United States, and those made taxable for State purposes * * *."

The obligations in question, as we have seen above, *are taxable for State purposes* under section 17 of the Act of 1913. Accordingly, we have no hesitancy in advising you that they are exempt from tax imposed by Section 3 of the Act of 1935.

Here again we find a significant difference in language in the Acts of 1935 and 1913. The wording of section 1 of the Act of 1913, which corresponds to the above quoted portion of section 3 of the Act of 1935, is:

"That all personal property of the classes hereinafter enumerated * * * is hereby made taxable annually for county purposes, and, in cities coextensive with counties, for city and county purposes, at the rate of four mills on each dollar of the value thereof * * * that is to say * * * all public loans whatsoever, except those issued by this Commonwealth or the United States and those made taxable for State purposes *by section seventeen hereof* * * *." (Italics ours)

Under the 1913 Act public loans are exempted from the four mill tax under section 1 *only if they are taxable for State purposes under section 17 of the same Act:* under the 1935 Act they are exempted from tax under section 3 if they are subject to *any* State tax.

We are accordingly of the opinion, and advise you, that scrip, bonds, certificates and evidences of indebtedness issued, or assumed by, or

upon which interest is paid by any counties, cities, boroughs, townships, school districts or incorporated districts of this Commonwealth are not subject to tax under any of the provisions of the Act of June 22, 1935, P. L. 414.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 190

Game law—Disposition of fines thereunder—Instalment payments—Act of May 17, 1917—Priority of costs over fines—Provision for lump sum instalments—Seizure of defendant's property.

1. Under the Act of May 17, 1917, P. L. 199, a justice of the peace may permit either costs or fines under the Game Law of May 24, 1923, P. L. 359, or both, to be paid in instalments, and may provide that the costs are to be paid in full before the fine, but if he fails so to provide and accepts lump sum instalments, such instalments must be allotted proportionately between costs and the fine.

2. Where property of a defendant convicted of a violation of the Game Law of 1923, is seized and sold, the justice of the peace is, under section 1114, entitled to be paid his costs in full before any application is made on account of the fine.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., January 6, 1936.

Honorable Nicholas Biddle, President, Board of Game Commissioners, Harrisburg, Pennsylvania.

Sir: This Department is in receipt of your request to be advised concerning a difference of opinion that seems to have arisen between the Department of Revenue, the Auditor General's Department and your Commission relative to the several amounts to be deposited in the Game Fund when a defendant convicted of a game law violation of the Game Law of May 24, 1923, P. L. 359, does not pay the total costs and fine involved.

You cite as an example a case arising in Lawrence County where a defendant was convicted before a justice of peace for hunting without a license and sentenced to pay a fine of $25 and costs in the amount of $4.50. The justice of peace was able to collect only $8 from the defendant, from which he deducted the costs of $4.50, remitting the balance to the Game Commission to apply on the fine, and the defendant presumably was committed to jail for the balance of his sentence.

You state further that the representatives of the Auditor General's Office, who have audited the books of the justice of peace have charged him with the additional sum of $3.03 to be paid into the Game Fund,

claiming by reason of opinion of this department the Commonwealth is entitled to such proportion of the amount collected as the amount of the fine bears to the total of fine and costs.

You request to be enlightened as to this opinion and for a review of the subject because of the custom of your Commission to promote cooperation between the justices of peace or aldermen by permitting them to collect the full amount of their costs in view of section 1114 of the Game Code. We will do so.

Ordinarily, it is the duty of the justice of peace or alderman imposing the fine to insist upon payment of the fine, the entry of security therefor or commitment of the defendant to jail in default of the payment thereof. However the Act of May 17, 1917, P. L. 199, 19 PS, Section 953, empowers all "sentencing authorities" to accept payment of fine or costs in installments. That act reads as follows:

> "Section 1. That any person sentenced to pay a fine or to pay the costs of any criminal proceeding against him, either in addition to or without a term of imprisonment, under any act of Assembly or municipal or borough ordinance, may, in the discretion of the sentencing authority, be given leave to pay such fine or costs by instalments.
>
> "Section 2. In giving leave under the foregoing section, the sentencing authority shall fix the amount of each instalment and the dates of payment but no order giving such leave shall prescribe a period longer than twelve months for the completion of payment of the entire fine or costs.
>
> "Section 3. Upon default in payment of any one instalment, under any such order, the entire unpaid balance of the fine or costs shall at once become due and payable.
>
> "Section 4. An order under section one of this act, giving leave to pay a fine or costs by instalments, shall not bar the sentencing authority from issuing a warrant of commitment against the defendant, but the execution of such warrant shall be stayed until default occurs in the payment of any instalment.
>
> "Section 5. All acts and parts of acts inconsistent with this act are hereby repealed."

It will be seen that the disjunctive "or" is used in this act, but Judge Hargest, then Deputy Attorney General on January 13, 1919, in a reported opinion, 28 D. R. 406, very properly construed the word "or" as meaning "and." In the particular case then under consideration by him, he ruled that the alderman was authorized to permit the payment of both costs and fines in installments under this act. With that interpretation we agree, but in doing so we point out that the act is to be read as authorizing the justice of peace to do one of three things, i. e., to permit (1) the fines or (2) the costs or (3) both to be paid in installments. In the particular case under consideration by Judge Hargest, the alderman accepted installments for both fines

and costs. Apparently the installments were not separated into installment payments on account of fine and installment payments on account of costs. After the payment on three different occasions of sums aggregating Eleven Dollars ($11.00), the defendant disappeared. The alderman then deducted all of his costs from the amount paid and remitted the balance to the Commissioner of Fisheries. The question before Judge Hargest was the propriety of such action, and he came to the following conclusion:

> "*The terms of the sentence entered by the alderman in this particular case* indicate that he granted leave to pay by instalments not only the amount of the fine, but the costs of the prosecution. This being the case, the alderman is without authority to deduct his whole costs from any one or more instalments. He is limited in his deductions to a proportionate part of his costs only, and you are, therefore, accordingly advised." (Italics ours.)

You ask us to consider in conjunction with this opinion section 1114 of the Game Code, which reads as follows:

> "Section 1114. Disposition of Seized Property When Defendant Convicted.—When a defendant is convicted of violating any of the laws relating to game or other wild birds or wild animals, and pays the fine and costs imposed, all guns, traps, boats, decoys, dogs, and other shooting or hunting paraphernalia seized in connection with his arrest shall, if the use of the same is not forbidden by this act, be returned to the defendant, except in the case of the conviction of any unnaturalized foreign-born person; and in case the fine and costs are not so paid in full, all property other than illegal devices so seized shall be sold at public auction in such manner and subject to such conditions as the board shall direct. The cost of any such sale shall be part of the costs of prosecution. Any fund arising from any such sale shall be applied, first to the cost of the sale, second to the payment of costs of prosecution, and third to the payment of the fine imposed. The remainder, if any, shall be returned to the owner of the property thus seized. * * *"

This provision, in our judgment, does not apply to the situation under discussion unless there are additional facts not stated in your letter, which would show that some property of the convicted defendant was seized and sold. If so, of course, from the proceeds of such confiscated property the justice of peace would be entitled to be paid his costs before any application to the fine could be made. But if there was no property of the defendant in this particular case seized and sold, then the case comes within the general rule relating to all cases where fines and costs are sought to be paid in installments under the Act of 1917. The rule laid down by Judge Hargest in the above opinion is only to be applied, however, where the alderman fails to provide separate installment schedules of fines and costs. By this we

mean that we see no reason why the alderman, under the authority of the act, cannot order that the defendant must pay the costs in full first and thereafter pay the fine in installments, or the alderman may fix the amount of the fine installment and the amount of costs installment, and when so fixed, apply the money received accordingly. Section 2 of the Act of 1917 gives him a wide latitude in fixing the amount of each installment and the dates of payment, so long as he does not spread them beyond the twelve months' limit fixed by the act. But the alderman must fix separate installment schedules for fines and costs at the time he exercises his authority under the act of 1917. If he fails to do so, and accepts lump sum installments, they must be apportioned as held by Judge Hargest's opinion.

We may further say in preparing this opinion we examined former Deputy Attorney General Moss' formal opinion No. 94, 20 D. C. 28, to Honorable Leon D. Metzger, Secretary of Revenue, and his explanatory letter to Auditor General Baldwin under date of April 2, 1934, and do not find it inconsistent with these views.

Yours very truly,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI.
Attorney General.

OPINION NO. 191

Elections—Referendum on Constitutional convention—Cost of printing ballots—Liability of Commonwealth—Of counties—Act of July 8, 1935.

The Act of July 8, 1935, P. L. 604, providing for a referendum on the question of holding a convention to revise the Constitution, does not authorize the Commonwealth to pay any expenses thereof, such as the cost of printing the ballots, and such expenses must therefore be borne by the counties which originally incurred them.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., January 29, 1936.

Honorable David L. Lawrence, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request to be advised on the following questions:

1. Is the Commonwealth of Pennsylvania liable for the cost of printing the ballot on which the constitutional question was submitted to the electors of this Commonwealth at the primary election, September 17, 1935?

2. If the Commonwealth is liable for the payment of the cost for printing the ballot on which this question was submitted to the voters, is the Commonwealth, in addition to this cost, also liable for the payment of any additional fees which were paid to the members of the various election boards by the different

counties for the counting and computation of the Constitutional Revision vote?

Your inquiries raise the question as to the liability of the Commonwealth of Pennsylvania for the costs incurred by the counties by the submission of the referendum on constitutional revision to the electors at the Primary Election of 1935, as provided by the Act of July 8, 1935, P. L. 604.

The only expenses for which the above act authorizes the Commonwealth to reimburse the counties are those resulting from the printing of the "Constitution Ballots." Provision for the payment of such expenses is made in sections 21 and 23 of the act, which read as follows:

> "Section 21. The county commissioners of the several counties shall cause to be printed, in the form prescribed by the Secretary of the Commonwealth, a sufficient number of official 'Constitution Ballots' for all the voters in their respective counties. The county commissioners shall, at the time distribution is made of the usual ballots for such election, distribute the constitution ballots to each of the several voting precincts in their respective counties in sufficient quantities to provide such ballots for the voters of each respective county.
>
> "The several counties of the Commonwealth shall be reimbursed out of the funds hereinafter appropriated, for all expenses lawfully incurred by such counties in printing official 'Constitution Ballots' authorized by this act for the submission of the proposed Constitution to the electors of such counties, upon bills rendered to the Secretary of the Commonwealth by the various county commissioners.
>
> "Section 23. The sum of six hundred fifty thousand dollars ($650,000), or so much thereof as may be necessary, is hereby appropriated out of the General Fund of the State Treasury * * * for the payment of expenses lawfully incurred by the several counties in printing official 'Constitution Ballots' as authorized in this act * * *."

As originally introduced into the House of Representatives, the act in question provided for the calling of a constitutional convention without first submitting to the people the question whether or not such a convention should be called. The act also provided that all expenses incident to the calling of a constitutional convention should be paid by the Commonwealth. However, in the Senate the original bill was amended to provide that a constitutional convention could be called only with the consent of the electors given at the Primary Election of 1935. This amendment necessitated the preparation of referendum ballots by the county commissioners. In thus amending the bill the Senate failed, or neglected, to include a provision placing the liability for the expense of printing such referendum ballots upon the Commonwealth. In the absence of such a provision, the requirement that

such ballots be prepared by the county commissioners placed the expense of such preparation upon the counties.

It undoubtedly was the intention of the framers of the original administration bill to have all the expenses incurred thereunder borne by the Commonwealth. As amended in the Senate the bill necessitated an additional expense; namely, the cost of printing the referendum ballots. However, neither the amendment inserted by the Senate, nor any other amendment, made the Commonwealth liable for such additional expense. Without proper provision in the act, the Commonwealth has no authority to assume this additional expense.

You are, therefore, advised that the Act of July 8, 1935, P. L. 604, does not permit the Commonwealth to pay any expense incurred by the counties in connection with the submission to the people of the question of calling a constitutional convention. Accordingly, such expenses must be borne by the counties which originally incurred them.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 192

Taxation—State personal property tax—Subject of taxation—Property held by resident trustee for nonresident beneficiaries of nonresidents—Act of June 22, 1935, Sec. 3—Materiality, of date on which property is received by trustee.

1. Section 3 of the Act of June 22, 1935, P. L. 414, exempts from the State personal property tax, after the effective date of the act, property in trusts held by resident trustees but created by nonresidents for the benefit of nonresidents regardless of whether such property was received by the trustees before or after the effective date of the act; any other construction would render the statute unconstitutional as an attempt arbitrarily to discriminate in classifying property for purposes of taxation and must therefore be avoided.

Statutes—Construction—Alternative meanings—Adoption of constitutional construction—Conclusiveness of punctuation.

2. Where there are two possible constructions of an act, one of which would render it constitutional and the other unconstitutional, the former should be adopted.

3. Punctuation is not conclusive in the construction of a statute and may be freely changed to effect the legislative intent.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., February 25, 1936.

Honorable John B. Kelly, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning the proper construction of the phrase "hereafter received" in Section 3 of the

Act of June 22, 1935, P. L. 414, known as the State Personal Property Tax Act.

The phrase in question occurs in that portion of the section which exempts property received from nonresidents by resident trustees for the use of nonresident beneficiaries from the tax of one mill imposed by the section for State purposes. The exact language in question is as follows:

> "* * * And provided further, *That the provisions of this section shall not apply to personal property of the class hereinabove enumerated, hereafter received* from any person or persons, copartnership, or unincorporated association, or company, nonresident in, or not located within, this Commonwealth, or from any joint-stock company, or association, limited partnership, bank or corporation formed, erected or incorporated by, under, or in pursuance of, any law of the United States, or of any state or government, other than this Commonwealth, and not doing business within this Commonwealth, by any person or persons, copartnership, unincorporated association, company, joint-stock company, or association, limited partnership, bank, or corporation as active trustee, agent, attorney-in-fact, or in any other capacity for the use, benefit or advantage of any person or persons, copartnership, or unincorporated association, or company, nonresident in, or not located within, this Commonwealth, or for the use, benefit or advantage of any joint-stock company or association, limited partnership, bank or corporation formed, erected or incorporated by, under, or in pursuance of, any law of the United States or of any state or government, other than this Commonwealth, and not doing business within this Commonwealth." (Italics ours)

This language is identical with the amendment to the Act of June 17, 1913, P. L. 507, effected by the Act of April 30, 1929, P. L. 871, and was intended to express the policy of the legislature both in 1929 and in 1935 to invite into the Commonwealth money from nonresidents to be held by our banks and trust companies as trustees in this Commonwealth for nonresident beneficiaries.

You inquire whether the tax imposed by the act of 1935 applies to:

a. Personal property in trust accounts created by nonresidents after the effective date of the act;

b. Personal property in trust accounts similarly created prior to the effective date of the act but subsequent to the effective date of the 1929 amendment to the 1913 act;

c. Personal property in trust accounts similarly created prior to the effective date of the 1929 amendment to the 1913 act.

We are of the opinion that a construction which would result in an affirmative answer to any of your queries would render the proviso of doubtful constitutionality in that it would create an arbitrary discrimination by attempting a classification of property for taxation not

depending upon any differences in kind but merely upon the date on which the property in question was placed in the hands of the resident trustee.

Article IX, Section 1 of the Constitution provides in part:

> "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 * * *."

It has been held by our courts that this section of the Constitution delegated to the legislature the power to classify property for the purpose of taxation and that in the exercise of that power the legislature may select any reasonable basis upon which to make the classification, subject always to the limitation that it must not make arbitrary and unjust distinctions. *Heisler* v. *Thomas Colliery,* 274 Pa. 448 (1922).

In *Commonwealth* v. *Girard Life Insurance Company,* 305 Pa. 558 (1932) the court said: (p. 562)

> "* * * Is there such a difference between the entity taxed and the one not levied upon, with relation to the act in respect to which the classification is proposed, as justified the legislature in fixing the classes which it did? If there is, the statutory provision is valid, if not, it is void. As we said in Schoyer *v.* Comet Oil & Refining Co., 284 Pa. 189, 197, summarizing our own cases and those decided by the Supreme Court of the United States: 'The test of classification is whether it produces diversity in results or lack of uniformity in its operation, either on the given subject of tax or the persons affected as payers, * * * Classification cannot be made arbitrarily * * * [It] must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis * * * nor may any question be raised concerning the right of the Commonwealth to classify properties and their owners for the purpose of taxation.' * * *"

In the present case it is clear, therefore, that the legislature cannot place a tax on property simply because it was received by trustees in Pennsylvania before a certain date and relieve from tax exactly similar property received by trustees in Pennsylvania after that date. This we think is so clear as not to need extended argument. However, in *Koch* v. *Essex County Board of Taxation,* N. J. 116 Atl. 328, the Supreme Court of New Jersey held unconstitutional a statute which exempted from taxation for five years certain improvements to real estate. The court held that this classification would depend entirely upon the element of time, was an arbitrary one and violated the constitutional provision requiring uniformity. The court said:

> "* * * It would hardly be argued that the legislature could lawfully segregate for the purpose of taxation at a higher rate all

> dwellings erected within the prescribed period, because for such buildings, being necessary for housing purposes, a higher rent could be obtained, for manifestly such classification would be arbitrary. The established rule in this state in classifying property for the purpose of taxation is that each classification must contain all the property which is in the same class, and that is largely determined by its use, but in this case the classification is based upon construction, within a limited period, for use for dwelling purposes, while all other buildings used for such purposes are not within the class. * * *''

The suggestion that the tax might apply to property received by resident trustees before a certain date and might not apply to similar property similarly received after that date, we believe, results from the punctuation which was inserted in the clause under consideration when it was printed in the official pamphlet laws.

It is to be noted that the same punctuation was adopted in the 1929 Act referred to above. The effect of the comma before the word ''hereafter'' is to suggest that this adverb modifies the verb ''received.'' If this comma were inserted after the word ''hereafter,'' or another comma inserted in that place, the word ''hereafter'' would modify the verb ''shall not apply'' and then the interpretation of the clause would be that the tax did not apply *after* the effective date of the act to personal property *received at any time* by resident trustees from nonresidents for the benefit of nonresident beneficiaries. This construction would not in any way violate the constitutional provision. If, however, the adverb ''hereafter'' is construed to modify the verb ''received,'' we have the unconstitutional result that property in trusts created before the effective date of the act is taxable under the act whereas similar property in trusts created after the effective date of the act would be relieved from tax.

It is to be presumed that the legislature did not intend to enact an unconstitutional statute.

In Endlich on the Interpretation of Statutes, section 178, we find the rule stated as follows: (p. 246)

> ''* * * Where an unconstitutional effect would be the result of a strict or narrow construction, a broad or liberal one is commanded. Thus, where the constitutionality of an act depends upon the construction of its language in a strict legal meaning, which would have the effect of limiting and destroying, whilst some other, popular acceptation would support, the act, the latter must be adopted. * * *''

The two possible constructions of the act which we have described above would be equally obvious if the punctuation of the section were disregarded or altered as we have suggested. On this point Endlich states the rule as follows: (Sec. 61, p. 77)

> "* * * It has been repeatedly asserted that punctuation is no part of a statute; that there is no punctuation in it which ought to control its interpretation; that it is not to be regarded in construction; or, at any rate, may be properly disregarded, and that an erroneous punctuation of a statute, in printing it, ought not to be allowed an effect which would lead to an absurdity. *Hence, a comma may be transferred from after a word to before it, to effectuate the obvious intent of the statute; or carried back several words,* in order to prevent the sacrifice of a material and significant word * * *." (Italics ours)

The courts of this Commonwealth have frequently expressed similar views with regard to the effect of punctuation in a statute. In *Commonwealth* v. *Reimel,* 68 Superior Court 240 (1917), the court said: (p. 242)

> "* * * 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."

In *Commonwealth* v. *Martin,* 107 Pa. 185, the court said: (p. 193)

> "It is no doubt for reasons such as these that it has always been held, since the time when punctuation marks were first introduced, that they have no legal place in a statute, and when inserted by compiler or printer are to be ignored by the courts as an aid to construction. * * *"

In *Commonwealth ex rel* v. *Taylor,* 159 Pa. 451, (1894) the lower court held that the title of the act of February 16, 1883, P. L. 5, violated the Constitution. The Supreme Court pointed out that the supposed defect in the title noted by the lower court was not substantial because it consisted merely in the misplacing of quotation marks. The court then proceeded properly to punctuate the title and held the act to be constitutional.

The analogy between situations in the case last cited and that under discussion here is obvious.

We are of the opinion, therefore, and so advise you, that a proper construction of the exempting clause in section 3 of the Act of June 22, 1935, P. L. 414, dealing with property in trusts held by resident trustees but created by nonresidents for the benefit of nonresidents, is that the tax imposed by the act shall not apply to any of the personal property so held after the effective date of the act regardless of

whether such property was received by the trustees before or after the effective date of the act.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 193

Taxation—Individual Net Income Tax Act of July 12, 1935—Unconstitutionality —Effect on amendment of School Code and Appropriation Act of same date.

The joint purpose of the Individual Net Income Tax Act of July 12, 1935, P. L. 970, the Act of June 12, 1935, P. L. 993, amending the School Code, and the Appropriation Act of July 12, 1935, no. 29*a*, was to raise and appropriate revenues for the relief of the various school districts of the Commonwealth, and the action of the Supreme Court in declaring the first act unconstitutional and the subsequent failure of revenues render the last two acts inoperative.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., April 3, 1936.

Honorable Lester K. Ade, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning the effect of the decision of the Supreme Court of Pennsylvania, in *Kelley* v. *Kalodner et al.*, decided on November 25, 1935, 320 Pa. 180, declaring the Individual Net Income Tax Act of July 12, 1935, P. L. 970 unconstitutional upon the Act of July 12, 1935, P. L. 993, and the Appropriation Act of July 12, 1935, No. 29-A. These acts are companion acts to the Individual Net Income Tax Act. The joint purpose of the three acts was to raise and appropriate revenues for the relief of the various school districts of the Commonwealth with the result that a lowering of local levies upon real estate for school purposes would be effected.

When the bill, which later became the Individual Net Income Tax Act, was originally introduced into the legislature it not only imposed a graduated income tax but also appropriated the proceeds thereof, and distributed them to the various school districts. In its original form the bill required no companion measures to accomplish in full its intended purpose of relieving real estate from a part of the burden imposed upon it for school purposes. The bill, however, was amended in the Senate to eliminate the appropriation and distribution features, leaving only that portion of the bill which imposed the tax. This necessitated the enactment of the two companion acts above mentioned.

The Individual Net Income Tax Act, as amended in, and finally passed by, the Senate, made no appropriation but directed that the proceeds of the tax be paid into the School Fund and be definitely earmarked "only for the payment of any appropriations made at any time by the General Assembly to the Department of Public Instruction for payment to school districts for *salaries of members of the teaching and supervisory staffs of elementary schools and junior high schools, in accordance with the provisions of law*": Section 701.

The Act of July 12, 1935, P. L. 993, likewise made no appropriation but amended the School Code, Act of May 18, 1911, P. L. 309, as amended, by requiring the Commonwealth to pay a total of $100.00 per month on account of the salaries of elementary and junior high school teachers and supervisors. In the absence of an enactment making an appropriation of money to carry out the purpose of this act, it would obviously be a nullity.

The third companion act, namely, Appropriation Act No. 29-A of 1935, made an appropriation in the sum of $25,000,000 for the biennium to the Department of Public Instruction for the purpose of reimbursing school districts with regard to the "*salaries of members of the teaching and supervisory staffs of elementary schools and junior high schools, in accordance with the provisions of law.*" Although this act did not specify the fund out of which the appropriation was to be made, its language was identical with that language of the Individual Net Income Tax Act designating how the tax under that act was to be devoted.

We have no hesitancy in advising you that the appropriation act, when considered in connection with the tax act, indicates an unmistakable legislative intent to make the appropriation out of the School Fund into which the proceeds of the tax act were payable. Since the Supreme Court has declared the tax act to be unconstitutional no proceeds thereof will accrue to the School Fund and, therefore, there will be no funds available for the payment of the appropriation contained in the appropriation act. Since the appropriation fails, the provisions of the Act of July 12, 1935, P. L. 993, amending the School Code, cannot be carried out for lack of available funds, and, as stated above, it becomes a nullity. The operation of this latter act required the appropriation and since the appropriation was dependent upon the collection of funds under the tax act, the failure of the tax act to provide such funds, by reason of its unconstitutionality, results in the failure of the entire set-up.

We are, accordingly, of the opinion and, therefore, advise you that the decision of the Supreme Court, declaring the Individual Net Income Tax Act unconstitutional, renders inoperative the Appropria-

tion Act of July 12, 1935, No. 29-A and also the amendment of July 12, 1935, P. L. 993, to the School Code.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 193a

Quo warranto—Right of judge to hold office—Petition to Attorney General—Exercise of discretion in granting or refusing petition—Petition prompted by revenge—Misuse of funds by judge in obtaining office—Proper exercise of office over long period—Public interest.

The Attorney General, in acting upon petition requesting him to file a writ of quo warranto, must exercise his sound discretion in such a way as to further the interest and convenience of the public, and he will therefore refuse to issue such a writ against an acting judge even though it appears prima facie that a large sum was spent during the judge's election campaign which was not accounted for and which was spent for unlawful purposes with the judge's knowledge and consent, where it is also apparent that the petition was prompted by a desire for revenge, where there is no complaint that the judge has not been exercising his office in a proper and judicial manner, where he has been serving for a number of years and his term is about to expire, and where there is no general public demand for his removal.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., April 6, 1936.

Petition for Writ of Quo Warranto.

This matter comes before us on the petition of John C. Hackney, of Fayette County, Pa., requesting the Attorney General to file, as relator, a suggestion to the Supreme Court of Pennsylvania that a writ of quo warranto issue, directed to Honorable Thomas H. Hudson, the president judge of the courts of Fayette County.

The petition alleges that the said Thomas H. Hudson did, during his unsuccessful primary campaign of 1925, violate the election laws of the Commonwealth, and that he again violated the said election laws in his successful primary and general election campaigns of 1927, at which time he was nominated and elected judge of the Court of Common Pleas of Fayette County, and that by reason of his said unlawful acts he is disqualified from holding the office of judge and should be ousted therefrom.

Hearings on this matter were held before us on July 5, 1935, and October 9, 1935. From the evidence adduced, we find the following facts.

Mr. George Hibbs was Judge Hudson's campaign manager in the 1925 primary campaign. In this capacity, he rented an office, directed campaign activities and spent large sums of money which had been entrusted to him, and placed in a safe deposit box rented in his name. At least seven or eight thousand dollars were distributed from this fund, for which no receipts were taken. In that campaign, approximately sixty thousand dollars were spent in attempting to procure Judge Hudson's nomination. This money was dispensed with Judge Hudson's knowledge and authority for unlawful purposes, to wit, the purchase of votes, liquor, etc. No receipts were taken for the sums so expended.

Judge Hudson filed his primary campaign account for the 1925 campaign in the office of the clerk of courts of Fayette County, where it remained two or three days until one of Judge Hudson's law associates, Joseph J. Bear, removed the account from the clerk's office. To date the account has not been returned to the proper files. The amount which Judge Hudson's account would indicate was spent in this campaign was much less than actually distributed by his representatives.

The evidence clearly indicates that in the primary campaign of 1925 Judge Thomas H. Hudson, through individuals interested in his nomination, spent much larger sums of money than were shown in his account, and that most of that money was spent in an unlawful manner and for improper purposes.

With reference to the 1927 primary, we find that that campaign was managed by Ray Shelby, who was in charge of the disbursement of funds, and that Judge Hudson boasted of the fact that Mr. Shelby was his campaign manager and that he was spending plenty of money. In one instance, $4,500 was given to an individual to take care of a district which polled approximately one thousand votes, and this money was used for the purpose of buying liquor and votes and bribing election boards.

From the evidence we find that a large sum of money was spent during the campaign of 1927 which was not accounted for, and that this money was spent for unlawful purposes with the knowledge and consent of Judge Hudson.

At least a prima facie case has been made out in support of this petition. Judge Hudson took the witness stand but refused to give any material testimony, claiming his constitutional rights and alleging, through counsel, that he refused to testify on the ground that his testimony might tend to incriminate him. This he had a right to do. However, he was present during this entire proceeding; he heard the numerous charges of violations of the election laws which were made against him and his representatives. If he had seen fit to do so,

he could have taken the stand and explained the circumstances regarding every material charge which was made. However, by relying upon his constitutional rights and refusing to testify, he has placed himself in a position where the prima facie case made out by the petitioner has not been sufficiently denied.

Although a prima facie case has been made out against Judge Hudson, there are other matters which must be taken into consideration in disposing of this petition.

The petitioner, John C, Hackney, knew all the facts that he has alleged for a period of at least eight years, and did not bring this petition or press this cause until criminal proceedings for embezzlement were instituted against him, which resulted in his conviction and sentence to a prison term by Judge Hudson. The evidence indicates that the action of the petitioner in instituting the present proceeding was prompted purely by a desire for revenge.

Judge Hudson has served as a judge of the Court of Common Pleas of Fayette County since 1925. He was first appointed to that office, and on the first Monday of January 1928, he began a 10-year elective term. A relatively short period of his term remains. During the 10 years that Judge Hudson has served on the bench many matters of public interest have been passed on by him, and many important matters are now pending before him. There has been no movement on the part of the public generally for his removal, and no complaint has been made that he is not exercising his office in a proper and judicial manner.

A quo warranto proceeding is not a matter of right, but is always discretionary with the court. The court must take into consideration, before exercising its discretionary powers, how the public would be affected. The motives of the petitioner are an obvious and important item for consideration. If the term of office is about to expire, the court wisely uses its discretion in refusing quo warranto proceedings. The court may find that the public interest may not be served by permitting quo warranto proceedings, or it may refuse leave or decline to entertain proceedings as a matter of public policy or convenience, or because of certain conduct on the part of the applicants which precludes them from pressing the matter. Circumstances tending to throw suspicion on the relator, long and unnecessary prejudicial delay, or acquiescence on the part of the persons complaining, or the public generally, are sufficient grounds for the court, in the exercise of its discretion, to refuse to entertain quo warranto proceedings.

In *Commonwealth* v. *Jones,* 12 Pa. 365 (1849), Chief Justice Gibson said, at page 370:

> "What mischief then has been done in this instance by the choice of an ineligible mayor, if he be so? and who are they

> that come here to complain of it? They do not pretend that he does not discharge the duties of the office with integrity and ability; or that the interests of the corporation are jeoparded by an irregular or improper exercise of his functions. All the corporators but two, are satisfied with him. A constituency of a hundred thousand souls are willing to dispense with a provision in the charter for their benefit. * * * It would be too much to say they are actuated by public spirit, or even by their own interest. They were dismissed from office, not for partisanship, but, as appears in the affidavits, for personal habits that unfitted them; and they could not expect to regain their places should the respondent be ousted. There is but one appetite to which the prosecution can be referred; and to the gratification of it, a Court will never lend itself. It would waste its time and the public money, as well as disturb the public repose, did it interfere for a defect of title so unproductive of consequences. In *Rex* v. *Brown*, 3 T. R. 574, it was said by Mr. Justice Ashurst, that 'when the application is made to disturb the local peace of the corporation, it is right to inquire into the *motives of the party*, to see how far he is connected with the Corporation' " (italics ours).

In *Commonwealth, ex rel.*, v. *Luker*, 258 Pa. 602 (1917), the court held, at page 607, that:

> "The authority just cited involved a public office, and both there, and in numerous other such cases, we have said that a court's exercise of discretion in refusing a quo warranto would not be reviewed. In that particular class of cases (involving public office) we have gone even further and held that the motive of the relator might be considered by a court in exercising its discretion as to the issuance of the writ."

51 C. J. 328, sec. 27, deals with this point in the following language:

> "In exercising its discretion, the court may and should consider all the circumstances of the case, the motives of the relator in having the proceeding instituted, the time which has elapsed since the cause of complaint occurred, and whether the public interest will be served by allowing the information to be filed; and it may refuse leave or decline to entertain the proceeding upon considerations of public policy, interest, or convenience."

The Attorney General is bound to execute the office entrusted to him by exercising the same sound discretion in matters of this nature that the courts exercise. He must use his office in such a way as to further the interest and convenience of the public and is bound to exercise his judgment in such a way as not to lend the power of his office to a movement which would be to the disadvantage of the public generally.

In *French's Petition*, 12 Dist. R. 703 (1903), former Attorney General Carson said, at page 710:

> "An application to the attorney-general for the use of the name of the Commonwealth is in the nature of a hearing for a rule to show cause. The granting of it is not a matter of right. It must be controlled by the discretion and judgment of that officer. He should not abdicate his office and surrender its powers to all those who would like to wield them. That would be to place in the hands of the petitioners in all cases the administration of the attorney-general's department. That cannot be permitted. It must be the official judgment and discretion of the attorney-general which governs his acts, after having patiently heard the parties and their counsel."

Therefore, although the petitioner has made out a prima facie case, we are of the opinion that this petition was prompted by a desire for revenge, that the public interest, convenience, and welfare do not call for quo warranto proceedings at this late date, and that to pursue the proceedings further would be an imposition and inconvenience to the public and against its best interests.

And now, April 6, 1936, the petition of John C. Hackney, requesting the Attorney General to file, as relator, a suggestion to the Supreme Court of Pennsylvania that a writ of quo warranto issue directed to Thomas H. Hudson, the president judge of Fayette County, Pa., is hereby dismissed.

CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 194

Award of contracts—Lowest responsible bidder—Tied bids.

Where two or more bidders have submitted equally low bids for a State contract and, because of preliminary agreements between the bidders, it is impossible for the Secretary of Property and Supplies by further advertising to obtain bids which are not tied, he may award the contract to any bidder who he in his sound judgment concludes is among the lowest bidders of equal responsibility.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., May 26, 1936.

Honorable Arthur Colegrove, Secretary of Property and Supplies, Harrisburg, Pa.

Sir: We have your request for this department's revision of Formal Opinion No. 187, dated December 16, 1935.

You state that it is impossible for you to comply with that opinion, inasmuch as it requires you to exercise sound and honest discretion in

awarding contracts to the bidder who, in your judgment, is the lowest responsible bidder, where tie bids are submitted.

You state further that in many instances tie bids were received from bidders of equal responsibility; that in such cases you have readvertised and done everything possible to secure a low responsible bidder, but that because of preliminary agreements between the bidders, it is impossible to receive bids for certain materials which are not tied. In other words, further readvertising would be futile inasmuch as you would still be faced by the same problem. You request advice as to what procedure should be followed and what your rights and duties are in such cases.

The practice of submitting equal bids, now engaged in by various bidders, is of the most pernicious nature. By such collusion, such bidders are assured that one of them will be awarded the contract, and, consequently, they are enabled to create a virtual monopoly within their own group for the particular commodity which they have for sale. Furthermore, it enables the parties to such agreement to maintain and receive higher and unreasonable prices for their product than the State would ordinarily be required to pay. Such collusive agreements have, in the past, cost the State millions of dollars, and must be broken up. To permit this practice to continue by awarding contracts by lot in such cases, not only is illegal, but amounts to a furtherance on the part of State officials of a vicious and insidious practice.

Furthermore, at a conference attended by you, Honorable Charles A. Waters, State Treasurer, and Honorable Frank E. Baldwin, Auditor General, it was unanimously agreed that the practice of collusive bidding could not be broken up through the medium of awarding such contracts by lot; that the only effective solution of the problem would be to permit you to award contracts to any bidder whom you, in your sound judgment, concluded was among the lowest bidders of equal responsibility. The above mentioned parties also agreed that if awards were made by you in such manner, they would unhesitatingly approve the same.

There is nothing in the law which prohibits you from making an award in such manner.

You are, therefore, advised that, where bidders have submitted equally low bids, and you find that two or more of them are of equal responsibility, you may award the contract to one of the lowest responsible bidders, so long as you designate to whom the contract shall be awarded.

Very truly yours,
DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 195

Marriage—Issuance of license—Three-day period—Act of May 7, 1935—Computation—Sundays and holidays—Act of June 20, 1883.

In computing the three-day period required to elapse, under the Act of May 7, 1935, P. L. 152, between the application for and the issuance of a marriage license, the day of application should be excluded and the day of issuance included, while the intervention of Sundays and holidays should have no effect unless the third day so computed falls on a Sunday or holiday, in which case, under the Act of June 20, 1883, P. L. 136, such day should be omitted from the computation.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., July 7, 1936.

Honorable Edith MacBride-Dexter, Secretary of Health, Harrisburg, Pennsylvania.

Madam: You have requested an opinion interpreting that portion of the Act of 1935, P. L. 152, which reads as follows:

> "Be it enacted, &c., That no license to marry shall be issued except after three days from the day of making application therefor and upon written and verified application to the clerk of the orphans' court: * * *."

You inquire specifically as to the method of computation of the three-day period required to elapse between the application for, and the issuance of, a marriage license.

The general rule in Pennsylvania for the computation of periods of time is contained in the Act of 1883, P. L. 136, section 1, which provides:

> "Where by any existing law or rule of court, or by any law or rule of court, that may hereafter be enacted and made, the performance or doing of any act, duty, matter, payment or thing shall be ordered and directed, and where any court shall, by special or other order, direct the performance or doing of any act, matter, payment, sentence or decree, and the period of time or duration for the performance or doing thereof shall be prescribed and fixed, such time in all cases shall be so computed as to exclude the first and include the last days of any such prescribed or fixed period, or duration of time: Provided, That whenever the last day of any such period shall fall on Sunday, or on any day made a legal holiday by the laws of this Commonwealth, or of the United States, such day shall be omitted from the computation: And provided, That this act shall not apply to the payment of negotiable paper. (1883, June 20, P. L. 136, Sec. 1.)"

This act was considered in the case of *Whitton* v. *Milligan,* 153 Pa. 376 (1893), where it was stated:

> "* * * In this case the appraisement is conceded to be regular and the question is whether a notice given on Tuesday,

> the day of appraisement, is sufficient to authorize a sale on the following Monday. It clearly is if, in computing the time allowed by the words of the statute, to wit, 'after six days public notice,' the day on which the notice is given is excluded and the day of sale is included. The intervening Sunday has no effect on the count, because it did not fall on the last day of the period. We think this case in respect to the notice of sale is governed by the act of June 20, 1883, P. L. 136. * * *''

Applying this act to the present situation, we reach the conclusion that the date of application for a marriage license should be excluded, and the date of issuance included in computing the required three days' time. The intervention of Sundays or holidays should have no effect upon this three-day period, unless the third day, as computed above, falls on a Sunday or a holiday, in which case, as is provided in the act of 1883, such day should be omitted from the computation.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 196

Constitutional law—Unconstitutional statute—Amendment to Constitution—Validation.

1. A statute passed contrary to the provisions of the Constitution existing at the time of its enactment is null and void ab initio and cannot be validated unless reenacted or unless an amendment to the Constitution clearly indicates by its language that it intended to validate prior existing invalid statutes.

Trusts—Investment of trust funds—Legality—Bonds of Federal land banks or joint stock land banks—Act of April 5, 1917, as amended by the Act of July 11, 1923—Constitution, art. iii, sec. 22, as amended.

2. The Act of April 5, 1917, P. L. 46, as amended by the Act of July 11, 1923, P. L. 1059, authorizing the investment of trusts funds in farm loan bonds issued by Federal land banks or joint stock land banks, which was invalid at the time of its passage because of a prohibition contained in article III, sec. 22 of the Constitution, was not validated by the amendment of November 7, 1933, to that section.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., June 30, 1936.

Honorable Luther A. Harr, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the amendment of

November 7, 1933, to sec. 22, article III, of the Constitution validated the Act of April 5, 1917, P. L. 46, as amended by the Act of July 11, 1923, P. L. 1059, which was invalid at the time of its passage because of a prohibition contained in sec. 22, article III, of the Constitution.

The act referred to above provided that trust funds held by executors, administrators, guardians and other trustees could be invested in farm loan bonds issued by Federal land banks or joint stock land banks. Prior to the 1933 constitutional amendment, this act was very properly held unconstitutional by this department. Therefore, trust funds could not be invested in farm loan bonds of either Federal land banks or joint stock land banks.

The constitutional amendment reads 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 language used in the amendment is not retrospective. Therefore, the general principle of law that any amendment to the Constitution or any statute enacted by the legislature is prospective, in the absence of clear, concise language which would plainly indicate that the legislature intended that it be retrospective, applies. A statute passed contrary to the provisions of the Constitution existing at the time of its enactment, or a statute passed in the face of a prohibition in the Constitution against such a statute, is null and void and invalid ab initio, and cannot be validated unless reenacted or unless an amendment to the Constitution clearly indicates by its language that it intended to validate prior existing invalid statutes.

12 C. J., Sec. 787, states:

> "An unconstitutional statute is absolutely null and void ab initio, having no binding force; and is not validated by a subsequent constitutional amendment removing the restriction by which its enactment was prohibited. Such statutes are regarded as though they had never been in existence and are not included in constitutional provisions intended to continue existing laws in force until altered or repealed by legislative action, such provisions having reference only to such laws as are constitutional and valid. * * *"

The language of the amendment in question certainly does not even inferentially indicate that the amendment was to have a retrospective application. In fact, the language used indicates that the legislature would, in the future, have the power to enact laws governing the investment of trust funds. Therefore, we must construe the amendment according to the general principle of law that it is prospective and not retrospective.

Accordingly, you are advised that the Act of April 5, 1917, P. L. 46, as amended by the Act of July 11, 1923, P. L. 1059, is not validated, and trust funds cannot be invested at the present time in the farm loan bonds of joint stock land banks or Federal land banks.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 197

Public service companies—Street railways—Abandonment of services—Removal of tracks—Duty to restore roadway—Jurisdiction of Public Service Commission.

The Public Service Commission should refuse to grant permission to a street railway company to abandon its services unless it performs its common law duty of removing all of its tracks, track structures and other facilities from the improved portion of the highway and restores and paves that portion of the highway previously occupied by its tracks and such other facilities so as to conform with the remaining surface of the roadway.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., July 1, 1936

Mr. Samuel Ettinger, Secretary, The Public Service Commission, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning the power of The Public Service Commission to attach, as a condition to its granting permission to a street railway company to abandon service, a requirement that the company should remove all its tracks and other facilities from the improved portion of the highway, and repave and restore that portion previously occupied by its facilities to the same condition as the remainder of the roadway at the time of such removal.

Clearly, such a requirement would enforce the coextensive legal obligation imposed upon the railway company in most instances by its franchises, and in every case by common law.

This duty to repave and restore is adequately established in Formal Opinion No. 21 of this department to the Secretary of Highways, dated August 17, 1931, in re Lancaster Ephrata & Lebanon St. Ry. Co., 16 D. & C. 624, and in the numerous authorities therein cited.

This common law responsibility is stated in 60 C. J. 366 [Section 265], as follows:

> "On abandonment of its railroad the company is obliged to remove its tracks and track structures forthwith; and this

> is so in the absence of any specifically stated obligation in the franchise to do so; and it is also its duty to restore the pavement of the invaded street or highway to the condition of the adjacent pavement. And equity has jurisdiction to compel the company to perform its duty in this regard."

Therefore, it must be determined whether The Public Service Commission has the power to compel the street railway company to fulfill this legal obligation as a condition to the granting of permission to abandon its service, and this necessitates a consideration of the supervisory powers of the commission over the operation and facilities of such companies.

The Public Service Company Law of July 26, 1913, P. L. 1374, its amendments and supplements, places the broad duty upon the commission to see that the facilities of these companies under its jurisdiction are kept in such condition that the safety of the public will not be jeopardized. For example, Article V, Section 13 of the law authorizes the commission to "establish such standards of facilities and service * * * as shall be reasonably necessary for the safety, accomodation, or convenience of * * * the public." Likewise, section 2 of the same article empowers the commission to require "safe" facilities.

While there is no Pennsylvania case or statute specifically defining the scope of the jurisdiction of the commission upon abandonment of service, it has generally been conceded that the power of the commission to determine the incidents of abandonment is necessarily implied: *Borough of Carlisle* v. *Public Service Commission,* 81 Pa. Super. Ct. 475 (1923).

At first glance, the case of *Borough of Swarthmore* v. *Public Service Commission,* 80 Pa. Super. Ct. 99 (1922), affirmed in 277 Pa. 472 (1923), seems applicable, because it held that the commission did not have jurisdiction to modify an agreement between a street railway company and a municipality, establishing the obligation of such company to pave and maintain the street wherein its tracks were laid. However, this case is distinguishable because the agreement enlarged the company's common law responsibility by requiring it to pave the streets from curb to curb. The appellate courts simply decided that the commission had no power to relieve the company of its broad obligation under the contract. No question of abandonment was there presented.

The removal of the rails and other facilities of a street railway company from the roadway without restoration of the surface thereof would generally result in leaving large holes therein, thus creating a condition dangerous to the travelling public, and, ipso facto, a public nuisance. The Public Service Commission is certainly within those incidental powers to provide safety for the general public, re-

ferred to in the various sections of The Public Service Company Law, if it takes steps to eliminate these dangerous conditions for which companies under its supervision are solely responsible. It would be a ridiculous commentary upon our system of government to rule that The Public Service Commission is interested only in the safety of the portion of the public which travels upon the utilities under its supervision, to the detriment and danger of the balance of the travelling public. Such an interpretation would permit a street railway company to abandon service and go out of existence without fulfilling its common law obligation to restore the street, and the commission, by granting permission to abandon service, would be preventing in many cases the enforcement of this lawful obligation. Clearly, the legislature never intended such absurd consequences.

The Swarthmore case merely prevented The Public Service Commission from diminishing the obligations of the utility; it did not prevent the commission from enforcing existing obligations. The commission has no power to relieve by its express mandate the railway company from its obligation to reconstruct and restore the surface of the roadway. Yet, in many cases, unconditional permission to abandon service results in the same sort of relief to the railway company.

Therefore, we are of the opinion that it is the duty of The Public Service Commission to refuse to grant permission to a street railway company to abandon its service, unless it removes all its tracks, holes, wires and other facilities from the improved portion of the highway, and restores and repaves that portion of the highway previously occupied by its tracks and such other facilities so as to conform with the remaining surface of the roadway

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 198

Tax anticipation notes—Pledge of current revenues—Excess profits from State liquor stores system—Acts of June 22, 1935, and July 18, 1935.

1. Under the Act of June 22, 1935, P. L. 442, all current revenues of the State, whether beyond or below budget estimates, are pledged for the repayment of the tax anticipation notes authorized by that statute.

2. Proceeds from the State liquor stores system form a part of the current revenues of the Commonwealth, even though they accrue on profits on liquor sold to the public instead of through taxation, and this is especially so since under the

Act of July 18, 1935, P. L. 1316, excess proceeds are made available for the payment of appropriations from the general fund.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., July 28, 1936.

Honorable George H. Earle, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: You inquire whether any profits, accruing from the State Liquor Stores System in excess of the amount of such profits heretofore budgeted, may be made the subject of further appropriation at this special session and pledged as security for tax anticipation notes secured by such excess profits. This inquiry arises by virtue of the fact that profits of the State liquor stores have to date exceeded the estimates for the biennium.

The Act of June 22, 1935, P. L. 442, in authorizing the issuance of $50,000,000 in tax anticipation notes against the current revenues for the biennium 1935-1937, expressly pledged the current revenues for such period for the repayment of such notes by paragraph (c) of Section 2 of such act, which reads as follows:

> "(c) The *current revenues* of the biennial fiscal period beginning the first day of June, one thousand nine hundred thirty-five, *are pledged for the payment of principal and interest of such notes,* which shall be payable in lawful money of the United States. * * *" (Italics ours).

This was expressly pointed out by this department in Formal Opinion No. 181, 24 D & C., 275, 278, as follows:

> "As we have stated above, in the Act here under consideration, the current revenue *of every kind or character,* are specifically pledged to repay the notes and must be allocated for that purpose. * * *"

The act does not pledge estimates. It pledges current revenues, and this means all revenues anticipated by the original budget to accrue during the biennium, whether beyond or below estimates.

It must be borne in mind that an estimate is in fact only a prediction and that prediction may fail either by being too high or too low. No estimate of revenue can ever be guaranteed as accurate. In times of prosperity it is likely to be too conservative. In times of depression, it is likely to be too optimistic. It is also true that the mere fact that revenue for part of a fiscal period exceeds in proportion the amount that was estimated does not necessarily justify the conclusion that such excess will continue, or that the estimated yield may not fall below that which was anticipated for the balance of the period. Likewise, the excess beyond expectation of certain items of revenue may be necessary to offset the deficiencies in other items which might fall below expectations. Therefore, it follows that any

excess yield from any item of current revenue over and above the original estimate for such item will necessarily remain pledged for the payment of the principal and interest of the 1935 tax anticipation note issue until the sinking fund requirements of such issue are met in full.

Your inquiry resolves itself into the question whether the proceeds from the State liquor stores system form part of the current revenues of the Commonwealth, even though such proceeds accrue to the Com monwealth by virtue of profits on liquor sold to the public instead of through a tax levied and assessed.

If the answer to this question should be in the negative, then ob viously none of the profits of the State liquor stores, including those within the limits of the original budget estimate yield, would be pledged for repayment of the 1935 tax anticipation notes, despite the fact that such income was considered in making up the budget for the current biennium. Accordingly, any suggestion that the anticipated excess profits from the State liquor stores system over and above the original estimates are available as security for further tax anticipation notes is paradoxical for the reason that it breaks up profits from the liquor stores into two classes; those within the original estimated yield as current revenue; and those in excess of the original estimated yield as some other specie of income but not current revenue. This suggestion attributes to liquor store profits a peculiar chameleon like nature, making them change their color and character completely as soon as they go beyond the original budget estimate. If such a propo sition were sound, it could, with the same force, be applied to any excess in revenue beyond the original estimate from any source such as from the cigarette tax or other taxes levied and assessed during the current biennium.

Are profits from the State liquor stores system current revenues of the Commonwealth?

In *Georges Township* v. *Union Trust Co.,* 293 Pa. 364, 369 (1928), the Supreme Court, in construing the debt provision of our Constitution relating to municipalities, defines the term "current revenues" at page 369 as follows:

> "* * * Current revenues include taxes for the ensuing year and all liquid assets, such as delinquent taxes, licenses, fines and other revenues which, in the judgment of the authorities, are collectible. * * *"

In *United States* v. *Bromley,* 12 Howard 87, 13 L. ed. 905 (1851), the Supreme Court of the United States, in deciding that the income of the Post Office Department is a part of the revenue of the Federal Government stated as follows:

> "* * * Under the Act of 1836, the revenue of the Postoffice Department is paid into the Treasury. Revenue is the income

of a state, and the revenue of the Postoffice Department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports."

It has been suggested that inasmuch as the profits of the liquor stores do not become part of the General Fund that they therefore cannot be considered as revenue of the Commonwealth. This contention is specious and without merit. It entirely overlooks the Act of July 18, 1935, P. L. 1316, which, after appropriating moneys in the State Stores Fund for the operation of the State liquor stores system, provides:

"Any moneys in the State Stores Fund, from time to time, which may not be required for any of the purposes hereinbefore specified in this act, shall be paid over into the General Fund, and *shall be available for the payment of appropriations made from the General Fund.* * * *" (Italics ours)

This act was made retroactive to the first day of June, one thousand nine hundred thirty-five, which was prior to the date of the enactment of the Tax Anticipation Notes Act of 1935. On the basis of the former act, the budget for the current biennium contained an estimated item of $10,000,000 to accrue to the General Fund from the State liquor stores system and this amount was included among the estimates of revenue against which the appropriations for the current biennium were made from the General Fund. The revenue that was estimated to accrue to the General Fund from the State liquor stores system was included in the financial statement issued to prospective purchasers of the 1935 issue of tax anticipation notes. This same item of revenue was also included in the financial statement that was presented to the Supreme Court at the time the court was asked to pass upon the constitutionality of the issuance of tax anticipation notes. Accordingly, the Supreme Court of Pennsylvania, in passing upon the validity of the 1935 Tax Anticipation Notes Act, considered this item as part of the Commonwealth's current revenues as did the purchasers of such notes. This is manifest from the court's statement at page 61:

"It must be understood, of course, that the limitation in section 4 has the effect, and the statute recognizes it, of limiting the issue and the payment of the tax anticipation notes to moneys received from the revenues already provided for and to become payable in the biennium. The holders of such notes can receive payment only from current revenue as heretofore decided by this court. Any deficit would be within the prohibition of section 4, unless it came within the $1,000,000.00 allowance for deficiency." (Italics ours)

Joseph J. Kelley v. *Frank E. Baldwin,* et al., 319 Pa. 53 (1935).

The Department of Revenue, pursuant to Section 4 of the Act of June 22, 1935, P. L. 442, has allocated the current revenues for the repayment of the principal and interest of the 1935 issue of tax anticipation notes as follows:

June 30, 1936	$3,000,000	December 31	$3,000,000
July 31	3,000,000	January 31, 1937	2,000,000
August 31	3,000,000	February 28	2,000,000
September 30	3,000,000	March 31	5,000,000
October 31	3,000,000	April 30	15,000,000
November 30	3,000,000	May 31	5,000,000

In Formal Opinion No. 181, we pointed out:

> "* * * All of the current revenues having been thus unconditionally made available for the repayment of the notes, and the Department of Revenue having exercised the authority given to it by directing the specific setting aside of sufficient of the revenues for that purpose, obviously the pledge and repayment provided for by the Legislature can only be made effective by considering the allocations absolutely payable in the manner, at the times, and in the amounts specified ahead of all other claims payable out of the General Fund."

In view of the foregoing, you are advised that liquor store profits either as orginally estimated or in excess thereof, being current revenues of the Commonwealth, have been pledged by the legislature by the Act of June 22, 1935, P. L. 442, for the payment of principal and interest of the tax anticipation notes issued under that act until the sinking fund requirements of such issue are met in full.

If the legislature should attempt to violate the pledge of current revenues as aforesaid, it is likely that noteholders will institute appropriate action for the protection of their rights, such action might result in a holding up of all expenditures of State revenues.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 199

Bureau of Professional Licensing—Appropriation—Payment of unpaid bills.

Bills remaining unpaid at the close of the fiscal year ending May 31, 1935, because of insufficient fees collected, may be paid from the appropriation made by the General Appropriation Act of 1935 for the 1935-1937 biennium.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., August 26, 1936

Honorable Charles A. Waters, State Treasurer; Honorable Lester K. Ade, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: This department is in receipt of a request from the Director of the Bureau of Professional Licensing in the Department of Public Instruction, asking us to advise whether or not moneys appropriated under the General Appropriation Act for the 1935-37 biennium to your department "for the payment of the bills incurred by said agencies and remaining unpaid at the close of the fiscal year ending May 31, 1935", authorizes the payment of an item of $909.39, incurred by the State Board for the Examination of Public Accountants during the biennium 1933-1935, which obligation should have been paid out of the fees earned in the 1933-35 biennium, but not so paid because of insufficient fees.

The statute laws involved here are as follows:

> General Appropriation Act of 1935, Section 2, Paragraph 1, Page 71.
>
> "The following sums, or as much thereof as may be necessary, are hereby *specifically appropriated* from the General Fund in the State Treasury to the several hereinafter named agencies of the *Executive,* Legislative, and Judicial Departments of the Commonwealth for the purposes hereinafter set forth, for the two years beginning June first, one thousand nine hundred and thirty-five, *and for the payment of the bills incurred by said agencies and remaining unpaid at the close of the fiscal year ending May thirty-first, one thousand nine hundred and thirty-five.*" (Italics ours)
>
> General Appropriation Act of 1935, Section 2, Paragraph 5, under the caption "To the Department of Public Instruction."
>
> "For the payment of salaries, wages or other compensation of a deputy, members, and other employes; for payment of general expenses necessary for the proper conduct of the work of the Department of Public Instruction *with respect to professional education and licensure and the professional examining boards and advisory committee within the department* the sum of * * *" (Italics ours)

From the above cited statute law it would appear that the Bureau of Professional Licensing is an *agency* within the Department of Public Instruction.

The Appropriation Act for the biennium 1933-35 contained a provision with respect to the expenditure for the work of the Department of Public Instruction with respect to professional education and

licensure and professional examining boards and supervisory committees within the department to the effect that:

> Paragraph 4 under the caption "To the Department of Public Instruction", General Appropriation Act of 1933, Page 186.
>
> "* * * no expenditure shall be made in respect to the work of any professional examining board or advisory committee in amount greater than the amount received in fees from the examining, licensing and other matters administered by such board or committee and paid into the General Fund."

The facts at hand are that the wages and expenses of board employes of the State Board for the Examination of Public Accountants for a certain period in the biennium 1933-35 remained unpaid on May 31, 1935.

The Appropriation Act of 1935 does not differentiate as to unpaid bills, whether or not they might have been paid by funds earned by fees, or out of moneys appropriated, but merely states that the money appropriated shall be used during the biennium 1935-37 for the purposes set forth in the said act, which included the payment of bills incurred by agencies within the department and remaining unpaid at the end of the biennium.

Therefore, we are of the opinion, and you are advised, that the appropriation to the Department of Public Instruction with respect to professional education and licensure and the professional examining boards and advisory committees for the biennium 1935-37 might be used to pay the unpaid bill of $909.39 contracted by the State Board for the Examination of Public Accountants during the 1933-35 biennium, and that the proviso in the 1933-35 General Appropriation Act that no expenditure shall be made in respect to the work of any professional examining board or advisory committee in any amount greater than the amount received in fees does not so limit the appropriation made by the General Appropriation Act of 1935 for the 1935-37 biennium because provision is made therein for the payment of unpaid bills without any distinction as to whether unpaid due to lack of fees or otherwise.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 200

Unemployment relief—Administration expenses—Determination of amount—Disbursements—Commitments—Act of August 7, 1936.

The amount of the appropriation made to the State Emergency Relief Board

by the Act of August 7, 1936, No. 44, that is available for administration expenses during a particular month is to be determined by applying the prescribed percentage rate to that particular month against the total commitments incurred during that month rather than against actual disbursements.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., August 26, 1936

Honorable Karl deSchweinitz, Executive Director, State Emergency Relief Board, Harrisburg, Pennsylvania.

Sir: You ask to be advised on what basis the State Emergency Relief Board shall compute the percentage of the appropriation for unemployment relief made by Act No. 44, approved August 7, 1936, that may be used by the board for administration expenses during each month.

In so far as it is applicable to your inquiry, Act No. 44, after making an appropriation of $22,283,789.00 to the State Emergency Relief Board for unemployment relief purposes, provides in section 1 as follows:

> "* * * Of the amount hereby appropriated, not more than twelve per centum *expended* during the month of September one thousand nine hundred thirty-six, not more than eleven per centum during the month of October, one thousand nine hundred thirty-six, not more than ten per centum during the month of November, one thousand nine hundred thirty-six, not more than nine per centum during the month of December, one thousand nine hundred thirty-six, and not more than eight per centum during the month of January, one thousand nine hundred thirty-seven, shall be used for administration expenses of the State Emergency Relief Board." (Italics ours)

Section 5 in turn provides, in part, as follows:

> "The State Emergency Relief Board may, from time to time, expend or authorize the expenditure of such sums as may be necessary out of the appropriation made by this act, *not exceeding the limitations hereinbefore prescribed* for the payment of salaries, * * *" etc. (Italics ours)

The answer to your inquiry depends upon the meaning to be ascribed to the word "expended".

Under the provisions of sections 2 and 3 of the act, the State Emergency Relief Board is required, from time to time, to make allocations of the appropriation among the several counties for expenditure through such local agencies as shall be designated by the board. Section 5 of the act, as above indicated, makes the appropriation available for the adminstration expenses of the board.

Reading the act as a whole we are of the opinion that the legis-

lature, by the use of the word "expended" did not mean funds actually disbursed during a particular month, but instead, contemplated commitments incurred for relief and administrative expenses during a given month.

The latter interpretation is the proper one since the obvious intention of the legislature was to permit only a certain proportion of the amount committed for expenditure during a particular month to be used for administration purposes. To construe the word "expended" to mean funds actually disbursed during a given month would not conform to this legislature intent in that this interpretation would include the liquidation during a particular month of commitments incurred at various times prior to that month.

We realize that it will be impossible for the State Emergency Relief Board to ascertain definitely the aggregate sum of commitments for a particular month until the end of that month, or even until the forepart of the succeeding month. However, it will be possible for the State Emergency Relief Board to make the necessary adjustments after the total amount of commitments is ascertained.

Accordingly, you are advised that the amount of the appropriation made to the State Emergency Relief Board by Act No. 44, that is available for administration expenses during a particular month, is to be determined by applying the prescribed percentage rate to that particular month against the total commitments incurred during that month.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 201

Delaware River Joint Toll Bridge Commission—Acquisition of land to be used in connection with the erection and construction of a bridge across the Delaware River.

The commission created by the Act of June 25, 1931, P. L. 1352, may take, in its own name as a body corporate and politic, title to property acquired in Pennsylvania, either by purchase or condemnation, to be later used in connection with the erection and construction of a toll bridge across the Delaware River between the Commonwealth of Pennsylvania and the State of New Jersey.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., August 26, 1936.

Delaware River Joint Toll Bridge Commission, State Office Building, Trenton, New Jersey.

Sirs: We have your request on behalf of the Delaware River Joint

Toll Bridge Commission to be advised as to whether the said commission may take, in its own name as a body corporate and politic, title to property acquired in Pennsylvania, either by purchase or condemnation, to be used in connection with the erection and construction of a bridge across the Delaware River, between the Commonwealth of Pennsylvania and the State of New Jersey, or whether it is necessary that such property be acquired in the name of the Commonwealth of Pennsylvania.

The Delaware River Joint Toll Bridge Commission was created as a body corporate and politic by the Act of June 25, 1931, P. L. 1352 (36 PS Sec. 3401). This act authorized the Governor to enter into a compact or agreement on behalf of the Commonwealth of Pennsylvania with the State of New Jersey in substantially the form recited at length in the statute. A similar statute was passed by the State of New Jersey, and, subsequently, the agreement was signed by the Governors of each state on the 19th day of December, 1934. As a result of the two state statutes and the subsequent agreement, the Delaware River Joint Toll Bridge Commission sprang into existence as "the public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey for the * * * public purposes" named in the statutes and agreement.

Article II, subdivision (j) of the statutes and agreement grants to the said commission the power "To acquire, own, use, lease, operate, and dispose of real property and interest in real property, and to make improvements thereon."

Article III of the statutes and agreement permits the commission to determine by resolution to acquire such property by "fees simple and absolute, or a lesser interest" as is necessary for its purposes in either state. This article then provides as follows:

> "If the commission is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property, in the Commonwealth of Pennsylvania, for any reason whatsoever, then the commission may acquire such real property by the exercise of the right of eminent domain, in the manner provided by the act, approved the eighth day of May, one thousand nine hundred and nineteen (Pamphlet Laws, one hundred forty-eight), entitled 'An act providing for the joint acquisition and maintenance by the Commonwealth of Pennsylvania and the State of New Jersey of certain toll bridges over the Delaware River," and the acts amendatory thereof and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River.
>
> * * * *
>
> "The power of the commission to acquire real property by condemnation or the exercise of the power of eminent domain

> in the Commonwealth of Pennsylvania and the State of New Jersey shall be a continuing power and no exercise thereof shall be deemed to exhaust it."

The above quoted paragraphs refer to the Act of May 8, 1919, P. L. 148 (36 PS Secs. 3271-3278), as providing the manner in which the right of eminent domain should be exercised. This act originally provided for the acquisition, either by purchase or condemnation, of toll bridges between the Commonwealth of Pennsylvania and the State of New Jersey by a joint commission. Section 4 describes in detail the procedure to be followed in the condemnation of such bridges, and provides that the acquisition shall be in the name of the Commonwealth of Pennsylvania and the State of New Jersey.

Therefore, under the act of 1919, the so-called joint commission was to acquire the property in Pennsylvania in the name of the Commonwealth, whereas, under the Delaware River Joint Toll Bridge Commission Act of 1931, the commission is authorized to acquire real property as a body corporate and politic. While the latter act refers to the act of 1919 in describing the "'manner" in which the Commonwealth should exercise its right of eminent domain, we are of the opinion that this reference is only to the procedure to be followed, and does not require the Delaware River Joint Toll Bridge Commission to take title to property acquired in Pennsylvania in the name of the Commonwealth. In the 1931 act, the legislature carefully indicated in articles II (j) and III that the commission had the power to take title to real estate in its own name. An analysis of the entire act of 1931 clearly reveals that this commission was to function as an entity separate and apart from the two state governments fostering it. Likewise the act of 1931 is the latest expression by the legislature on the question of toll bridges between the Commonwealth of Pennsylvania and the State of New Jersey, and in the event of ambiguity, this later expression would prevail. In incorporating the act of 1919 by reference to the "manner" of the "exercise" of the right of eminent domain, the act of 1931 would not include within its scope the nature of the title obtained as a result of such exercise of eminent domain.

We find as a precedent for this conclusion the procedure followed in the acquisition of the property for the bridge between Philadelphia and Camden. The Delaware River Joint Commission was created by the Act of June 12, 1931, P. L. 575 (36 PS Sec. 3503), and this commission now has control of the Philadelphia-Camden Bridge. We understand that title to the property on the Pennsylvania side of this bridge has been taken in the name of the Delaware River Joint Commission. The act creating that commission follows the same general plan as the act of 1931 creating the Delaware River Joint Toll Bridge Commission. Article IV provides that the commission has the

power to acquire real property, and article V similarly refers to another act of 1919, approved July 9, 1919, P. L. 814 (36 PS Secs. 3421-3431), for the manner in which its property in Pennsylvania may be acquired. Section 5 of this latter act of 1919 contemplates the acquisition of the land in Pennsylvania in the name of the Commonwealth.

Accordingly, we are of the opinion that the Delaware River Joint Toll Bridge Commission, created by the Act of June 25, 1931, P. L. 1352 (36 PS Sec. 3401), may take, in its own name as a body corporate and politic, title to property acquired in Pennsylvania, either by purchase or condemnation, to be later used in connection with the erection and construction of a toll bridge across the Delaware River between the Commonwealth of Pennsylvania and the State of New Jersey.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 202

Schools—Assistant county superintendent—Disqualification—Member of State Legislature.

The office of assistant county superintendent of schools is a "civil office under the Commonwealth" within the meaning of Article II, sec. 6 of the Constitution and section 15 of the Act of May 15, 1874, P. L. 186, making members of the State Legislature ineligible for appointment to any civil office of this Commonwealth during their term of office.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., August 27, 1936.

Honorable Lester K. Ade, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked for an opinion as to whether a member of the State Legislature may be appointed as an assistant county superintendent of schools.

This question is governed by Article II, section 6 of the Pennsylvania Constitution, and by section 15 of the Act of May 15, 1874, P. L. 186. Article II, section 6 provides:

> "No Senator or Representative shall, during the time for which he shall have been elected, be appointed to any civil office under this Commonwealth, * * *"

Section 15 of the Act of May 15, 1874, P. L. 186, provides:

> "No Senator or Representative shall, during the time for

> which he shall have been elected, be appointed to any civil office under this Commonwealth; and no member of congress or other person holding any office, except of attorney-at-law or in the militia, under the United States or this Commonwealth, shall be a member of either house during his continuance in office. They shall receive no other compensation, fees or perquisites of office for their services from any source, nor hold any other office of profit under the United States, this state or any other state."

Obviously, the determination of this question depends upon whether or not the position of assistant county superintendent of schools is the type of office which the framers of the Constitution and the legislature intended to cover by the use of the term "civil office under this Commonwealth."

The nature of the position of an assistant county superintendent of schools is fully discussed in the case of *Foyle* v. *Commonwealth,* 101 Pa. Super. Ct. 412 (1930). In that case, the question presented was whether or not an assistant county superintendent of schools was an employe of the Commonwealth within the provisions of the Workmen's Compensation Act of 1915. The court held at page 422:

> "* * * The status of an assistant county superintendent of schools does not result from a contract of hiring between him and the Commonwealth, or between him and the county, as that phrase is commonly understood. His office is created by the legislature, his minimum salary is fixed by law, he takes and subscribes to an oath, receives a commission, and cannot be removed in any method other than that provided by statute. His duties are prescribed by statute and involve judgment, intelligence, discretion and technical knowledge, and are of such consequence to the public as to place him in a position of such dignity and responsibility that he must be considered a *public officer* as distinguished from an employee. * * * (Italics ours)

It is true that the opinion quoted above refers to "public office" while the constitutional provision and the statute with which we are now concerned speak of "civil office"; but the controlling word is "office", and we need not be concerned with the difference between the respective modifying adjectives, for they are approximately synonomous. They are often used interchangeably and we feel that the doctrine of the above case is controlling in the present situation. A civil office is merely that type of public office which has no military attributes.

The question now remains as to whether an assistant county superintendent of schools holds an office "under this Commonwealth." The scope of these words has been restricted somewhat by the recent decision of *Commonwealth ex rel. Woodruff v. Joyce,* 291 Pa. 82, 84

(1927). In that case the question arose as to the compatibility of the offices of state senator and poor director. The court held:

> "The interdiction of the statute is not against holding any office, or any public office, or any office of profit, but against being appointed to any civil office under this Commonwealth or holding any other office of profit under this State. The legislature, therefore, confined to State offices the offices which might not be held; had it desired to exclude the holding of any other office it would have been easy to say so, or had it wished to include municipal offices within the ban that term could have been used. The office in question is a purely municipal one: * * *"

However, a consideration of the various attributes of the position of assistant county superintendent of schools leads us to the conclusion that it is not a purely municipal or local office. The mere fact that the functions of an assistant county superintendent of schools are confined to a single county is not at all controlling. The authority of a common pleas judge is ordinarily similarly confined, yet the court stated in *Commonwealth ex rel. Woodruff* v. *Joyce,* supra, "We think no one could gainsay that judges are state offices in Pennsylvania."

Section 1127 of the School Code of 1911, P. L. 309, provides that the assistant county superintendent may be appointed by the Superintendent of Public Instruction in certain situations. This section also provides that he shall be commissioned by the Superintendent of Public Instruction.

Section 1130, as last amended by the Act of May 27, 1919, P. L. 300, provides that his salary shall be paid out of the state appropriation for public schools, and that his travelling expenses shall be paid by the Auditor General, upon the requisition of the Superintendent of Public Instruction..

Section 1131 provides, in part, that an assistant county superintendent shall, when directed by the Superintendent of Public Instruction, conduct examinations for promotion or graduation.

Section 1129 provides that an assistant county superintendent may be removed from office by the Superintendent of Public Instruction upon the written recommendation of the proper county authorities. assistant county superintendent of schools holds an office "under

We feel that these statutory provisions clearly indicate that an this Commonwealth."

You are advised, therefore, that a member of the legislature is prohibited, by Article II, section 6 of the Pennsylvania Constitution and

by section 15 of the Act of May 15, 1874, P. L. 186, from being appointed as an assistant county superintendent of schools.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 203

Corporations—Formation—Purpose—Practice of Chiropody—Business Corporation Law of 1933, sec. 201.

1. A corporation may be formed under the Business Corporation Law of May 15, 1933, P. L. 364, sec. 201, only for the purpose of conducting a lawful business, rather than for any lawful purpose.

2. A corporation may not be formed for the purpose of practicing any branch of medicine, including chiropody.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., August 27, 1936.

Honorable David L. Lawrence, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your letter of July 24, 1936, inquiring whether a certificate of incorporation should be granted to a proposed corporation that wishes to engage in the practice of chiropody.

The Century Dictionary Encyclopedia defines chiropody as "The art of treating diseases, callosities or excrescences of the hands and feet."

In case of *Commonwealth* v. *Howard C. Long,* 100 Pa. Super. Ct. 150, the court at age 152 stated:

> "* * * 'The practice of medicine' includes all practice of the healing art with or without drugs."

It can readily be seen that the practice of chiropody comes within this definition. Therefore, those wishing to engage in such practice are required under section 6 of the Act of June 3, 1911, P. L. 639, as amended by section 5 of the Act of July 25, 1913, P. L. 1220, to undergo instruction in approved schools, be examined and be licensed by the State Board of Medical Education and Licensure.

The inquiry devolves into the question of whether or not a corporation can engage in the general or limited practice of medicine.

That part of The Business Corporation Code of May 5, 1933, P. L. 364, pertinent to the instant question provides:

Article II, Section 201:

> "Three or more natural persons of full age and either sex, married or single, at least two-thirds of whom are citizens of the United States or of its territories or possessions, may form a business corporation, under the provisions of this act, for any lawful purpose or purposes. (1933, May 5, P. L. 364, art. II, sec. 201.)"

In a formal opinion rendered by this Department to the Honorable Cyrus E. Woods, Secretary of the Commonwealth, on February 3, 1921, and reported in 30 District Reports 778, it was held that lawful purpose was synonymous with business, and that an application for incorporation stating, as one of its purposes, the practice of medicine, should not be approved.

The opinion quoting the case of *In re Co-operative Law Company*, 198 N. Y. 479, used the following language, on page 779:

> "* * * I agree with the opinion expressed by the Court of Appeals of New York, which said in a similar case that the words 'any lawful business' mean 'a business lawful to all who wish to engage in it * * * The Legislature, in authorizing the formation of corporations to carry on "any lawful business", did not intend to include the work of the learned professions. Such an innovation, with the evil results that might follow, would require the use of specific language clearly indicating the intention:' In re Co-operative Law. Co., 198 N. Y. 479, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879, 92 N. E. Repr. 15."

On page 780 we find the following language:

> "The case cited dealt with a corporation organized for the purpose of practicing law. The reasons for this view, which are set forth at length in the opinion quoted from, are: (1) A corporation, by reason of the fact that it is an artificial person, cannot possess professional knowledge and skill and cannot be examined, registered and qualified, as is required by the laws regulating the practice of law; and (2) the relation between lawyer and client is based upon a contract, for the breach of which the client has his action for damages. If he make his contract with a corporation, which, perchance, is irresponsible, there being no privity of contract with the lawyer who rendered the service, the client may be left without redress for his damage. By this device the lawyer might readily escape the liability which the law has placed upon him.

Hence, since the practice of chiropody is in effect the practice of a branch of medicine, we feel that the instant case is ruled by the above cited decisions, to which we subscribe.

We are of the opinion, and you are therefore advised, that a certificate of incorporation should not be granted to a proposed corporation for the purpose of engaging in the practice of chiropody.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 204

Quo warranto—Petition for writ—Duties of Attorney General—Presentation of substantial question—Street railway companies—Forfeiture of charters—Lease of all properties—Fraud—Reorganization of lessor in Federal courts—Jurisdiction of State over franchises of lessees.

1. In passing upon a petition for a writ of quo warranto it is the duty of the Attorney General to determine whether the petition presents a substantial question and one of sufficient public interest to justify submission to a court of law for consideration and ultimate disposition.

2. There is sufficiently reasonable ground for the conclusion that nonoperating Philadelphia Rapid Transit Company underliers have used a system of so-called leases of their properties as a "cloak for manipulation and fraud", rather than an exercise of their franchises, to warrant the grant of a petition for a writ of quo warranto to determine whether or not their franchises have been forfeited.

3. The fact that a transit company is being reorganized by the Federal courts does not prevent the State which granted certain of its underliers franchises from bringing action to determine whether or not the franchises have been forfeited.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., August 27, 1936.

IN THE MATTER OF THE PETITION OF MATTHEW H. McCLOSKEY, JR., FOR A WRIT OF QUO WARRANTO AGAINST THE UNION TRACTION COMPANY OF PHILADELPHIA AND THE FORTY-TWO OTHER UNDERLIERS OF THE PHILADELPHIA RAPID TRANSIT COMPANY.

This matter comes before us on the petition of Matthew H. McCloskey, Jr., praying that a suggestion for a writ of quo warranto be filed against forty-three railway and traction companies known as the underliers of the Philadelphia Rapid Transit Company. Answers admitting the material allegations to said petition were filed by or on behalf of all the companies named in the petition. Briefs were filed, and oral arguments later presented on behalf of the respective parties.

The ultimate question involved herein is whether these underlier corporations have failed to exercise or have abused the franchises conferred upon them by the legislature, and whether they have therefore forfeited these franchises.

The petition alleges that the named corporations exist merely for

the purpose of collecting and disbursing as dividends rents upon leases of their franchises and properties.

These corporations rely mainly upon the Acts of 1887 and 1895 as authority for the leases herein involved. The Act of Assembly approved March 22, 1887 (1887 P. L. 8) entitled "An Act to provide for the incorporation and regulation of motor power companies for operating passenger railways by cables, electrical or other means," provides that such corporations shall have the power

> "To lease the property and franchises of passenger railway companies, which they may desire to operate, and to operate said railways."

The Act of Assembly approved May 15, 1895 (1895 P. L. 64) entitled "An Act Authorizing traction or motor power companies to enter into contract with each other for the sale, lease and operation of their respective property and franchises," provides as follows:

> "That any traction or motor power company heretofore or hereafter incorporated under the laws of this Commonwealth is hereby authorized to sell or to lease, or to lease and to sell its property and franchises, as well as those owned as those leased, operated or controlled by it, including so much of any line or lines of passenger railways owned, leased or controlled by it as is located upon street or streets, to any other traction or motor power company incorporated under the laws of this Commonwealth, upon such terms as may be agreed upon. Such traction or motor power company may also enter into contracts with other traction or motor power companies incorporated under the laws of this Commonwealth for the operation of lines of railway and property owned, leased, operated or controlled by it: Provided, That nothing herein contained shall be construed as authorizing any traction or motor power company to acquire, lease or operate so much of the line of any other motor power company as occupies any township, borough or county road."

The petitioner claims that the agreements and leases, by virtue of which the Philadelphia Rapid Transit Company exercises the franchises of the underliers, were not in accordance with the spirit and intent of the acts cited; that they were mere devices for pyramiding of capital, schemes for earning an unfair return and curtains behind which could be hidden a conspiracy to defraud the investing public and the car riders of Philadelphia.

If the leases were executed as, or later became, instruments for the perpetration of frauds and abuses, the privileges and powers conferred by the legislature upon these corporations have been forfeited.

In passing upon the question herein presented, it is the duty of the Attorney General to determine whether the petition presents a substantial question, and one of sufficient public interest to justify sub-

mission to a court of law for consideration and ultimate disposition.

In Welch's Petition, 18 D. & C. 2327, it was stated that in proceedings of the present nature, the Attorney General of the Commonwealth has:

> "* * * simply to determine whether there is a substantial question affecting the public interest, which would warrant submission of the issue to a court of proper jurisdiction."

In the matter of the Application to the Attorney General for a Writ of Quo Warranto against the Grant and Liberty Street Railway Co., Official Opinions of the Attorney General of Pennsylvania, 1905-6, 358, the sole inquiry made by the then Attorney General was whether "these matters are proper subjects for a judicial inquiry."

After a careful examination of the pleadings, the exhibits and the briefs presented, we are convinced that the petitioner has presented such a case, and that the questions herein involved are of such moment to the public, as to warrant further proceedings before a court of law.

The leases involved are all for the term of 999 years. Improvements apparently are the property of the lessor corporation, which becomes indebted to the lessee for the amount of the improvements; however, this indebtedness is placed into a "stated account," which is not to be settled until the termination of the lease, and upon which no interest is payable during the entire term of 999 years.

The leasing companies do not keep depreciation or obsolescence accounts, and do not provide adequate reserve for sinking fund requirements; nor do they provide for the retirement of obligations without sinking fund provisions. The effect of this method of bookkeeping is obvious, and must have been obvious to the directorates of the respective corporations. In a word, the bookkeeping systems permitted the companies to liquidate themselves and yet to continue charging the car-riding public for property which had long since been fully paid.

The lessee corporations pay the salaries, the counsel fees, etc., of the lessor corporations; and, by virtue of interlocking directorates, it is apparently impossible for one leasing party ever to occupy a position genuinely antagonistic to the other, notwithstanding adverse interests.

The rentals set forth in the leases are expressed as dividends on the stocks of the lessor corporations, and are set up as fixed charges against the property of the lessee. Although some of the lessor corporations were earning high dividends at the time the leases were created, other leases were created at a time when the lessors were unable to earn any dividends, and yet payments on the stocks of these latter companies were also set up as fixed charges, in some instances even preferred to funded indebtedness.

The petitioner claims further, and the exhibits indicate, that vast mileage of abandoned tracks and thousands of pieces of unused rolling stock are carried upon the books as property and equipment merely for rate-making purposes. Asset accounts include nonexistent property for which the taxpayer and the car rider continue to pay.

The securities issued by many of the defendant corporations are based upon values which indicate inflation. The petitioner has reasonable basis for his claim that both in the exchange of securities and in the issuance thereof, the many leasing parties intended the manipulation of stock values and imposition upon the public, rather than the execution of bona fide leases.

There is reasonable ground for the conclusion that the so-called leases were executed or performed merely as a cloak for manipulation and fraud. These underlier corporations should be stripped of the franchises which they have misused to the detriment of the public, and in some instances failed to use at all for the public purpose of their incorporation. Innocent investors in underlier securities have a complete legal remedy in the courts.

The public duty owed by railway and traction companies is uppermost in my mind, in this decision that the courts should have an opportunity to act upon the present controversy. The first obligation of public service companies is to the public. The petitioner claims, and the facts reasonably warrant this claim, that only by completely ousting these corporations from their franchises can the public be at all benefited under the present state of circumstances.

This matter is of vital importance to the taxpayers of Philadelphia, to the car riders who use the facilities of the Philadelphia Rapid Transit Company, and to the thousands of stockholders and other investors in its securities.

Many benefits would accrue from any decree of ouster which may be awarded by the courts in the present case. The first will be the distribution of the earnings of the Philadelphia Rapid Transit Company among the thousands of poor, laboring, amateur investors in that company, rather than among the banking interests who control the stock of many of the underlier corporations and who are responsible for the present situation.

Another benefit flows from the first; that is, by restoring the earnings of the Philadelphia Rapid Transit Company to that corporation, its directors acquire the opportunity to exercise their discretion in applying such funds toward sorely needed improvements in service and toward a reduction of trolley fares. With improved service and reduced rates, earnings will be still further increased, eventually permitting a greater return to the thousands of the citizens of Philadelphia and to the thousands of employes of the Philadelphia Rapid

Transit Company who, in good faith, invested their funds in the stock of that company.

Still another of the important benefits resulting from such action will be to free the Philadelphia Rapid Transit Company from underlier pressure and influence. It is a matter of common knowledge that the necessity of nourishing the underlier parasites has dominated policies of the transit company and has been the largest single influence in making of contracts and leases burdensome to the City of Philadelphia. Restoration of earnings to the Philadelphia Rapid Transit Company and freedom from underliers domination will make it possible for the directors of the Philadelphia Rapid Transit Company to enter into leases with the City of Philadelphia which can effect an ultimate saving of twenty-six cents on the tax rate of that city.

The argument advanced by the respondent corporations, that due to pending reorganization proceedings the Federal courts now have sole jurisdiction over this subject matter, is entirely fallacious. The franchises here involved emanate exclusively from the sovereignty of the State, and are completely without the jurisdiction of any other governmental agency. The further argument advanced by the respondents, to the effect that the doctrine of laches may here be invoked against the Commonwealth, is of no avail because there are substantial grounds for the claims that the Commonwealth had no knowledge of the circumstances forming the basis of the acts herein until the time of filing the petition.

I am convinced that the petition has presented a substantial question of grave public moment, proper for judicial determination.

The prayer of the petition is therefore granted.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 205

Alcoholic beverages—Retail liquor license—Place of amusement—Restaurant on same premises—Means of communication—Incidental entertainment—Act of July 9, 1881, sec. 1.

1. The Act of July 9, 1881, P. L. 162, sec. 1, prohibits the granting of a retail liquor license for an establishment whose principal business consists of providing amusement to the public.

2. A retail liquor license may properly be granted to a restaurant upon the same premises as a place of amusement if, and only if, there is no passage or

means of communication between the two establishments and they are entirely independent of each other.

3. A retail liquor license may properly be granted to a bona fide restaurant whose principal business consists of providing food to the public, even though an amusement may be maintained incidentally therewith.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., August 28, 1936.

The Pennsylvania Liquor Control Board, Claster Building, Harrisburg, Pennsylvania.

Sirs: I have your request for advice as to the propriety of issuing a restaurant license to an individual who operates the restaurant part of an establishment engaged principally in providing amusement to the public. You state that the particular establishment involved is of a very high type, doing business as a pool and billiard parlor, as well as a bowling alley and catering to the best class of people who are interested in these activities. That the applicant for a liquor license is a lessee who rents the restaurant part of the establishment from operators of the recreation parlor.

The Act of July 9, 1881, P. L. 162, Section 1, provides as follows:

> "That no license for the sale of vinous, spirituous, malt or brewed liquors, or any admixture thereof, in any quantity, shall be granted to the proprietors, lessees, keepers or managers of any theatres, circus, museum or other place of amusement, nor shall any house be licensed for the sale of such liquors or any of them, or any admixtures thereof, which has passage or communication to or with any theatre, circus, museum or other place of amusement; and any license granted contrary to this act shall be null and void."

This act prohibits the granting of a liquor license to any person operating any establishment whose principal business consists in providing amusements.

The effect of this act, and its construction, was recently passed upon in *Shibe's Case,* 117 Pa. Super. Ct. 7 (1935), in which it was held that the Act of 1881 was not repealed by the Liquor Control Act of 1933 and is still in force.

The court, in concluding that the act prohibits the issuance of liquor licenses to places of amusement, states at page 14:

> "To hold otherwise would open the door to the granting of licenses to every theater, moving picture show, skating rink, stadium, baseball park, and other place of amusement, which undertook to operate a so-called 'eating place' in connection therewith. * * *"

Inasmuch as the business of providing amusement is the principal business conducted on the premises referred to in your inquiry, it is

necessary to ascertain whether or not there is any communication or connection between the place of amusement and the establishment for which the license is applied for. In other words, a place of amusement and a bona fide "eating place" could be maintained upon the same premises, as long as there was no passageway or means of communication between the two places. If such passage or communication does exist, then under the act of 1881 no liquor license can be granted. The place of amusement and the eating place must be separate, distinct and entirely unrelated in any manner whatsoever.

Under the Liquor Control Act of 1933, restaurant licenses may be granted only to reputable bona fide "eating places" where food is regularly and customarily prepared and sold. This requires that the business of supplying food must be the principal business of the applicant. If his principal business consists of providing amusement, then he is not entitled to a license. A reputable "eating place" may provide amusement for its patrons and in so doing would not lose its rights to a license. This is obvious from the provisions of the Liquor Control Act of 1933 which provide for amusement permits. However, as before stated, the amusement must be incidental and not the principal business of the lessee.

To summarize, you are advised that an establishment, whose principal business consists of providing amusement to the public, is not entitled to a retail liquor license; that such license may not be granted to a restaurant or "eating place" upon the same premises, where such amusement is conducted, where there is a passage or communication between the place of amusement and the "eating place"; and that a restaurant may be entitled to receive a license even though a place of amusement is maintained upon the same premises, provided that there is no passage or communication between the two establishments, and that the same are entirely independent of each other. Retail licenses may be granted to bona fide "eating places" whose principal business consists in supplying food to the public even though an amusement may be maintained incidentally therewith.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 206

Trusts—Investment of trust funds—Tax anticipation notes.

Tax anticipation notes issued under the Act of August 6, 1936, P. L....., are interest-bearing obligations of the Commonwealth of Pennsylvania and as such are a legal investment for trust funds under the Act of July 2, 1935, P. L. 545.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., September 4, 1936.

Honorable Luther A. Harr, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning whether tax anticipation notes of the Commonwealth of Pennsylvania, $45,000,000 Series BT, are legal investments for trust funds in this Commonwealth.

The tax anticipation notes were authorized by Act No. 36 of the Extraordinary Session of the Legislature of 1936, approved August 6, 1936. Section 1 of the act authorizes the Governor, the Auditor General, and the State Treasurer, on behalf of the Commonwealth of Pennsylvania, to borrow on the credit of the current revenues of the Commonwealth $45,000,000. Section 2 (a) provides that "Such loans shall be evidenced by notes of the Commonwealth of Pennsylvania," which are declared to be tax anticipation notes, and which are to be issued subject to rates of interest not exceeding 4-1/5%. Section 2 (c) pledges the current revenues of the biennial fiscal period ending May 31, 1937, for the payment of interest and principal of these notes. The act provides further in section 4 that such loans shall first be paid out of new revenue raised by laws enacted at the special Session of the Legislature of 1936. That the notes are also secured by the current revenues of every kind accruing to the General Fund, except those required for the payment of the previous series of tax anticipation notes issued under the authority of the Act of June 22, 1935, P. L. 442.

The constitutionality of the issuance of tax anticipation notes was upheld by the Supreme Court of Pennsylvania in the case of *Kelly* v. *Baldwin,* et al., 319 Pa. 53 (1935).

On November 7, 1933, Article III, Section 22 of the Pennsylvania Constitution, relating to investments for trust funds, was 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."

Pursuant to this constitutional direction, the General Assembly enacted a comprehensive schedule of legal investments for fiduciaries in the Act of July 2, 1935, P. L. 545, which amended Section 41 (a) (1) of the Fiduciaries Act of June 7, 1917, P. L. 447, as amended. The 1935 amendment provides, in part, as follows:

> "Subject to the conditions herein contained a fiduciary holding moneys to be invested may invest such moneys in:
>
> * * * *
>
> "Subsection (2) Pennsylvania Obligations.—Bonds, or other

interest-bearing obligations of the Commonwealth of Pennsylvania, or those for the payment of the principal and interest on which the faith and credit of the Commonwealth is pledged."

Although the loans in question are payable out of revenues of a specific fiscal period, the notes are neverthless "interest-bearing obligations of the Commonwealth of Pennsylvania". The loans are evidenced by notes of the Commonwealth which are signed by the Governor, the Auditor General, and the State Treasurer, containing a facsimile of the great seal of the Commonwealth, and are secured by current revenues which are specifically appropriated for the payment of the principal and interest thereof. Moreover, the act specifically permits the payment of interest not exceeding 4-1/2% per annum.

Accordingly, you are advised that tax anticipation notes of the Commonwealth of Pennsylvania, $45,000,000 Series BT, are legal investments for trust funds in this Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 207

Schools—Physical education program—Authority of board—Lease of athletic fields —Purchase of athletic equipment—Transportation from schools to fields.

1. A school board has authority, under sections 401 and 602 of the School Code of 1911, as amended, to lease suitable athletic fields and rooms to meet the requirements of a proper program of physical education and training.

2. A school board has authority, under section 701 of the School Code of 1911, to purchase such athletic equipment as may be required by students participating in a proper program of physical education and training.

3. A school board may properly furnish to students transportation between its schools and athletic fields and rooms when suitable fields and rooms can be procured only at locations necessitating such transportation.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., September 4, 1936.

Honorable Lester K. Ade, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to the authority of a school board to make certain expenditures in connection with the inauguration of a proper physical education and health program. You state that the proposed program is to be established and administered as

an integral part of the general physical education and health program and is to be under the joint supervision of the Director of Physical Education and Health, the principals of the high schools, and the superintendent of schools.

You ask whether the school board would have authority to act as follows in facilitating the establishment and maintenance of such a program:

(a) Lease athletic fields and rooms suitable for carrying on the proposed program;

(b) Purchase the athletic supplies necessary to make the operation of the proposed program as advantageous as possible;

(c) Pay for the transportation of the participating students between the schools and the athletic fields and rooms.

Considering first the authority of the school board to lease athletic fields and rooms, we find that section 401 of the School Code of 1911, P. L. 309, as last amended 1931, P. L. 243, section 8, (24 PS 331) provides in part as follows:

"The board of school directors in every school district in this Commonwealth * * * may establish, equip, furnish, and maintain the following additional schools or departments for the education and recreation of persons residing in said district * * * which said additional schools or departments, when established, shall be an integral part of the public school system in such school district, and shall be so administered, namely: * * *

"Gymnasium

"Play-grounds * * *"

Section 602 of the School Code of 1911 as last amended 1925, P. L. 248, section 1 (24 PS 672) provides in part as follows:

"In order to comply with the provisions of this act and subject to the conditions thereof the board of school directors of each district is hereby vested with the necessary power and authority to acquire in the name of the district by purchase, lease, gift, devise, agreement, condemnation or otherwise, any and all such real estate * * * as the board of school directors may deem necessary to furnish suitable sites for school buildings or play-grounds for said district * * *."

We feel that a school board is clearly authorized by the above provisions to lease suitable athletic fields and rooms to meet the requirements of a proper program of physical education and training.

You next ask whether the school board has authority to purchase such athletic supplies as may be necessary for the administration of the proposed program. Section 701 of the School Code of 1911 (24 PS 821) provides:

> "The boards of school directors of each school district in this Commonwealth shall purchase all necessary furniture, equipment, text-books, school supplies, and other appliances for use of the public schools, or any department thereof, in their respective districts, and furnish the same free of cost for use in the schools in said districts, subject to such rules and regulations regarding the use and safe-keeping thereof as the boards of school directors may adopt. * * *"

This provision clearly authorizes the school board to purchase the athletic equipment which will be required by the students participating in the proposed program.

Your third question concerns the authority of the school board to pay for the transportation of students back and forth between the schools and the playing fields and rooms. Apparently, the playing fields and rooms will be located at such distances from the schools that it will become necessary to furnish transportation to the students if they are to obtain any real advantage from the use of those fields and rooms in the time available.

Although there is no statutory provision with reference to this particular subject, it is a matter of common knowledge that a program of physical education and training is a proper part of a school curriculum and accordingly the school directors have the right to provide adequate playing fields and rooms for such a program. If the only available facilities which are reasonable in respect to cost and suitability are so located that it will be necessary to transport the pupils to and from them in order that they may be efficiently utilized, it is entirely proper for the school directors to furnish the necessary transportation. In such a situation the necessary transportation might well be considered as an integral part of the athletic facilities, and the school directors would be acting within the scope of their authority in providing for it.

Section 119 of the School Code of 1911 provides as follows: (24 PS 30)

> "The several school districts in this Commonwealth established by this act shall be and hereby are vested as bodies corporate with all necessary powers to enable them to carry out the provisions of this act."

You are advised therefore that a school board has authority to lease the playing fields and rooms which may be required in inaugurating a proper program of physical education, and that it may purchase the athletic equipment needed by the students participating in such program. A school board is also authorized to furnish transportation to students between the schools and the playing fields and rooms, when

suitable fields and rooms can be procured only at locations necessitating such transportation.

Very truly yours,

DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION No. 208

State Government—Control of State Police—Local disturbance—Request for help from sheriff—Sending State Police or National Guard to vicinity—Control of policy—Governor—Sheriffs.

1. Throughout the Commonwealth the Governor is the highest military as well as civil authority to safeguard life and property and preserve law and order, all other police officers, including sheriffs, being subordinate to him.

2. When the Governor, in answer to a request for assistance from a sheriff who feels that a local disturbance has reached a point which is beyond his control, or acting upon his own initiative, sends the National Guard or State Police, or both, to the locality, he, through his agents in the National Guard or State Police, assumes control of the situation, and the sheriff must obey his orders.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., September 11, 1936.

Honorable Lynn G. Adams, Superintendent of State Police, Harrisburg, Pennsylvania.

Sir: We have your request to be advised upon the following two questions:

> "On many occasions and also during labor disturbances, sheriffs of counties have called upon the State Police for assistance, indicating the situation was beyond control, and with the approval of the Governor, such assistance was furnished. Under such circumstances, shall the State Police act under the instructions of the sheriff or shall the State Police act under instructions of their superior officer carrying out the policy of the Governor, assuming that the known policy of the Governor does not coincide with the known policy of the sheriff?
>
> "Should the State Police, on arrival at the scene of the disorder, learn that the measures taken by the sheriff did not adequately cover the situation as regards the preservation of law and order, or in the opinion of the State Police officer in charge, were too harsh or burdensome, are the State Police authorized to act independent of such sheriff?"

In order to answer your questions it is necessary to ascertain the powers and rights of both the Governor of the Commonwealth and

the sheriff of the individual county where the disturbance is located.

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 constituted 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."

Under Section 701 (a) of The Administrative Code, one of the duties of the Governor is defined:

> "To take care that the laws of the Commonwealth shall be faithfully executed;"

Throughout the Commonwealth the Governor is the highest civil as well as military authority to safeguard life and property and preserve law and order. All other police officers, including sheriffs of the several counties, wherever located, are subordinate to him.

As to the power of the sheriff, we must remember that at common law the sheriff was under the crown. However, 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; the Governor over the entire Commonwealth; the sheriff in the particular locality over which he has jurisdiction, subject, however, to the authority of the supreme executive power which is vested in the Governor.

The sheriff is the chief peace officer of an individual county, and it is his duty to preserve order and see that the laws are faithfully executed. However, when a disturbance reaches the point that the sheriff believes it is beyond his control, it is his right to call upon the Governor for assistance. This assistance the Governor may give by sending into the locality the National Guard, the State Police, or both, who will act as his agents in the preservation of law and order. When the sheriff calls upon the Governor for assistance, and admits the situation is beyond his control, he is thereby asking the chief executive of the Commonwealth to take charge of the situation, and by so doing he steps aside and is subservient to the acts and orders of the chief executive, acting through his agents, the National Guard or State Police, or both. However, in such case it is the sheriff's duty to cooperate in the preservation of law and order.

Under Section 710 of The Administrative Code of 1929, P. L. 177, the powers of the State Police are defined as follows:

> "The Pennsylvania State Police shall have the power, and its duty shall be:
>
> * * * * * * *

"(b) To assist the Governor in the administration and enforcement of the laws of the Commonwealth, in such manner, at such times, and in such places, as the Governor may from time to time request;"

It is clear from the above quotation that the Governor may send the State Police into any locality where law and order is not being preserved; and, that when he does so, the State Police are acting for the Governor and at his direction.

Since the duty to preserve law and order in the county is primarily vested in the sheriff, the policy of the Governor should be that the State Police should not interfere with the said authority, unless their assistance is specifically requested. Where a disturbance occurs in any county and the sheriff desires that the State Police be sent there, the Governor should require that the sheriff of the particular county make the request for aid, which request should clearly specify that the situation is beyond his control and that the sheriff specifically asks the Governor to take charge of the situation by sending in the State Police, the National Guard, or both.

Therefore, in response to your first inquiry, you are advised that when the sheriff of a particular county calls upon the State Police for assistance in preserving law and order, such request should be addressed to the Governor, and that the State Police should act under the instructions of their superior officer who is carrying out the policy of the Governor.

In answer to your second question: if the State Police, upon their arrival at the scene of disorder, learn that the measures taken by the sheriff to preserve law and order are not adequate, or that such measures are too harsh or burdensome, or that law and order can be better preserved by other means, it is the duty of the State Police to formulate and carry out their own orders as to how the situation must be handled, and in so doing they may act independently of the sheriff. It may be that, upon arrival of the State Police at the secne of the disorder, they find the sheriff has issued a proclamation defining the activities of persons in and about the scene of the disorder, or had issued orders as to the manner in which peace officers and others must conduct themselves. The sheriff, by proclamation, can in no way limit the superior authority of the Governor; and his agents, the State Police, are not bound thereby, but may perform their duty in such manner and make regulations for the conduct and activities of persons in and about the secne of disorder as they, in their discretion, deem proper.

It has not been the policy of the Commonwealth to interfere with local authorities in enforcement of the laws and the handling of local officers, unless assistance is asked in the manner above out-

lined. However, the Governor, as the chief executive officer and the highest civil and military authority within the Commonwealth, may at any time that he believes the enforcement of the law and the preservation of peace and order is being handled inadequately, or that the interests of the public demand it, supersede the local sheriff, and send in the State Police to take charge of the situation. In such cases, the local officers and authorities are likewise subservient to him and his orders and his representatives, and the State Police are not bound by any proclamation or other order than the sheriff may issue.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

OPINION No. 209

Mines and mining—Anthracite coal mine inspectors—Qualifications—Practical experience—Act of May 17, 1921, sec. 3—Legislative intent—Strict construction.

1. In order to obtain the five years' practical experience as a "coal miner" required by mine inspectors by section 3 of the Act of May 17, 1921, P. L. 831, the applicant must have been engaged in the actual work of cutting or blasting coal or rock at the face of a gangway, airway, breast, pillar or other working place for at least five years, but it is immaterial whether he was termed a coal miner or given some other designation such as safety inspector, foreman or assistant foreman.

2. The Act of May 17, 1921, P. L. 831, prescribing the qualifications of mine inspectors, was intended to guarantee to the anthracite coal industry men with sufficient knowledge and experience to protect the workers in the mine and the owners themselves, to the end that the mines would be operated so as to protect human life and property, and must be strictly construed to achieve its purpose.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., September 23, 1936.

Honorable Michael J. Hartneady, Secretary of Mines, Harrisburg, Pennsylvania.

Sir: We have your request for an interpretation of Section 3 of the Act of May 17, 1921, P. L. 831, which provides that applicants for the position of mine inspector shall have had "at least ten years' practical experience in the anthracite mines of this Commonwealth, five years of which shall be as coal miners in the anthracite mines of this Commonwealth."

You specifically request us to define the term "coal miner", as used in the act, and inquire if it is necessary for an applicant to

have engaged in the actual work of cutting or blasting coal or rock at the face of a gangway, airway, breast, pillar, or other working place, in order to qualify as having five year's experience as a "coal miner."

The act, while specifying the qualifications of mine inspectors, does not define the term "coal miner", as used therein.

Prior to the enactment of the above act, the qualifications of mine inspectors were set forth by Section 6 of Article II of the Act of June 2, 1891, P. L. 176, which provided, inter alia, as follows:

> "* * * and he must produce satisfactory evidence to the Board of Examiners of having had at least five (5) years' practical experience in anthracite coal mines of Pennsylvania.* * *"

The act of 1891 was amended by the Act of June 1, 1915, P. L. 712 to include a definition of the word "miner." That definition appears in Article XVIII, as amended, and reads as follows:

> "The term 'miner' means the person who cuts or blasts coal or rock at the face of a gangway, airway, breast, pillar, or other working-place; also any person engaged at general work in a mine, and qualified to do the work of a miner."

The same article defines the term "mine" as follows:

> "The term 'mine' includes all under-ground workings and excavations and shafts, tunnels and other ways and openings; also all such shafts, slopes, tunnels, and other openings in course of being sunk or driven, together with all roads, appliances, machinery, and material connected with the same below the surface."

The above definition provides that a miner is one who actually cuts or blasts coal from its beds, or one who, although not actually engaged in digging the coal, is qualified to do so and is engaged in general work in a mine.

Section 5 of the Act of July 15, 1897, P. L. 287, provides that a miner shall have the following qualifications:

> "All persons applying for a certificate of competency, or to entitle them to be employed as miners, must produce satisfactory evidence of having had not less than two years' practical experience as a miner, or as a mine laborer in the mines of this Commonwealth * * *."

Accordingly, if a person qualifies as a miner under the provisions of the act of 1897, he falls within the definition of a miner contained in the act of 1915, so long as he is engaged in general work in a mine.

In a formal opinion of this department, dated October 24, 1895, 17 Pa. C. C. 99, it was held that any person who works in an underground working, excavation, shaft, tunnel, other way and opening, etc., is a miner within the meaning of the act of 1891. (*See Matthews v. Roderick*, 18 Dau. 56 [1915]).

At the outset, it is to be noted that the act of 1921, concerning which you inquire, prescribed additional qualifications for applicants for the position of mine inspector, particularly with reference to the number of years' experience required, and added the qualification that applicants must have at least five years' experience as "coal miners."

Your inquiry raises the further question whether a person who is qualified to do the work of a miner, as evidenced by the fact that he is the holder of a certificate of competency issued in accordance with the provisions of the act of 1897, may fulfill the requirements of the act of 1921 by working in and about a mine, although he is not engaged in the actual work of cutting or blasting coal or rock at the face of the gangway, airway, breast, pillar, or other working place.

Obviously, the phrase "at least ten years' practical experience in the anthracite mines of this Commonwealth" does not comprehend "five years of which shall be as coal miners;" otherwise, the latter qualification would have been redundant and unnecessary. Inasmuch as it is presumed that the legislature intends every provision of a statute to be effective, it is clear that ten years' experience in the anthracite coal mines of the Commonwealth is not sufficient for qualification as a mine inspector, unless the applicant was engaged as a "coal miner" during at least five of those ten years.

An ambiguous statute should be construed in a manner which will best effect the legislative intent. It is clear that, by the act of 1921, the legislature intended to provide that mine inspectors shall be thoroughly competent, and that individuals undertaking the responsibilities of mine inspectors shall be acquainted, by actual experience, with the very purpose for which mines are operated, — the cutting or blasting of coal from their veins in a safe manner. The intention of the legislature was to require of mine inspectors such qualifications as to guarantee to the anthracite coal industry men with sufficient knowledge and experience to protect the workers in the mines, and the owners themselves, to the end that the mines would be operated in a manner best calculated to preserve human life and property. The protection of the lives and health of the miners is paramount. The legislative intent must be construed in such a way as will most fully protect them.

It has been suggested that, inasmuch as the legislature has seen fit

to define the term "miner" in the act of 1915, we should accept that definition and conclude that any person who meets the requirements of that act is a "coal miner" for all purposes. We cannot agree with this proposition. If that had been the legislative intent, the legislature certainly would not have specified that five of the ten years' practical experience required of a mine inspector must be acquired by working as a coal miner in the anthracite mines of this Commonwealth. In other words, while one may be qualified to act as a miner, and may be engaged as a miner, so far as the act of 1915, is concerned, nevertheless he is not a "coal miner" in the anthracite mines of this Commonwealth unless he is actually engaged in performing the work and duties of a "coal miner." Under the act of 1915, one may be a miner without doing any of the work of a "coal miner." Under such circumstances, he is not acquiring the knowledge and experience which the legislature unquestionably intends him to have before he can be entrusted with the high responsibility of a mine inspector. As we have already pointed out, if the legislature had intended that general work around a mine would suffice to qualify an applicant for the position of mine inspector, it merely would have increased the five years' experience required by the act of 1891 to ten years. By imposing the additional qualification, the legislature recognized the difference between one who is qualified to act as a miner and one who is acquiring practical experience as a "coal miner."

Therefore, it is clear that the legislature did not intend to permit persons who are qualified as miners, but who have not engaged in the blasting or cutting of coal or rock for at least five years, to become inspectors.

However, if for five years a person has engaged in doing the work of a practical miner, he has complied with the spirit and intent of the statute. A person who actually goes into the mines and works at the face, who drills and cuts, drives gangways, and removes pillars, or a person who is engaged in experimental work which requires him to drill, charge, fire and cut, may be doing the work of a practical miner, even though he may have another designation, such as safety inspector, foreman, assistant foreman, etc.

In coming to this conclusion, we appreciate the fact that in some instances such a rule may work a hardship on those who have not had the actual five years' practical coal mining experience but who, because of their general knowledge and their years of experience in the mines, may be thoroughly competent and might prove to be reliable and safe mine inspectors. Nevertheless, a rule which is prescribed for the protection of persons and property must be strict-

ly construed, and the fact that occasional hardships may result therefrom cannot be considered in its proper interpretation.

Therefore, you are advised that, in order to obtain the five years' practical experience as "coal miner" required of mine inspectors by the Act of May 17, 1921, P. L. 831, an applicant must have engaged in the actual work of cutting or blasting coal or rock at the face of a gangway, airway, breast, pillar, or other working place, for at least five years. You are likewise advised that the necessary practical experience can be acquired by one who works in a mine, even though he may not be classified as a "coal miner."

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,

Attorney General.

OPINION No. 210

Public service companies—Street railways—Abandonment of service—Removal of tracks—Condition—Discretion of Public Service Commission.

Although it is the duty of the Public Service Commission to require a street railway company, upon abandonment of its services, to remove its tracks and other facilities from the improved section of the highway and to restore and pave that portion of the highway so as to conform with the remaining portion of the roadway, the commission, may, nevertheless, specify to what extent such work is necessary, the manner in which this result is to be accomplished, the time within which said work must be done, and the imposition of such condition that it may deem to be just.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., September 25, 1936.

Mr. Samuel Ettinger, Secretary, The Public Service Commission, Harrisburg, Pennsylvania.

Sir: On behalf of the Public Service Commission, you have requested an amplification of Formal Opinion No. 197 of this department, dated July 1, 1936, wherein you were advised that it is the duty of the commission to refuse to grant permission to a street railway company to abandon its service, unless it removes all of its tracks and other facilities from the improved portion of the highway, and restores and paves that portion of the highway previously occupied by its facilities so as to conform with the remaining surface of the roadway.

You now wish to be advised whether the commission is obliged

to attach this condition in every case where a street railway company makes application for permission to abandon service.

Formal Opinion No. 197 was not intended to remove from the Commission its discretion to investigate and examine the facts in each case, and to dispose of the same in such a manner as is justified by the evidence disclosed. The commission has the right to make rules and regulations and to specify in what manner its orders shall be carried out. Accordingly, although it is the duty of the commission to require street railway companies to remove its tracks and other facilities from the improved section of the highway and to restore and pave that portion of the highway so as to conform with the remaining portion of the roadway, the commission may, nevertheless, specify to what extent such work is necessary, the manner in which this result is to be accomplished, the time within which said work must be done, and the imposition of such conditions that it may deem to be just.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

OPINION No. 211

Taxation—Tax anticipation notes—Series BT—Legal status.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., September 25, 1936.

Honorable Charles A. Waters, State Treasurer, Harrisburg Pennsylvania.

Sir: We have your inquiry as to the legal status of the $45,000,000, Commonwealth of Pennsylvania tax anticipation notes, series BT, dated September 1, 1936 and maturing May 31, 1937.

We have examined the proceeding relative to the issuance by the Commonwealth of Pennsylvania of tax anticipation notes, series BT, to the amount of $45,000,000. This issue was authorized by the General Assembly of this Commonwealth by an act approved August 6, 1936, (Act No. 36 of the Extraordinary Session of 1936). With respect to the passage of this act we have satisfied ourselves, by an examination of the journals of both houses and the original records on file in the office of the Secretary of the Commonwealth, that said act was duly and properly enacted and approved by the Governor.

The constitutionality of the issuance of tax anticipation notes has been upheld by the Supreme Court of Pennsylvania in the case of *Kelly v. Baldwin et al.*, 319 Pa. 53, (1935).

The act provides, inter alia, that the current revenues for the biennial fiscal period ending May 31, 1937, accruing to the General Fund of the State Treasury, are pledged for the payment of principal and interest of the notes, and that so much of said revenues as may be necessary are specifically appropriated for such payment, the Department of Revenue being authorized to allocate such revenues to said payment.

The act authorizes the Governor, the Auditor General, and the State Treasurer to determine the terms and conditions of the issue, rates of interest, and time of payment of interest, provided that the notes shall not mature later than May 31, 1937 and shall not bear interest in excess of 4½ percent per annum. The minutes of the meetings held by the Governor, the Auditor General and the State Treasurer, between August 11, 1936 and September 1, 1936, show that all proceedings taken relative to the issuance of the notes comply fully with the provisions of the act and are in due legal form; and that all necessary action has been duly taken; that the said notes were duly offered at public sale on September 1, 1936, and all of them were awarded to one bidder, namely, Dougherty, Corkran & Co. of Philadelphia, Pennsylvania, at their bid of 99.52 per centum of par with interest at the rate of 1½ per centum per annum and accruing interest.

We have examined notes number one in the following denominations: $100,000, $25,000, $10,000, and $5,000, in coupon form and find that the same are duly and properly executed and conform with the form approved by the Governor, the Auditor General and the State Treasurer.

In conclusion we have no hesitation in advising you that the $45,000,000, notes of the Commonwealth of Pennsylvania, series BT, represented by coupon certificates, constitute legal obligations payable by the Commonwealth of Pennsylvania from the new revenues raised by laws enacted by the special session of the General Assembly convened on May 4, 1936, and such current revenues accuring to the General Fund of the State Treasury of the Commonwealth of Pennsylvania during the two fiscal years beginning June 1, 1935 not required for the payment of notes issued as series AT under the authority of the Act of June 22, 1935, P. L. 442; and further that such notes are secured by such new revenues and, subject to the prior payment of the said series AT notes, by the current revenues levied and assessed for revenue purposes of every kind and charac-

ter accruing to the said General Fund during said biennial period. We are further of the opinion that the allocations of the moneys in the General Fund, which are specifically set forth on the face of the notes made by the Department of Revenue, and approved by the Governor, the Auditor General, and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking fund account, mentioned on the face of the notes, in at least the amounts and on or before the times specified, prior to all other expenditures, expenses, debts, and appropriations, including current expenses, payable from the General Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

OPINION No. 212

Board of Fish Commissioners—Enforcement of fishing laws—Lake Erie.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., October 15, 1936.

Honorable O. M. Deibler, Commissioner of Fisheries, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of recent date asking to be advised as to the jurisdiction of the Board of Fish Commissioners to enforce the Fish Law on Lake Erie, particularly that provision requiring license to fish.

We understand the facts that prompt your inquiry are as follows:

The master of the *Eugene Loesch,* a boat operated from the harbor at Erie, makes a practice of taking out fishing parties and announcing to them that fishing licenses are not required to fish the pike grounds, which are beyond the four mile limit from the shore.

Specifically, you seek to be informed:

(a) Whether a license is required in such cases; and

(b) Whether the *Eugene Loesch,* the boat so taking parties out, is subject to confiscation under the circumstances related.

Your inquiries involve the fundamental or basic question as to how far into Lake Erie the jurisdiction of Pennsylvania extends.

From the records of the Secretary of Internal Affairs it appears that the frontage of the Commonwealth of Pennsylvania on Lake

Erie during pre-Revolutionary days was a subject of dispute and conflicting claims of three states, i. e., New York, Massachusetts and Connecticut.

King Charles II of England granted to William Penn, on March 4, 1681, the territory in America now known as Pennsylvania, and described to be three degrees of latitude and five degrees of longitude from points twelve miles distant from New Castle town in Delaware. After the establishment of these lines, it was found that the northern boundary of Penn's grant left a triangular body of land beyond the present western boundary of the State of New York, and between Pennsylvania's old line and Lake Erie. In subsequent years, the three states above named, namely, New York, Massachusetts and Connecticut, each claimed this triangular body of land by virtue of colonial charter grants.

These three claims were irreconcilable. They engendered much bitterness.

About the time of the adoption of the Articles of Confederation, the State of New York, by deed dated March 1, 1781, set forth in full in 7 Journals of Congress, page 37 (1781-82), conveyed to the Federal Government its claims to land westward of its present boundary. The land thus conveyed included the disputed triangle.

The conveyance was complete and absolute, as appears from the following pertinent extract thereof, said deed conveying:

> "* * * in the name of the people, and for and on behalf of the state of New York, and by virtue of the power and trust committed to us by the said act and commission, cede, transfer, and forever relinquish to, and for the only use and benefit of such of the states as are or shall become parties to the articles of confederation, *all the right, title, interest, jurisdiction and claim,* of the said state of New York to all lands and territories to the northward and westward of the boundaries, to which the said state is in manner aforesaid limited and restricted, and to be granted, disposed of, and appropriated in such manner only, as the Congress of the said United or Confederated States shall order and direct." (Italics ours.)

Following this lead on April 19, 1785,, as appears from 10 Journals of Congress, page 94, the State of Massachusetts, by its delegates and pursuant to authority of that state, conveyed all its right, title and estate of and in as well, the soil as the jurisdiction within the limits of Massachusetts Charter situate and lying west of the boundary line recited in New York's deed of cession just before mentioned.

Both of these deeds of cession were accepted by Congress.

The claim of Connecticut, which included virtually the whole

northern part of Pennsylvania, was ended by the decree of Trenton handed down by the commissioners appointed under the Articles of Confederation to decide the territorial dispute between Pennsylvania and Connecticut. By that decree (December, 1782) the dispute was finally decided in favor of Pennsylvania. See *Enslin v. Bowman, et al.*, 6 Binney 462-466 (1814), and with that decree Connecticut's claim to the Lake Erie frontage in question fell.

On June 6, 1788, the United States Government entered into a contract with the State of Pennsylvania for this triangular piece of land for a consideration of $151,640.25, and on September 4, 1788, as appears from the Journals of Congress of that date, an act was passed authorizing the conveyance to the State of Pennsylvania in the following language:

> "Whereas it appears that the board of treasury, in conformity to the act of Congress of the 6th of June last, have entered into a contract with the delegates of the state of Pennsylvania, in behalf of the said state, for the tract of land bounded east, agreeably to the cession of western territory, by the states of Massachusetts and New York, south by Pennsylvania, north and west, by lake Erie; and whereas the said tract is entirely separated from the other lands of the western territory, over which the jurisdiction of the United States extends: And whereas under these circumstances, it will be expedient for the state of Pennsylvania to hold and exercise jurisdiction over the tract aforesaid; therefore,
>
> "*Resolved*, That the United States do hereby relinquish and transfer all their right, title and claim to the government and jurisdiction of the said tract of land, to the state of Pennsylvania, forever. And it is hereby declared and made known, that the laws and public acts of the said state shall extend over every part of the same tract, to all intents and purposes, as if the same had been originally within the charter bounds of the said state; provided that the inhabitants of the said tract shall be maintained in all the rights and privileges which other citizens of the said state of Pennsylvania are now or may hereafter be constitutionally entitled to enjoy."

By Act of October 2, 1788, Congress appropriated the sum of £1200 to purchase the Indian title to the tract in fulfillment of its contract to sell it to Pennsylvania. At the treaty of Fort Harmer on January 9, 1789, Cornplanter and the other chiefs of the six nations signed a deed in consideration of the £1200 ceding "Presquile" lands of the United States to be vested in the State of Pennsylvania, and on April 13, 1791, the Governor of Pennsylvania was authorized to complete the purchase from the United States, which,

according to the communication from him to the Legislature, was accomplished in March, 1792, and the consideration amounting to $151,640.25 paid. See *History of Erie County* by Laura G. Sanford, published 1894, page 61.

Formal title was vested by a deed made and delivered March 3, 1792, by George Washington, then President, conveying the triangular piece of land in question to the State of Pennsylvania, of which deed the following is a copy:

"In the Name of the United States,
To whom these Presents shall come,
Whereas by an Act of Congress

intitled an Act, &c., for carrying into effect a contract between the United States and the State of Pennsylvania it was provided that for duly conveying to the said State a certain tract of land the right to the Government & jurisdiction whereof was relinquished to the said State by a resolution of Congress of the fourth day of September in the year One Thousand Seven Hundred & Eighty-Eight & Whereof the right of Soil has been sold by virtue of previous resolution of Congress of the Sixth day of June in the said year, the President of the United States be authorized on fulfillment of the terms stipulated on the part of the said State to issue letters patent in the name & under the Seal of the United States granting & conveying to the said State forever the said tract of land as the same was ascertained by a survey made in pursuance of the resolution of Congress of the Sixth of June, One Thousand Seven Hundred and Eighty-Eight.

"Now Know Ye that inasmuch as it appears by a certificate from the Comptroller of the Treasury that the terms stipulated on the part of the said State concerning the tract of land aforesaid have been fulfilled according to the true intent and meaning of the said contract.

"I Do By This Presents, in pursuance of the above recited Act of Congress, grant and convey to the said State of Pennsylvania forever the tract of land as the same was ascertained by the survey aforesaid a copy whereof is hereunto annexed.

"In testimony whereof I have caused these letters to be made Patent; and have hereunto subscribed my name and caused the Seal of the United States to be affixed at Philadelphia, this third day of March in the year of our Lord One Thousand Seven Hundred & Ninety-two & of the Independence of the United States of America the Sixteenth.

(SEAL) G. Washington,
Inrolled the 25th day of By the President
April A. D., 1792 Th. Jefferson"

Recorded in Deed Book D, No. 31, Page 107 &c in the Office of Recorder of Deeds for City and County of Philadelphia

Appended hereto is a copy of the survey. It will be seen it consists of a triangle extending with one line perpendicular to the northern boundary of the State of Pennsylvania and with the other at right angles to said perpendicular line and extending to Lake Erie.

Nothing is said in the deed as to how far the lines in question extend into Lake Erie, and this question entails further examination into the nature of the interest that was conveyed by the contesting states to the Federal Government.

If we examine the Treaty of Peace that ended the Revolutionary War, we find it was not a treaty between the United States Government and England, but a treaty with the Thirteen Colonies declared by the Declaration of Independence to be free and independent states, and by the Treaty of Peace acknowledge to be such.

The treaty, as it appears in 8 Statutes at Large, page 81, shows that the thirteen states are mentioned by name, and, in Article I thereof His Brittanic Majesty

> "* * * acknowledges the said United States, viz. * * * [naming the thirteen states] to be free, sovereign independent States; that he treats with them as such; and for himself, his heirs and successors, relinquishes all claims to the government, propriety and territorial rights of the same, and every part thereof."

The treaty then fixes the northern boundary between Canada and the thirteen states, and, so far as Lake Erie is concerned, recites the international boundary to be *the midde of Lake Erie.*

This treaty, therefore, is a recognition that there was released and confirmed to the states bordering on Lake Erie everything south of the middle line thereof. Whoever, therefore, at the time of this Treaty of Peace, owned the land fronting on the southern shore of Lake Erie, became the owner to the middle line thereof. This is the plain inescapable result of the treaty.

It is not necessary for us to determine now whether Massachusetts or New York owned that part of the southern shore here involved. Both laid claim thereto, but, as both conveyed all their interest therein to the United States Government, without reserving to themselves any part of the water or land covered by water, the conclusion is inevitable that their title became vested in the Federal Government.

The Federal Government on its part, as appears from the Act of September 4, 1788 (quoted supra) resold the whole of its title so

acquired to the State of Pennsylvania, again without reservation and without any words limiting the jurisdiction to the water's edge.

When deeds conveying land on waterfront are interpreted in absence of words expressing a different intent, the common law rule regulating such grants is that land bounded by a river or lake is presumed to include the land under water to the middle line. *Hardin v. Jordan,* 140 U. S. 371, 35 Law Ed. 428-436.

Or as stated in the case of *State of Georgia v. State of South Carolina,* 257 U. S. 516, 66 Law Ed. 347:

> "The general rule is, that where a river, navigable or non-navigable, is the boundary between two states, and the navigable channel is not involved, each takes to the middle of the stream, in the absence of convention or controlling circumstances to the contrary."

The same rule applies with regard to boundary lakes. *Hardin v. Jordan,* 140 U. S. 371, supra.

In *Stewart v. Turney,* 237 N. Y. 117, 31 A. L. R. 960-963, where the question involved concerned Lake Cayuga, a large nontidal lake thirty-eight miles long and one to three miles wide, the New York Court of Appeals laid down the following rule:

> "* * * In deeds from an individual owning to the center of a highway or a nontidal stream or a lake or pond of land said to be bounded by such highway, stream, or lake, *or simply of a tract with reference to a map showing the tract to be so bounded,* the grantee takes title to the center of the highway or to the thread of the stream or lake. A presumption founded originally upon the assumed intent of the parties, it has now become a rule of property. If the grantor desires to retain his title to the land in the highway or underneath the water, the presumption must be negatived by express words or by such a description as clearly excludes it from the land conveyed. * * *" (Italics ours)

This quotation is particularly appropriate to the situation before us because there is no description in the deed of grant, but merely reference to a map showing the land conveyed to be bounded by the lake.

While it is true that the rule between individuals does not always apply between an individual and a sovereign, nevertheless, where the issue is between two sovereigns, or states, or nations, the rule between individuals may well be applied. See Justice Nelson's concurring opinion in *Howard v. Ingersoll,* 13 Howard 381-422, 14 Law Ed. 189-207.

Nor are we without precedent in the application of this rule in

our own jurisdiction, for in the case of *The Tinicum Fishing Co. v. Carter,* 61 Pa. 21-30 (1869), Mr. Justice Sharswood held:

> "The bed and channel of the Delaware river *ad medium aquae filum* belong respectively to the states of New Jersey and Pennsylvania. The grants both to the proprietaries of the former and to William Penn, were bounded on each side by the river: *Bennett v. Boggs,* Baldw. 72. The bed and channel remained in the British crown, but by the revolution and the acknowledgment of the independence of the colonies by the treaty of peace, all the rights and sovereignty of the crown were transferred to and vested in the several states. The Delaware being a navigable co-terminous stream between New Jersey and Pennsylvania, the title of each to the bed extended from their respective shores to the middle of the river, according to the well established principle of universal public law: Vattel, Section 266. * * *".

See also *Corfield v. Coryell,* 4 Wash. C. C. U. S. 271; Fed. Cases No. 3230 (1825); *Bennett v. Boggs,* Baldw. U. S. 60; Fed. Cases No. 1319 (1830); holding to the effect that the Treaty of Peace which ended the Revolutionary War operated to extend Pennsylvania's and New Jersey's jurisdiction over and ownership of the bed of the Delaware to the middle line thereof.

Applying this rule, therefore, to the case at hand, it is clear that when the United States Government received its grant to the triangular piece of land bordering on Lake Erie, there being no reservations in the deeds of the various states reserving to themselves any title in the water or the land covered by the water, the United States took title to the international boundary line.

And when the United States, in turn, conveyed to the State of Pennsylvania, again without reservation in itself to any of the land under the water or to the waters of the lake, it meant Pennsylvania to have not only the land bordering on the lake, but the land under the water extending as far as the middle thereof, which was ceded by the King of England in the Treaty of Peace which ended the Revolution.

In this interpretation we are confirmed by at least two acts of Congress, which showed clearly that the United States Government intended Pennsylvania's line to extend to the middle of the lake. First is the Act of Congress of June 15, 1836, 5 Statutes at Large, page 49, by which the Territory of Ohio was erected into a state and admitted to the Union.

In that act, the northern boundary of the newly erected State of Ohio is described as extending:

> "* * * northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie; and thence, with the said last mentioned line, to its intersection with the western line of the State of Pennsylvania."

Since the international boundary line between the United States and Canada is the middle of the lake, unless the western boundary of the State of Pennsylvania can be regarded as projecting into the lake to the middle thereof, the line described as the northern boundary of Ohio along the international boundary could never intersect the western boundary line of Pennsylvania.

The other act is Act of Congress of August 19, 1890, Chap. 804, 26 Statutes at Large, page 329, ratifying the boundary compact set forth in our Act of June 6, 1887, P. L. 353, (71 PS, Section 1861), in which Preamble No. 2, confirming the report of the Commissioners fixing the boundary line between New York and Pennsylvania, reads:

> "The line of cession, described as a meridian line, drawn from the forty-fifth degree of north latitude, south through the most westerly bent or inclination of lake Ontario, in the deed of cession to the United States of certain territory claimed by the State of New York, lying west of said line, executed first March, seventeen hundred and eighty-one, by James Duane, William Floyd and Alexander McDougal, delegates in Congress of said United States from the said State of New York, in pursuance of an act of the Legislature of said State, entitled 'An act to facilitate the completion of the articles of confederation and perpetual union among the United States of America,' passed February nineteenth, seventeen hundred and eighty, which said territory was afterward conveyed by the United States aforesaid to, and became a part of the territory and jurisdiction of the said Commonwealth of Pennsylvania, as the said line was surveyed and marked with posts and monuments of stone in the year seventeen hundred and ninety, by Andrew Ellicott, who was duly appointed for that purpose by the President of the United States, in pursuance of a resolution of Congress, passed nineteenth August, seventeen hundred and eighty-nine, *which said line, and its prolongation due north into the waters of Lake Erie until it intersects the northern boundary of the United States aforesaid, have since been acknowledged and recognized by the said two States, as a part of the limit of their respective territory and jurisdiction,* shall, notwithstanding any possible want of conformity to the verbal description

> thereof, as contained in said deed of cession, continue to be the boundary or partition line between the said two States, so far as said line so surveyed and marked in seventeen hundred and ninety shall extend." (Italics ours.)

Thus we have one act of Congress confirming the prolongation of the western boundary of our State into the middle of Lake Erie, and another confirming the extension to the same distance of the eastern line of our Lake Erie frontage.

These then are weighty corroboration of the correctness of our interpretation of the deed of the United States to Pennsylvania that the grant of the triangular piece of land, sometimes called "Pennsylvania's Stovepipe Territory," extends not merely to the *shore* of the lake, but to the *middle* thereof.

Pennsylvania, therefore, must be regarded as having full and free jurisdiction as a sovereign over the land and water to the middle of Lake Erie, subject only to the paramount right of the Federal Government to regulate navigation in the waters thereof pursuant to the Interstate Commerce Clause of the Constitution.

As well stated by the Circuit Court of Appeals in *Bigelow v. Nickerson,* 70 Fed. 113, 30 L. R. A. 336:

> "* * * it is said to be the settled law of this country that 'ownership of, and dominion and sovereignty over, lands covered by tide waters or navigable lakes, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be without substantial impairment of the interest of the public in such waters, and subject to the paramount right of congress to control their navigation, so far as may be necessary for the regulation of commerce.' * * *"

This brings us to the next question as to whether the State of Pennsylvania has sought to regulate fishing in Lake Erie and to require a license therefor.

A reference to the Fish Law of 1925 shows that the legislature has so regulated. Section 226 thereof provides as follows:

> "No person shall angle or fish in any of the *waters within or bounding on or adjacent to this Commonwealth* unless the license hereinbefore provided be at such time continually kept about the person of the licensee and exhibited upon the request of any fish warden, sheriff, constable, or other officer of the Commonwealth. No person shall angle or fish in any of the *waters within or bounding on or adjacent to this Commonwealth* unless the license button be at such time

> continually displayed on the outer garment in such manner that the license figures are plainly visible." (Italics ours.)

The words italicized, i. e., "waters within or bounding on or adjacent to this Commonwealth," clearly include such part of Lake Erie as is under the jurisdiction of the State.

It may be urged that the Federal Government has, as an incident to its power to regulate navigation, also the power to regulate the fisheries.

Whether this be so or not is not now material, because Congress of the United States has never sought to regulate fisheries in the navigable waters of the nation, and until they do so the right of the states not only cannot be denied, but has been specifically upheld in the case of *Manchester* v. *Commonwealth of Massachusetts,* 139 U. S. 240, 35 Law Ed. 159.

Finally, there remains to be determined your inquiry whether the *Eugene Loesch* boat is subject to confiscation under the Fish Law.

The power of confiscation by the fish wardens is regulated by Section 270 of the Fish Law of 1925, (30 PS, Section 270), which reads:

> "Powers of Officers to Destroy Unlawful Devices and Make Arrests. Any fish warden, special warden, sheriff, constable, or any special officer, or any peace officer in this Commonwealth, is hereby authorized and required to proceed, with such force of the county as may be necessary, to destroy any device for catching fish used contrary to or prohibited by law in any of the waters within or on the boundary of or adjoining to this Commonwealth. Such officers are hereby required to arrest with or without warrant any person owning, placing, or using such device or violating any provisions of this act."

While we do not say that a boat may not, under certain circumstances, be a device within the meaning of this section authorizing confiscation of devices used in violating the provisions of this act, we are of the opinion that the boat as here used under mistaken judgment as to the extent of the Commonwealth's jurisdiction should not be confiscated at this time.

We advise that notice should be given to the master of the *Eugene Loesch,* advising him that, pursuant to an opinion of this department reviewing the question, the ownership of the soil underneath the water to the middle of Lake Erie is in the Commonwealth of Pennsylvania, and that its jurisdiction over the waters thereof extends also to that line, subject only to the paramount rights of Congress to regulate navigation under the Interstate Commerce Clause;

that the operation of the Commonwealth's fishing license law extends to the middle line of Lake Erie with reference to the waters fronting Pennsylvania, and no one may fish in such waters without first complying with section 226 of the Fish Law requiring a license; and that you will prosecute anyone violating said law, or anyone hereafter encouraging the violation of said law.

If such notice is not effective to stop the practice of which you have complained, you should proceed with the prosecution as here outlined.

To summarize, therefore, we find:

1. That the ownership of the bed of Lake Erie and the jurisdiction over the waters thereof, subject only to the paramount rights of the Federal Government with respect to navigation, is in the Commonwealth of Pennsylvania and extends to the international boundary line or the middle of the lake.

2. That it is unlawful for anyone to fish in said waters without possessing a fishing license pursuant to the Fish Law of the Commonwealth.

3. That anyone so offending is liable for prosecution.

4. That, while a boat used merely for conveying a fisherman, fishing with rod or hand line, is not the kind of a device ordinarily subject to confiscation, a boat may nevertheless be so used as to become a device within meaning of the confiscation provision of the Fish Law.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 213

Criminal procedure—Arrest in county other than that in which offense was committed—Right to enter bail before justice of the peace in county of arrest—Act of March 31, 1860, sec. 3, as amended—Waiver of right.

1. An alderman or justice of the peace of a county in which an arrest is made may, under the provisions of section 3 of the Criminal Procedure Act of March 31, 1860, P. L. 487, as amended, take bail from the defendant for his appearance at the court having jurisdiction of the crime, but he may not summon witnesses and hold a preliminary hearing.

2. Where a defendant arrested in a county other than that in which the offense was committed does not desire to give bail, it is unnecessary to take him before an alderman or justice of the peace of the county in which the arrest was made but he may be taken directly to the proper alderman or justice of the peace of the county in which the offense was committed.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., October 16, 1936.

Honorable Lynn G. Adams, Superintendent of State Police, Harrisburg, Pennsylvania.

Sir: You have asked for an opinion interpreting Section 3 of the Act of 1860 P. L. 427, as amended May 2, 1899 P. L. 173, which provides for the arrest of persons in counties other than the one in which the offense was committed, and the warrant issued, and for the taking of bail by aldermen or justices in the county in which the arrest was made.

You ask if the alderman or justice of the county in which the arrest was made is limited to taking bail from the defendant, or whether he may summon witnesses and hold a preliminary hearing. You also ask whether the provisions for taking bail in the county of arrest are optional so that they may be disregarded and the defendant taken directly before the proper alderman or justice in the county in which the offense was committed if the question of bail is not raised.

The Act of 1860 P. L. 427, as amended, provides as follows:

> "In case any person against whom a warrant may be issued by any judge or alderman of any city, or justice of the peace of any county in this Commonwealth, for any offense there committed, shall escape, go into, reside, or be in any other city or county out of the jurisdiction of the judge, alderman, or justice of the city or county granting such warrant as aforesaid, it shall and may be lawful for the person to whom such warrant was originally directed, or the person having such warrant for execution, to execute the same, and arrest such offender in such city or county, out of the jurisdiction of the alderman, justice or justices granting such warrant aforesaid, and to carry the defendant before any alderman, justice or justices in the city or county in which such offender may be apprehended; and in case the offense for which such offender shall be so apprehended, shall be bailable in law by any alderman or justice of the peace, and such offender shall be willing and ready to give bail for his appearance at the next court of general jail delivery or quarter sessions, to be held in and for the city and county where the offense was committed, such alderman, justice or justices, in the city or county where such offender was apprehended shall and may take such bail for his appearance, in the same manner as the alderman or justices of the peace of the proper city or county might have done; and the said alderman, justice or justices of the peace of such other city or county so taking bail, shall deliver or transmit such recognizance and other proceedings to the clerk of

> the court of general jail delivery or quarter sessions, where such offender is required to appear by virtue of such recognizance, and such recognizance and other proceedings shall be as good and effectual in law as if the same had been entered into, taken or acknowledged in the proper county where the offense was committed, and the same proceedings shall be had therein; and in case of the offense for which such offender shall be apprehended in any other city or county, shall not be bailable in law by an alderman or justice of the peace, or such offender shall not give bail for his appearance at the proper court having cognizance of his crime, to the satisfaction of the alderman or justice before whom he shall be brought, then the constable or other person so apprehending such offender shall carry and convey him before one of the aldermen or justices of the peace of the proper city or county where such offense was committed, there to be dealt with according to law: Provided, That the warrants so as aforesaid issued shall be stamped with the official seal of the officer issuing the same, which seal shall contain the name and official title of said officer and the state and county in which he resides."

We know of no court decisions or opinions of this department ruling upon the questions you raise. However, we feel that the above provision clearly indicates that the sole function of the alderman or justice of the county in which the defendant is arrested is to take his bail for his appearance at the court having jurisdiction of the crime and not for a preliminary hearing.

The only authority given to aldermen or justices by the statute is

> "* * * such aldermen, justice or justices, in the city or county where such offender was apprehended shall and may take such bail for his appearance * * *."

The necessary additional authority to hold a preliminary hearing could only be conjured up by implication, and it is axiomatic among the rules of statutory interpretation that there is no occasion for construction or implication unless the statute involved is ambiguous.

It is true that this act is silent upon the question of a preliminary hearing but there is a clear distinction between ambiguity and silence. Ambiguity is sometimes a species of silence in that it is the result of a lack of explicit words in statutory provisions. However, no one would contend that a statute making express and definite provisions for one situation is rendered ambiguous because it is silent as to other entirely different situations. This act authorizes nothing but the taking of bail for appearance in court and we are convinced that any attempts to extend by implication the powers conferred by the statute would be improper.

As stated before, there is no ambiguity in this provision requiring construction or interpretation, but even if there were, the result of such construction would be dictated by the intent of the legislature in passing the statute, and we do not believe the legislature contemplated removing the scene of the preliminary hearing from the county in which the crime was committed.

You also ask whether it is necessary to proceed in accordance with the provisions of this act if the defendant does not raise the question of bail.

It is our opinion that in such a situation the defendant may be taken directly before the proper alderman or magistrate in the county where the offense was committed. If the defendant is informed of his rights and does not wish to give bail for appearance in court it would be a useless formality to take him before the alderman or magistrate in the county of arrest.

The act provides that if the defendant does not give bail when brought before such alderman or magistrate he shall be taken before one of the aldermen or justices in the county of the crime, to be dealt with according to law.

In other words, when the defendant has decided not to give bail for appearance in court, the same result is reached whether he is taken before the alderman or justice in the county of arrest or not. Consequently, if the only reason for taking the defendant before the alderman or justice in the county of arrest is lacking, we think this step in the prosecution may properly be dispensed with.

You are advised, therefore, that the alderman or justice of the county in which an arrest is made under the provisions of Section 3 of the Act of 1860 P. L. 427 as amended is limited to the taking of bail from the defendant for his appearance at the court having jurisdiction of the crime and may not summon witnesses and hold a preliminary hearing. You are also advised that if the defendant does not wish to give bail, the procedure outlined in the act may be dispensed with and the defendant taken directly before the proper alderman or justice in the county in which the offense was committed.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 214

Taxation—Abatement or penalties and interest on delinquent taxes—Act of June 4, 1936—Legislative intent—Methods of obtaining benefits of act—Necessity for paying 1936 taxes—Constitutionality.

1. The Act of June 4, 1936 (No. 3), authorizing the abatement of certain tax penalties, was intended to bring delinquent taxes into the treasuries of the several taxing authorities to which it applies and to relieve taxpayers of the burden of penalties and interest thereon: to this end it should be liberally construed in favor of the taxpayers.

2. The Act of June 4, 1936 (No. 3), provides two plans under which the taxpayer may receive the benefits of the act: (1) On or before November 1, 1936 he may pay all delinquent taxes for the tax years up to and including 1934 in full without penalties or interest; (2) he may pay delinquent taxes for 1935 in full with interest and penalties plus 20 percent of all taxes delinquent for the years up to and including 1934 and may pay the remaining 80 percent without penalties and interest in four annual instalments due in 1937, 1938, 1939 and 1940 provided, however, that current taxes for each of these years must be paid in full before they become delinquent: if current taxes are not paid before they become delinquent, in order to obtain the benefits of this plan the taxpayer must, in addition to the payment of the current taxes together with accrued interest and penalties and the instalment payments, pay one-fifth of the total amount of the abated penalties and interest at the time the next scheduled instalment payment becomes due.

3. A delinquent taxpayer need not, in order to secure the benefits of the Act of June 4, 1936 (No. 3), pay the current taxes for the year 1936 on or before November 1, 1936.

4. The Act of June 4, 1936 (No. 3) is constitutional, for the legislature, having the power to enact laws for levying taxes and prescribing penalties and interest to be paid for delinquency, likewise has power to abate penalties and interest.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., October 29, 1936.

Honorable Lester K. Ade, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your inquiry of July 8, 1936, requesting an interpretation of Act of June 4, 1936, No. 3 (Special Session of 1936), which authorizes the abatement of certain tax penalties and interest on delinquent county, city (except city of the first class), borough, town, township, school district (except school district of the first class), and poor district taxes, prohibits the sale of real property for the nonpayment of any such taxes for a certain period, preserves certain tax liens, and provides for the extension thereof.

You submit the following questions:

> "1. Must the delinquent taxpayer qualify for abatement by the payment of 1936 current taxes?
>
> "2. Can installment benefits be secured without the payment of 1936 current taxes? Must 1935 taxes have been paid or be paid, with penalties and interest if any

has accrued to qualify for payment of back taxes at FACE for 1934 and prior years to secure benefits of the act?

"3. Is it correct that under section 2 the entire amount of delinquent taxes for 1934 and previous years may be paid at FACE, in a lump sum, whether or not 1935 or 1936 taxes have been, or are, paid?"

That part of Act No. 3 which is pertinent to your inquiry reads, in part, as follows:

"Section 1. Be it enacted, &c., That all penalties and interest imposed on delinquent county, city (except city of the first class), borough, town, township, school district (except school district of the first class), and poor district taxes, for the tax year one thousand nine hundred and thirty-four and all previous years, assessed and levied against any parcel or parcels of real estate are hereby abated, without the necessity of further action by the authority levying the tax, if said delinquent taxes are paid as hereinafter provided.

"In order to receive the benefits of this act, the taxes for the year one thousand nine hundred and thirty-five and all penalties and accrued interest, and twenty per centum of the delinquent taxes due for the tax year one thousand nine hundred and thirty-four and for all previous years shall be paid on, or before, the first day of November one thousand nine hundred and thirty-six; twenty per centum on, or before, the first day of November one thousand nine hundred and thirty-seven; twenty per centum on, or before, the first day of November one thousand nine hundred and thirty-eight; twenty per centum on, or before, the first day of November one thousand nine hundred and thirty-nine; and the final twenty per centum on, or before, the first day of November one thousand nine hundred and forty; And provided, That the respective current taxes on such parcel or parcels of real estate for the years subsequent to the year one thousand nine hundred and thirty-six during such installment periods, assessed and levied by such taxing authority, shall be paid before they become delinquent during the then current year. If and whenever any of the said current taxes, or any of the said installments, are not paid when due and payable as herein provided, then, and in that event, there shall become due and payable for such year a sum equal to one-fifth of the total amount of the abated penalties and interest in addition to the other payments required to be paid under this act during that year, which said additional sum shall be payable and must be paid at the time the next succeeding installment payment becomes due under this act. If such additional sum is not so paid then the total amount of the abated penalties and

interest, less the aggregate of any such additional sums theretofore paid, shall be revived and added to the unpaid taxes with the same force and effect as if such abated penalties and interest or portion thereof, had never been abated, and the taxpayer shall not thereafter be entitled to any further benefits or privileges under this act.

"Section 2. Any taxpayer may anticipate the payment of such delinquent taxes for the tax year one thousand nine hundred and thirty-four and previous years at any time on, or before, November first, one thousand nine hundred and thirty-six by paying the entire amount of such delinquent taxes and receive the benefit of this act, and in such cases, payment of the taxes, assessed and levied for the year one thousand nine hundred and thirty-six, shall not be required at the time of such payment.

"Section 3. This act shall be construed to apply to all such taxes whether or not liens for such taxes have been returned for non-payment, or have been filed in the office of the prothonotary of the county, or proceedings for the collection of such taxes have been instituted in any court in said county, or where real property has been sold to a county, city, borough, town, township, school district or poor district at a tax sale or on a tax lien, and the period of redemption has not expired; but this act shall not be construed to apply to cases where real property has been sold other than to a county, city, borough, town, township, school district or poor district at a tax sale or on a tax lien, and where the period of redemption has not expired, and the taxpayer shall be liable for the payment of all costs incurred in such proceedings, except the solicitor's fees."

Careful consideration has been given by this department to the meaning and proper interpretation of the statute in question. We have come to the definite conclusion that the general intent of the statute, and the meaning that should be given it, is that its purpose is to bring delinquent taxes into the treasury of the several taxing authorities to which it applies and to relieve taxpayers of the burden of penalties and interest thereon. These intentions are attained by relieving the taxpayer of certain penalties and interest exactions all upon the condition that he make the payments called for by the statute strictly at and before the date or dates mentioned in the statute. To this end, we believe that the statute should be liberally construed in favor of the taxpayer.

The act provides two plans under which the taxpayer can receive the benefits of the abatements of penalties and interest upon taxes, said plans being as follows:

PLAN No. 1. The taxpayer under Plan No. 1, which is contained in section 2 of the act above referred to, may pay all of the delin-

quent taxes for the tax year 1934 and all previous years in full, without paying the penalties or interest, provided the payment of said taxes is made on or before November 1, 1936.

PLAN No. 2. The taxpayer under Plan No. 2, which is contained in section 1 of the act above referred to, may pay the delinquent taxes for 1935 in full with accrued interest and penalties, plus 20 percent of all taxes delinquent for the year 1934 and previous years. If the taxpayer elects to pursue Plan No. 2, he pays the remaining 80 percent of the delinquent taxes for the year 1934 and preceding year without penalties and interest, in four installments, 1937, 1938, 1939 and 1940. Under this plan, the current taxes for each of the four years above designated must be paid in full, in addition to the 20 percent of the delinquent taxes, before the current taxes for the year in which said payment is made becomes delinquent.

If, subsequent to the present year, the taxpayer, under Plan No. 2, fails to pay the current taxes and 20 percent of the delinquent taxes on or before the first day of November, 1937, or subsequent thereto, then, and in such event, in order to obtain the benefits of this act, the taxable, in addition to the payment of the current taxes, together with accrued interest and penalties, shall pay one-fifth of the total amount of the abated penalties and interest at the time the next scheduled installment payment becomes due, which, in effect, means that the delinquent taxes must be paid on or before the first day of November, and current taxes before same become delinquent.

In order to receive the full benefits of the act, the taxpayer need not pay on or before November 1, 1936, taxes assessed and levied for the year 1936.

The act applies to all taxes, whether or not liens for the same have been returned or filed in the office of the prothonotary of the county, or proceedings for the collection of such tax instituted, in any court in said county, or where real property has been sold to a county, city, borough, town, township school district or poor district, at a tax sale, or on a tax lien, and the period of redemption has not expired. The act, by its terms, does not apply to any property that has been sold to other than a county, city, borough, town, township school district or poor district at a tax sale, or on a tax lien, and where the period of redemption has not expired, and the taxpayer shall be liable for the payment of all costs incurred in such proceedings, except the solicitor's fees.

The benefit of the act extends to any successful bidder or purchaser at sheriff's or other judicial sale, grantee, transferee, mortgagee, or other party in interest, in the parcel, or parcels of real estate, against which the above-mentioned taxes have been assessed and levied.

The taxpayer has the right to pay the delinquent taxes assessed and levied against any parcel or parcels of real estate, without being required to pay the delinquent taxes assessed and levied against any other real estate.

A statement of delinquent taxes shall be furnished, upon written application to the owner, by the person in whose custody the records are kept. Said statement shall show the statement of the taxes, the face amount of the penalty, the interest, the cost, and other charges, in detail.

The act provides that no real estate shall be sold for nonpayment of taxes before November 1, 1936 and any tax sale shall be adjourned as often as may be necessary, for this purpose, without necessity for readvertisement.

Where a taxpayer avails himself of the privileges or benefits of the act, the period during which payment of said delinquent taxes are postponed or continued, under the act, shall not be included in computing and determining whether or not any right of the tax-assessing and levying authorities has been barred or lost by reason of the provisions of any statute now existing, or hereafter enacted, limiting the right of the said tax-levying and assessing authorities to file, preserve, or maintain, the lien of the said taxes.

In our opinion the act is constitutional. Penalties, fines and interest, in the nature of penalties, are proper subjects for abatement, especially so during times of general depression and economic disturbances.

The legislature has the power to enact laws for levying taxes and prescribing penalties and interest to be paid by the delinquency, and such legislative and taxing authority has the power to abate such penalty or interest.

The Act of May 1, 1935, P. L. 129, as amended by the Act approved June 22, 1935, P. L. 444, continues in full force and effect as to any and all taxpayers who have taken advantage of, and are not in default in the provisions thereof.

It is our opinion, and you are, therefore, advised on the questions which you submitted, as follows:

> 1. Must the delinquent taxpayer qualify for abatement by the payment of 1936 current taxes?

The current taxes for the year 1936 need not be paid previous to November 1, 1936 to secure the benefits of this act.

> 2. Can installment benefits be secured without the payment of 1936 current taxes? Must 1935 taxes have been paid or be paid, with penalties and interest if any has accrued to qualify for payment of back taxes at

face for 1934 and prior years to secure benefits of the act?

The first part of this question has been answered in Question No. 1. 1935 taxes must be paid with penalties and interest in order to secure the benefits of this act.

3. Is it correct that under Section 2 the entire amount of delinquent taxes for 1934 and previous years may be paid at *face*, in a lump sum, whether or not 1935 or 1936 taxes have been, or are, paid?

In order to secure the benefits of this act it is necessary that taxes for the year 1935, plus penalties and interest, be paid.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,

Attorney General.

OPINION NO. 215

State lands—Natural resources—Use of, by State institutions—Section 511 of The Administrative Code.

1. Section 511 of the Administrative Code of 1929, authorizing the board of trustees of a State institution to sell products of the property of the institution not needed for its upkeep, impliedly authorizes such a board to use the natural resources of the lands over which it has control for the proper maintenance of the institution.

2. Section 511 of the Administrative Code of 1929 forbids the cutting of live trees upon property of a State institution for sale without the censent of the Department of Forests and Waters, but such consent is not necessary where the trees are not to be sold.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., November 5, 1936.

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

Sir: We have your communication of September 17, wherein you state in part that:

> "Deposits of fire and red brick clay on land owned by the Commonwealth and occupied by the Torrance State Hospital have in the past been utilized in the manufacture of brick and tile."

You also state that:

> "* * * standing timber on the land occupied by the institution is being cut and used in connection with building operations carried on at the institution."

It appears further that:

> "The work necessary and incident to the utilization of resources on land belonging to institutions of this class

> furnishes employment to inmates which is claimed to be desirable to the inmate from the standpoint of its therapeutic and rehabilitative value."

In general, your inquiry is designed to ascertain if the board of trustees of a State institution has authority to make use of the natural resources from property of the Commonwealth, administered by such board, for the purposes set forth in your communication.

In an opinion by this department rendered July 6, 1928 (Ops. Atty. Gen'l, 1927-1928, p. 188) it was held, at page 189, that:

> "* * * Trustees of State institutions do not have any power without express legislative authority to deplete the natural resources of land owned by the Commonwealth and occupied by a State institution * * *"

However, that opinion was rendered prior to the enactment of The Administrative Code of 1929. In section 511 thereof it is provided, in part:

> "Sale of Surplus Products.—All departments, boards and commissions may sell, for the best price obtainable, but not less than the current market price for similar products, any surplus products of the soil, meats, live stock, timber, or other materials raised or grown upon or taken from property of the Commonwealth administered by such departments, boards, or commissions, respectively.
>
> "As used in this section, 'surplus' shall mean products, meats, live stock, timber, or other materials, which cannot conveniently and economically be used in connection with the proper maintenance of the institution, park, or other property, administered by the department, board, or commission involved, but under no circumstances shall *live trees be cut for sale* unless and until the Department of Forests and Waters has approved the cutting of such trees, *and no sales shall be made* under this section by any departmental administrative board or commission without the approval of the department with which such board or commission is connected. * * *" (Italics ours)

It is obvious, under this section there is ample authority for the board of trustees to use the materials mentioned for the purposes of repairing or improving the buildings in connection with the institution. The section specifically states that all " 'surplus' * * * which cannot conveniently and economically be used in connection with the proper maintenance of the institution" may be sold. Therefore, it follows that the legislature has given authority to use materials in and about the institution.

The standing timber on the land occupied by the institution may

be cut without the consent of the Department of Forests and Waters, since section 511, supra, merely provides for such consent when the trees are *alive and are to be sold.* In no way can it be held that property belonging to the Commonwealth and the natural resources of mine and forests on State lands could not be used either in the operation or development of the State institution involved, or any other State institution.

We are of the opinion, and you are therefore advised that, under Section 511 of The Administrative Code, institutions may use the natural resources of the lands over which their board of trustees have control for the purposes of proper maintenance of the institution.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

CASES CITED

STATUTES CITED

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